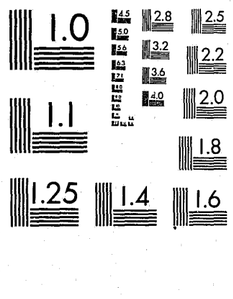

MODEL RULES FOR PEACE OFFICERS

A Resource Manual on Police Discretion and Rulemaking

TEXAS ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

MODEL RULES FOR PEACE OFFICERS

A Resource Manual on Police Discretion and Rulemaking

The preparation of this report was financed in part by funding provided by the Law Enforcement Assistance Administration through a grant administered by the Criminal Justice Division of the Office of the Governor of Texas. The statements, findings, conclusions, recommendations, and other data contained in this report do not necessarily represent the views or policies of the Law Enforcement Assistance Administration or the Criminal Justice Division.

About the Commission

The Texas Advisory Commission on Intergovernmental Relations is a state agency created by the Texas legislature to improve coordination and cooperation among all levels of government in Texas by providing continuing research, information, and advisory services to public officials and citizens of the state. The Commission is composed of representatives of state government, federal government, cities, counties, special districts, school districts, and the general public.

Published October 1980 by the
Texas Advisory Commission on Intergovernmental Relations
PO Box 13206, Austin, Texas 78711 · 512/475-3728

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FOREWORD

The Texas Advisory Commission on Intergovernmental Relations (Texas ACIR) is pleased to publish the 1980 Model Rules for Peace Officers: A Resource Manual on Police Discretion and Rulemaking. This Manual updates and completely revises the 1974 Model Rules for Law Enforcement Officers: A Manual on Police Discretion (prepared by the International Association of Chiefs of Police) to reflect current statutory and case law as well as modern police procedures. In addition, the Model Rules Manual now includes an entirely new chapter on child abuse.

The present Model Rules have been developed by the Texas ACIR staff, with the advice and supervision of a Special Committee on Law Enforcement Practices composed of law enforcement administrators and officers, prosecution and defense attorneys, elected government officials, and community representatives. The project received funding from the Law Enforcement Assistance Administration of the US Department of Justice, as administered by the Criminal Justice Division of the Office of the Governor of Texas.

This Manual, although it contains carefully analyzed and drafted "model rules," is presented solely as an advisory research resource, primarily for local law enforcement agencies. Therefore, although this Manual should assist a law enforcement agency in developing written directives, it cannot eliminate the crucial need for key administrators to study each rule and tailor it to individualized local needs. This study should include a thorough legal review. The section entitled "Guide for Law Enforcement Agencies in Designing, Implementing, Enforcing, and

Updating Written Rules and Procedures" should facilitate this adaptation and "customization" process. Until actually adopted by a particular agency, no "rule" becomes operative. Thus, the Texas ACIR cannot assume any responsibility for a particular agency's reliance on the Model Rules.

The Commission began this project in November 1979. Stan Kantrowitz, an attorney on the Texas ACIR staff, served as principal draftsman. Louise Winecup provided supervisory and administrative assistance. Zirka Kaulbach (a certified paralegal), Norma Villa (a 1980 graduate of the University of Texas School of Law), and William Keitel (a joint degree candidate at the University of Texas School of Law and the Lyndon B. Johnson School of Public Affairs) served as Texas ACIR interns on this project. The Texas ACIR approved this report for publication at its meeting on September 12, 1980.

Austin, Texas
September 1980

Bob Honts
Commission Chairman

ACKNOWLEDGMENTS

In November 1979 the Texas Advisory Commission on Intergovernmental Relations appointed a Special Committee on Law Enforcement Practices, chaired by Steve Bartlett, to guide and review this project. Over the many months of the project, including eight, day-long meetings, members of the Special Committee gave freely of their time in reviewing and discussing drafts of the chapters. They provided valuable insights and expertise regarding law enforcement goals and procedures. The Commission and its staff are grateful for the contributions made by the Special Committee. Members of the committee are:

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The Commission also recognizes and appreciates the concerned efforts of Robert Greenwald of the Community Relations Service of the US Department of Justice, Gordon Johnson of the Sheriffs' Association of Texas, and Glen McLaughlin of the Texas Police Association on behalf of this project.

CONTENTS

INTRODUCTION

Each day, virtually every peace officer makes innumerable discretionary decisions. Many of these decisions involve tough choices that have a crucial impact on people's lives. For example, an officer regularly decides:

- Whom to arrest? When? For what offense?
- When to handcuff? When to draw a firearm?
- When to use force? How much?
- When to engage in "hot pursuit" to speed after a car?
- How to handle domestic disturbances, mentally ill persons, child abuse, and disorderly conduct?
- How to assist a rape victim?
- When to "stop" someone for questioning? When to "frisk"?

These decisions, which usually occur on the street and without supervision, often have the potential to create controversy and community unrest. For a brief discussion of police discretion, see Greenlee, Discretionary Decision Making in the Field, Police Chief, Feb. 1980, at 50-51.

In order to minimize these problems and produce more efficient and consistent law enforcement practices, numerous authorities have suggested increased reliance on written internal "rules." For example, over a dozen years ago, the President's Commission on Crime recommended that each police department "develop and enunciate policies that give police personnel specific guidelines for the common situations requiring exercise of police discretion." The Challenge of Crime in a Free Society 104 (1967). In 1973, the National Advisory Commission on Criminal Justice Standards and Goals

reaffirmed this position. In its Report on Police, that Commission (at 21) recognized that individual officers exercise a "broad range of administrative and operational discretion." The Commission then called for each police agency to develop:

> . . . comprehensive policy statements that publicly establish the limits of discretion, that provide guidelines for its exercise within those limits and that eliminate discriminatory enforcement of the law. Policies should be developed to guide and govern the way policemen exercise this discretion on the street.

For an extensive bibliography on these issues, see Police Discretion published by the National Criminal Justice Reference Service of the National Institute of Law Enforcement and Criminal Justice (part of the Law Enforcement Assistance Administration within the US Department of Justice).

Thus, over the years, each law enforcement agency's need for a system of written directives has become virtually beyond debate. Law enforcement administrators recognize that internal rulemaking can function as a crucial administrative bridge between departmental goals and actual police practices. Most administrators, therefore, have wrestled with the job of developing and implementing written rules. This Manual, as a reference tool and informational resource, is meant to assist their ongoing efforts.

THE ADVANTAGES OF SYSTEMATIC RULEMAKING

Written rules and guidelines cannot and should not eliminate the use of discretion by the police officer. However, they can structure and guide discretionary actions. Rules, for example, can implement departmental policies (e.g., misdemeanor field release by citation, arrest and search warrant procedures, responding to child abuse and rape, the use of force).

Rules can summarize and reinforce training. Rules can also serve to instruct officers about the legal authority and requirements of particular police operations (e.g., the need for articulable reasons for a "stop-and-frisk").

1. Improved officer performance and morale. Unwritten policies are often misinterpreted or forgotten. Through established written rules, higher level management can better control many enforcement decisions. This should improve coordination and efficiency, enhance uniform enforcement efforts, and reduce the likelihood of police misconduct. Numerous books and articles have stressed the importance of police rulemaking to structure and control police discretion, particularly in the area of selective enforcement. See, for example, K. C. Davis, Police Discretion 112-20 (1975).

Clearly expressed departmental policies should also increase the morale and sense of responsibility of each officer. Impartial and rational discipline based on performance measured against accessible and coherent standards can only enhance an officer's sense of fairness and professionalism. An officer who has a genuine opportunity to participate in the rulemaking and disciplinary processes will be more likely to support such efforts. Moreover, the demand for professionalism in police work requires better education and training. Coordinated departmental rules can make an indispensable contribution toward those requirements.

By the nature of their work, peace officers face a substantial risk of litigation. In addition, police chiefs and other administrators increasingly find themselves named as defendants in suits arising out of actions taken

by their officers. In the future, courts may hold these administrators accountable for a failure to articulate adequately detailed policies and procedures to govern discretionary decision-making by their officers, even though the US Supreme Court has yet to accept federal judicial intervention in police rulemaking. See Rizzo v. Goode, 423 U.S. 362 (1976). A systemized structure of rulemaking and discipline has the capacity to reduce the frequency and seriousness of incidents that produce litigation. Thus, from the standpoint of legal liability for both law enforcement personnel and their governmental employers, voluntary establishment of adequate procedures appears highly desirable.

2. Improved community relations. Increasingly in recent years, citizens have sought to expand their input into law enforcement practices. Citizen expectations now influence the values, goals, and even some operating procedures of police departments. Administrative rulemaking enables a department to incorporate community concerns while exercising positive initiative. As a community has increased access to a department's policies and rules, that community should better understand and appreciate the scope, volume, sensitivity, and complexity of the work of the police. Moreover, the 24-hour-a-day availability of the local police department makes it the agency that many citizens first contact with an array of problems, including many that do not involve traditional law enforcement functions. Therefore, improved procedures in these areas will also promote community goodwill.

* * * * * *

A NOTE ON FORM

This Manual largely follows the legal citation format of A Uniform System of Citation (12th ed. 1976). This format generally eliminates the introductory use of the word "page" or the abbreviation "p." In addition, for convenience, this Manual uses masculine pronouns (e.g., "he" and "his") when both genders are meant to be included. As noted several times throughout this Manual, use of the term "chief" or "chief of police" does not mean to exclude a "sheriff," "constable," or other "law enforcement chief executive."

GUIDE FOR LAW ENFORCEMENT AGENCIES ON DESIGNING, IMPLEMENTING, ENFORCING, AND UPDATING WRITTEN RULES AND PROCEDURES

Numerous governmental and private studies have strongly emphasized the need for each law enforcement agency to develop and enforce a coordinated set of written administrative rules and procedures which would provide guidance for its officers. Although virtually every law enforcement agency also recognizes this need for systematic rulemaking, many agencies (particularly small ones) find that limited financial resources and the pressing demands of daily operation have precluded a cohesive and sustained effort toward rulemaking. For a discussion of these matters, see the July 1980 issue of Police Chief which contains several articles devoted to "Administering the Small Police Department."

This Guide provides a general checklist for a law enforcement agency that wants to design, implement, enforce, and update its written rules and procedures. The organization of this Guide makes it compatible with a department's joint consideration of substantive chapters within the Model Rules for Peace Officers: A Resource Manual on Police Discretion and Rulemaking. This Guide is strictly advisory. Individual agencies are encouraged to adapt it to meet their specific needs and circumstances.

This Guide outlines the major steps for establishing an ongoing rulemaking procedure. It provides a framework for planning the development, implementation, and enforcement processes. It also highlights major objectives and potential benefits of systematic rulemaking. The Guide concludes with an appendix that suggests the structure and procedures of a model rulemaking committee.

RULEMAKING OBJECTIVES AND BENEFITS

Systematic administrative rulemaking, particularly when thoroughly integrated into training programs, will assist any law enforcement agency in implementing its policies. It facilitates increased coordination between supervisory and field personnel. Rules should also promote efficiency as well as uniformity and consistency in enforcement, arrest practices, and other police procedures "on the street."

If properly designed and implemented, a department's rulemaking should improve the morale and attitudes of its officers. Most officers desire stable, sound, and consistent guidance to help them handle the variety of complex situations that confront them each day. They want to know, in clear terms, what the top administrators expect from them. If incorporated into a fair and impartial departmental disciplinary structure, rules can simultaneously enhance accountability. Thus, officers can be held responsible for knowing and following a specific set of written procedures. Written rules, therefore, should upgrade the scope and standard of disciplinary review and improve overall peace officer performance. This, in turn, should reduce unauthorized actions and lessen an officer's (as well as his supervisor's and employer's) exposure to litigation.

For several reasons, an established rulemaking system should also improve community relations. Written rules, adopted after thorough consideration, will project a department's professional approach to law enforcement. The presence of established rules and procedures reduces the need for an ad hoc or stopgap approach to potentially inflammatory issues. In addition, to the extent that the community has access to a department's rules, police practices will be "de-mystified" and better

understood. This openness will often buttress community support as it channels community concern and participation into constructive paths.

DESIGN

Administrative Leadership. A system of written directives cannot succeed without consistent and aggressive support and leadership by the chief executive (e.g., chief of police, sheriff, etc.) of the law enforcement agency. Effective rulemaking also requires careful planning. Top-level administrators should help develop the key policies and goals of the rulemaking effort. Top administrators should also strive to develop earnest and dedicated support for rulemaking from the other levels of personnel. For a further discussion of the chief executive's role, see National Advisory Committee on Criminal Justice Standards and Goals, Police Chief Executive (1976). For a more general discussion of police management, see International City Management Association, Local Government Police Management (B. Garmire ed. 1977).

Rulemaking Structure. A department should systemize its rulemaking procedures. Rulemaking should become an ongoing and integrated function of the agency. The chief executive should ensure that the rulemaking process includes participation from all personnel levels within the agency. (The appendix details the composition and operation of a model "Department Rulemaking Committee (DRC)" appointed by the head of the agency.)

1. Establish basic policies. The chief executive (or the DRC), to focus and guide the agency's rulemaking efforts, should establish underlying policies. These policies should represent the philosophies and attitudes of management. Regardless of the agency's size, these policies should serve

as a touchstone to the rulemaking process. Policies represent an overall approach or general guide to action. They provide a broader setting for specific rules. These policies involve value choices and may include departmental goals. In general terms, a department might develop its rulemaking policies within the following parameters:

(a) Departmental rules will comply with the current law.

(b) Departmental rules will reflect up-to-date police practices.

(c) Departmental rules will contain as much plain language, and as little ambiguity, as possible and will be presented in a clear format.

(d) The drafters of departmental rules will consider the impact of each rule on the safety of officers.

(e) The drafters will consider (and balance, as necessary) community concerns and the concerns of officers.

(f) Departmental rules will not create inconsistent requirements or procedures.

2. Set rulemaking priorities. The efforts of the chief executive (or the DRC) should concentrate on drafting rules and procedures to cover topics that most critically need departmental clarification and guidance. The chief (or the DRC) should identify these key topics through a variety of means. For example, a recent statute or court case may make an existing rule obsolete, a particular incident or disciplinary matter may have shown a strong need for a new or revised procedure, or one or more officers may have expressed confusion over the interpretation of a particular rule.

The relative ease or difficulty of drafting a rule should not influence the selection priority. For example, drafting a rule on the use of force, although perhaps controversial and difficult to draft, should not be even temporarily ignored in favor of developing a simpler rule relating to establishing a dress code.

3. Establish an overall program timetable. When appropriate (particularly for an agency creating its first written directives system), a timetable will structure the pace of the rulemaking. A timetable, although flexible, serves as a framework to identify initial and long-range priorities and assign a target date for each objective. A timetable also permits convenient and frequent progress evaluation. This, in turn, will highlight any need for additional personnel or other resource allocation to assist the project.

4. Centralize promulgation. Only the chief executive of the law enforcement agency should have the final authority to issue a rule. Regardless of who may participate in researching, discussing, or drafting the rule, the chief administrator must evaluate the rule and decide whether to implement it. This correctly places the responsibility squarely at the highest level. It also lessens confusion by preventing a proliferation of personnel who can issue rules.

5. Develop an appropriate format. Following several basic principles will improve the format of the written directives:

(a) Standardize the format (e.g., as to layout, paper size, paper color, classification, numbering, method of distribution, etc.).

(b) Prepare and keep current both a sequential and a subject-matter index (with adequate cross-indexing) to the rules.

(c) Make the format distinctive and readily identifiable. For example, distinguish between directives issued for the entire agency and those which apply to one or more individuals or units.

(d) Classify and group subjects logically.

IMPLEMENTATION

Implementation of the rules issued by the chief executive of the agency requires coordinated efforts by the entire management of the agency. Implementation involves distribution, orientation, and training. For a further discussion of these issues, see Kazoroski, Policy Implementation, Police Chief, Nov. 1979, at 63.

1. Establish a distribution system. Everyone affected by a particular directive must individually receive a personal copy of that directive. Thus, the distribution system should contain an appropriate mechanism to ensure that all affected personnel receive their copies. The mechanism should produce a written record that will prevent oversights. For example, a simple sign-up sheet would serve well.

2. Communicate with and orient personnel. An officer's attitude toward a rule will often develop during the orientation session. Therefore, this session requires appropriate planning. Following the decision to initiate development of a system of written directives (or to create the DRC or analogous committee), the administrators of the agency (generally after appropriate briefing and discussion with the chief executive) should schedule meetings with the officers to explain the policies behind the rulemaking effort.

These meetings should afford ample opportunity to explore the full scope and purpose of the project. The meetings should encourage suggestions and questions from the officers. The officers should receive adequate background on the reasons and policies behind a particular rule. The orientation should emphasize the practical benefits and goals of each rule. This initial exposure should also stress the problems and shortcomings of any superseded rule.

3. Train the affected personnel. Departmental directives often address complex technical and legal matters. Administrators should anticipate the need for significant levels of training to instruct officers about a new or revised directive. In-depth, formalized training regarding a department's rules and procedures should occur in, but not stop with, recruit school. In-service training should occur regularly. Haphazard instruction, such as during roll call, cannot suffice.

Increased emphasis on instruction about the department's rules and disciplinary procedures improves personnel understanding and voluntary support. Since written directives incorporate departmental expectations and frequently form the basis for disciplinary actions, training that increases officer support will also help management achieve its goals. To the extent feasible, a department should consider an officer's knowledge of, and conformance with, its rules in making decisions on career advancement and merit promotions.

ENFORCEMENT

Written directives, by definition, require compliance by the affected personnel. The chief administrator of the law enforcement agency must develop appropriate disciplinary procedures linked to the written directives. These procedures must be fully understood by every officer. Regardless of the disciplinary procedures an agency institutes, the agency administrators must strive for consistency, fairness, and impartiality. (For a discussion of disciplinary procedures, see Chapter Seventeen on Departmental Review and Discipline.)

First-line supervisors have the greatest opportunity to detect misconduct. Therefore, they have the primary responsibility for enforcing

departmental rules and procedures. In addition, citizen complaints should become an invaluable source of information on officer conduct. Each department, to preserve its integrity, should develop a formal system for responding to citizen complaints. In addition, the department should help educate the community about the complaint process.

The affected officer's immediate supervisor may appropriately investigate minor allegations, although the supervisor should ordinarily advise the "internal affairs" unit of the complaint and its resolution. Serious allegations, however, should be directly assigned to an internal affairs investigative unit. A department should have a centralized internal investigatory function. For a more detailed discussion of these issues, see International Association of Chiefs of Police, Managing for Effective Police Discipline (2d rev. ed. 1977).

UPDATING

Each department, to maintain the accuracy and usefulness of its written directives, should systematically review each of its rules and procedures. Review on a general "as needed" basis alone is insufficient. Review of each rule should also occur at regular intervals, not less frequently than every two years. This will help to keep the rules current and will encourage an organized rulemaking effort.

Appendix

MODEL RULEMAKING PROCEDURE

This appendix suggests a model or prototype Departmental Rulemaking Committee (DRC) to develop, review, and help implement written policies and procedures. As noted, however, each law enforcement agency must tailor its rulemaking structure to fit its own circumstances.

SECTION ONE: ESTABLISHMENT OF RULEMAKING COMMITTEE

1.01. This order creates a Departmental Rulemaking Committee ("the DRC") [to replace the former committee designated as _____].

1.02. The DRC will develop, review, and help implement departmental policies and rules.

1.03. The [law enforcement chief executive (the "chief")] shall appoint, to serve at his pleasure, the [total number] members of the committee with representation from the following categories:

(a) Senior staff officer [e.g., deputy chief, major, etc.];
(b) Planning officer [any rank];
(c) Training officer [any rank];
(d) Patrol supervisor [e.g., sergeant];
(e) Patrol officers;
(f) Legal advisor; and
(g) Investigators.

1.04. The chief or his designee shall chair the DRC meetings.

1.05. The DRC shall meet at the request of the chief.

This section establishes a Departmental Rulemaking Committee which will meet to prepare and analyze departmental policies and rules on procedures, discretion, and enforcement. The composition of the DRC's membership, although within the discretion of the chief of police

(or other "law enforcement chief executive"), should encompass (Section 1.03) a relatively broad spectrum of departmental viewpoints.

DRC composition might vary for each agency. For example, a small department may not have an in-house legal advisor. However, to enhance the effectiveness of the DRC, it should include representatives from as many levels within the department as possible. The rulemaking process will benefit from a broad range of current experience in law enforcement. In general, supervisors and patrol officers should be included because they are responsible for the daily enforcement and application of the rules.

If appropriate, the chief may wish to include community representatives to provide further public input into the rulemaking process. The original 1974 Model Rules recommended community representation as well as open meetings, at the discretion of the chief. However, in order to reduce unnecessary politicization and to increase the harmony and productivity of the DRC, this prototype does not suggest open meetings or the formal inclusion of community representatives.

No department should expect to be able to take another department's policy and directly attempt to graft it into its own system without careful consideration, including a review by counsel. Thus, before any department considers adopting any policy or procedure, it should have that document thoroughly analyzed by an attorney with experience in the appropriate areas of law. For a discussion of the role of the "police legal advisor," see ICMA, Local Government Police Management 382-401 (B. Garmire ed. 1977); Seibert, The Police Legal Advisor, Police Chief, May 1978, at 18.

SECTION TWO: RULE DEVELOPMENT AND DISSEMINATION

2.01. The DRC shall only act on requests from the chief to review or develop policies and procedures. The DRC may also recommend, to the chief, areas of departmental operation appropriate for its own consideration.

2.02. The DRC shall review each departmental policy and procedure whenever needed but not less frequently than once every two years.

2.03. The DRC may seek advice and information from any appropriate departmental or other source to assist its development and analysis of departmental policies and procedures.

2.04. In reviewing and developing departmental policies and procedures, the DRC shall, at a minimum, consider the following factors:

(a) Legal requirements and limits;
(b) Community needs and attitudes;
(c) Practicality, effectiveness, and safety;
(d) Financial, personnel, and equipment resources and limits; and
(e) Existing related practices and procedures.

2.05. With the approval of a majority of the members, the DRC shall forward its written recommendations (with a detailed explanatory commentary) to the chief in the form of a proposed general order. Minority recommendations, so designated, may also be forwarded to the chief.

2.06. The proposed general order will only take effect when approved and issued by the chief. Each officer to whom an order applies shall receive a copy of the order.

2.07. Approved policies and procedures shall be available (with copies for sale at nominal cost) to the public, except at the discretion of the chief.

This section establishes a basic process for the development and dissemination of police policies and procedures. A law enforcement agency which has the discretionary authority to make decisions on enforcement methods and practices also has the authority (if not the duty) to state publicly and in advance how it will direct its officers to make those decisions.

Section 2.02 establishes a system of periodic review of departmental rules. This rule sets a two-year maximum interval between the DRC's reviews of any given rule. This review requirement will promote rule reevaluation in light of changing law and police practices. It should prevent rules from going "stale" and encourages efficient administration.

The DRC should develop policies and procedures in the form of general orders, written in a clear, concise, and analytical format. Descriptive or explanatory commentary should accompany such orders and cite the practical and legal foundation for the policy or procedure. In formulating rules, Section 2.04 directs the DRC to consider various factors, to avoid a narrow focus on a particular exigency confronting that law enforcement agency.

Copies of a department's policies and procedures should be available for public scrutiny (Section 2.07), except when the chief decides otherwise. For example, certain exclusively internal rules may not merit public disclosure. Under the Texas Open Records Act (Tex. Rev. Civ. Stat. Ann. art. 6252--17a, sec. 3(a)(8) (Vernon Supp. 1980)), a law enforcement agency need not "open" records maintained for "internal use." Of course, the Open Records Act does not restrict an agency's authority to "open" even strictly internal rules. In fact, section 3(a)(8) may not even apply to the type of rules under discussion. For a further discussion of the Open Records Act, see Section Three of Chapter Fifteen on the Control of Criminal Justice Information.

GLOSSARY OF TERMS

Abandoned Property - Discarded object or property (other than land) over which all persons have fully relinquished ultimate control and any reasonable ownership or privacy interest. [6:1.01]

Abuse - Nonaccidental infliction or threat of infliction of physical injury or emotional or mental damage to a child by a person responsible for the child's health or welfare. [4:1.01]

Access Area - The area (also known as the "area of immediate control") into which an arrestee might reach in order to grab a weapon or destructible evidence. [6:1.02; 9:1.01, with variation]

Administration of Criminal Justice - Performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information. (From section .002(b) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.01]

Agency Disposition - Information from a criminal justice agency which reveals the decision made by that agency with regard to its disposition of the offender or his case or both. (From section .002(j) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.02]

Allegation - A charge that an officer has violated a rule or regulation covered by the departmental disciplinary process. [17:1.01]

Armed - Carrying a weapon or other object capable of inflicting death or serious bodily injury. [9:1.02]

Arrest - The intentional seizure, whether actual or constructive, of a person by an officer acting under real or assumed legal authority, coupled with a recognition of the custody by the seized person, for the purpose of charging him with a criminal complaint. (Chapter Nine on Stop-and-Frisk discusses temporary restraints which fall short of "arrest.") [5:1.01]

Assault - A criminal act which causes bodily injury to another, including one's spouse; a threat against another, including one's spouse, of imminent serious bodily injury; any threat against another, including one's spouse, made while brandishing a deadly weapon. [Defined solely for use in Chapter One on Domestic Disturbances.] [1:1.01]

Authorized Agency - A public social agency authorized to care for children or to place children for adoption, or a private association, corporation, or person approved for that purpose by the Department of Human Resources through a license, certification, or other means. [4:1.09]

Authorized Weapon - A weapon approved by [this law enforcement agency] for official use by its officers. A firearm cannot be authorized unless it is registered with [this department] to a particular officer. [3:1.01]

Bodily Injury - Physical pain, illness, or any impairment of physical condition. [1:1.02, 4:1.02, 5:1.02]

Book and Release - A procedure (also known as "identification release") in which an officer arrests the violator and takes him to be booked; the violator has a set of fingerprints and photograph taken (also known as "printed and mugged"); and the violator secures his immediate release by signing the Citation's waiver and notice to appear. [2:1.04]

Breach of the Peace - Any unauthorized and unwarranted act which involves violence, or which likely will provoke violence, and which significantly disturbs or threatens the peace and quiet of a community. [1:1.03, 5:1.03]

Child - A person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes. Under statutes regarding crimes against children, however, the age of a "child" varies from under 14 to under 17. [1:1.03, with variation; 4:1.03]

Child Abuse and Neglect Reporting and Inquiry System (CANRIS) - The automated central registry of reported and investigated child abuse cases in Texas. [4:1.04]

Child Abuse Hotline ("the Hotline") - A statewide, toll-free telephone number (1-800-252-5400) for 24-hour reporting of children in need of protection. The Hotline refers all reports it receives to local protective services staff. [4:1.05]

Child Protective Worker - A staff member of the child protective services of the Texas Department of Human Resources (DHR) or another designated agency such as County Child Welfare, trained to investigate child abuse and to handle civil legal actions involving child abuse. [4:1.06]

CHRI System - A system, including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation, or dissemination of criminal history record information (CHRI). (From Section 20.3(a) of the LEAA regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.03]

CJI System - A system, including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation, or dissemination of criminal justice information (CJI). [15:1.04]

Close Pursuit - (The term used in Louisiana for "fresh pursuit.") Under Louisiana law, an officer's immediate pursuit of a person, continuously or intermittently in the presence of the officer, in order to apprehend and arrest that person for the commission of an offense. (Chapter Eleven on Emergency Driving defines and discusses "high-speed pursuit" (or "hot pursuit").) [5:1.04]

Complaint - The affidavit made before a magistrate or a district or county attorney which charges a particular person with the commission of an offense. The filing of a "complaint" triggers a suspect's right to counsel at eyewitness identification procedures. For the purposes of this chapter, the term "complaint" includes a grand jury indictment. [14:1.01]

Continuing Misdemeanor - A misdemeanor which occurs over a period of time and without intermission. [5:1.05]

Conviction Data - All notations of criminal transactions related to an offense that have resulted in a conviction, guilty plea, or a plea of nolo contendere. (From section .002(*l*) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.05]

Corrections - Those criminal justice agencies which supervise criminal offenders under sentence of a court whether incarcerated or not, e.g., probation departments, county jails, Texas Department of Corrections (TDC), Board of Pardons and Paroles, and the Texas Youth Council. (From section .002(h) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.06]

Court - The District Court or Family District Court which has jurisdiction in all civil proceedings affecting the parent-child relationship. [Defined solely for use in Chapter Four on Child Abuse.] [4:1.07]

Criminal History Record Information (CHRI) - Includes records and related data contained in either a manual or an automated criminal justice information system, compiled by criminal justice agencies for purposes of identifying criminal offenders and maintaining as to such persons notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release. Criminal history record information is a general term which includes within its definition both conviction data and nonconviction data. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. (From section .002(c) of the CJD regulations.) However, this chapter does not apply to CHRI contained in certain types of documents; section .003 of the CJD regulations sets forth these exempted documents. [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.07]

Criminal Justice Agency - Includes courts and any government agency or any subunit thereof which performs the administration of criminal justice

pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice. (From section .002(a) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.08]

Criminal Justice Information (CJI) - Includes CHRI (as defined in Rule 15:1.08) plus all other information collected by any criminal justice agency on identifiable individuals, such as intelligence, analytical and investigative data. [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.09]

Curtilage - The yard and buildings which relate to domestic activities and surround a residence or dwelling place, generally including garages, sheds, outhouses, driveways, barns, fenced-in areas around the house, and the like. It does not include vehicles, commercial business structures, or open fields surrounding a residence. For apartments or multi-unit dwellings, it also does not include fire escapes, lobbies, or common hallways. [6:1.03, 8:1.01]

Custodial Arrest - A procedure in which an officer arrests and then transports a person to a detention facility to await bond or an appearance before a magistrate. [2:1.02, 6:1.04]

Deadly Force - Force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury. [3:1.02]

Deadly Weapon - A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use can cause death or serious bodily injury. [1:1.05]

Department - The law enforcement agency, e.g., the [police department of the city of _____]. [15:1.10]

Designated Agency - An agency designated by the court to protect children, and to receive any reports of child abuse. [4:1.08]

Direct Access - Having the authority to access the CHRI data base. (From section .002(m) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.11]

Disposition - Information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for postponement. Dispositions shall include but not be limited to acquittal, acquittal by reason of insanity, charge dismissed due to mental incompetency, charge still pending due to insanity, charge still pending due to mental

incompetence, guilty plea, nolle prosequi, nolo contendere plea, failure to indict by the grand jury (no bill), convicted, youthful offender determination, deceased, deferred disposition, dismissed--civil action, found insane, found mentally incompetent, pardoned, probation before conviction, sentence commuted, adjudication withheld, mistrial--defendant discharged, executive clemency, placed on probation, paroled, or released from correctional supervision. (From section .002(i) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.12]

Disorderly Conduct - Acts proscribed under the Texas Penal Code Annotated and analogous municipal ordinances as: Disorderly Conduct (section 42.01), Public Lewdness (section 21.07), Indecent Exposure (section 21.08), Obstructing Highway or Other Passageway (section 42.03), Disrupting a Meeting or Procession (section 42.05), Public Intoxication (section 42.08), Hindering Proceedings by Disorderly Conduct (section 38.13). (The Appendix [to Chapter Thirteen on Disorderly Conduct] sets forth the statutory language of the cited offenses.) [13:1.01]

Dissemination of CHRI - The release, either verbally or printed (hard copy), of CHRI by an agency to another agency or individual or the transfer of CHRI from computer to computer. (From section .002(d) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.13]

Domestic Disturbance - A dispute, whether of a civil or criminal nature, that occurs between members of the same family (or between persons who share a similarly intimate relationship) and results in contact with a law enforcement agency. [1:1.06]

Emergency Admission - A statutorily prescribed process (Tex. Rev. Civ. Stat. Ann. art. 5547--27 through --30) by which a health or peace officer, who has probable cause to believe that a person is mentally ill and is therefore likely to injure himself or others if not immediately restrained, may obtain a warrant from any magistrate and take such person into custody and immediately transport such person to the nearest appropriate hospital for temporary detention. [12:1.01]

Emergency Removal - Removal of a child from his home without written consent of his parents and before a court hearing, upon reasonable cause to believe that an immediate danger exists to the child's physical health or safety. [4:1.10]

Emotional Neglect - Failure of the parents or caretaker to provide adequately for the developmental needs of the child (such as stimulation and affection) and to provide consistent care for the child. [4:1.11]

Evader - A driver who continues to drive his vehicle and fails to pull over to the right and stop when he knows or should know of the audible and/or visual signals to do so directed to him by an officer, but who does not attempt to escape by driving recklessly and/or at an excessive speed. [11:1.02]

Exigent Circumstances - An emergency or unforeseen occurrence or combination of circumstances which requires an officer to act immediately. For example, exigent circumstances may exist if:

(a) A wanted suspect may escape, or
(b) Bodily injury may occur, or
(c) Evidence will be lost or destroyed, or
(d) Serious damage to property, real or personal, may occur. [8:1.02]

Exploitation - The forcing or undue encouragement of a child to participate in activities detrimental to his well-being, by a person responsible for the child's health or welfare. (For example, exploitation may involve begging, stealing, exposure to immoral or degrading circumstances, inappropriate responsibilities for the child's age, and too many working hours for the child's age.) [4:1.12]

Expunction (or Expungement) - The official removal, obliteration, or destruction of information from an information system by eliminating all indications that the information had ever been recorded. [15:1.14]

Felony - An offense so designated by law or punishable by death or confinement in a penitentiary. [5:1.06]

Field Release - A procedure in which an officer arrests a violator but immediately releases him after the violator signs the Citation's waiver and written notice to appear. [2:1.03]

First Amendment Activities - The lawful exercise by one or more persons of the constitutional right (without prior restraint or fear of arbitrary subsequent punishment) to assemble, to speak, or to engage in communicative behavior which expresses a point of view. Although first amendment activities usually involve political, social, economic, or religious ideas, issues, or opinions, they are not limited to those topics. [13:1.02]

Field Identification - A corporeal identification procedure (also known as "confrontation," "showup," and "one-on-one") in which the suspect is presented singly to the witness. [14:1.03]

Field Release Citation ("the Citation") - The official departmental form that an officer issues to a violator and which states the offense allegedly committed. The Citation also contains both (1) a waiver of the arrestee's right to appear, without unnecessary delay, before a magistrate, and (2) a "notice to appear," that obligates the violator to appear at a stated time and place to face the charges against him. [2:1.01]

Filler - Any person, other than a suspect in a particular criminal investigation, who participates in a lineup which relates to that investigation. [14:1.07]

Fresh Pursuit - (Commonly known as "hot pursuit.") Pursuit of a person without unreasonable delay, but not necessarily instantly or immediately, in order to apprehend and arrest that person for the commission of an offense. (Chapter Eleven on Emergency Driving defines and discusses "high-speed pursuit" (or "vehicular hot pursuit").) [5:1.07]

Frisk - Jargon referring to a weapons search of a person generally limited to a patdown of his outer clothing to ensure the safety of the officer and others. [6:1.05, 9:1.03]

High-Speed Pursuit (Vehicular Hot Pursuit) - Police vehicular pursuit of another vehicle at speeds which exceed the legal speed for nonemergency vehicles. [11:1.03]

Informal Identification - A procedure in which an officer takes a witness to observe a suspect who is at liberty, and who is usually unaware that he is being observed. [14:1.05]

Intoxication - Any disturbance of mental or physical capacity resulting from the introduction of any substance into the body. [1:1.08]

In the Presence of - When an officer, through one or more of his five senses, has probable cause to believe that an offense is being committed, that offense occurs "in the presence of" that officer. [1:1.07, 5:1.08]

Investigation Division - The division of the Department of Human Resources responsible for criminal investigations of child abuse. [4:1.13]

Lack of Supervision - A failure of parents to account for a child's actions and whereabouts. (Examples of lack of supervision include a young child left unattended while the parents are working, or a preteen left to take care of very young children for long periods of time.) [4:1.14]

Lineup - An identification procedure in which a suspect is placed in a live group-setting and presented to an eyewitness. [14:1.02]

Medical Neglect - A failure of parents to secure necessary medical, surgical, or psychiatric treatment to correct some condition in the child. (Examples of medical neglect include a long-term failure to treat a seriously ill child, a malnourished child, or an emotionally disturbed child.) [4:1.15]

Mental Hospital - A hospital operated for the primary purpose of providing in-patient care and treatment for the mentally ill. [12:1.02]

Mentally Ill Person - A person who displays symptoms of substantially impaired mental health and who is in danger of causing injury to himself or to the person or property of others or is in danger of being injured by others. [12:1.03]

Mental Patient - A person admitted or committed to any mental hospital or a person under observation, care, or treatment in a mental hospital. [12:1.04]

Mere Evidence - Property or items (but not contraband or a fruit or instrumentality of a crime) constituting evidence of an offense or tending to show that a particular person committed an offense. [8:1.03]

Misdemeanor - An offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail. [2:1.05, 5:1.09]

Neglect - Depriving the child of living conditions which provide the minimally needed physical and emotional requirements of life, growth, and development, by a person responsible for the child's health or welfare. (Examples of child neglect include inadequate housing, clothing, or food; lack of supervision; lack of needed medical attention; and abandonment.) [4:1.16]

Nexus - Probable cause which, by connecting mere evidence to an offense, permits an officer to seize mere evidence even if the search warrant does not describe it. [8:1.04]

Nonconviction Data - Arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals. (From section .002(k) of the CJD regulations.) [See Chapter Fifteen on the Control of Criminal Justice Information.] [15:1.15]

Noncriminal-Justice Agency - Any person, organization, or other entity which is not a criminal justice agency. [15:1.16]

Nondeadly Force - Force which, under the circumstances, is not reasonably capable of causing death or serious bodily injury. [3:1.03]

Nonsuspect - A person who an officer has no reasonable suspicion to believe is involved in any criminal activity. [9:1.04]

Offender - A person whom an officer has probable cause to arrest or detain. [5:1.10]

Offense - An act or omission, including misdemeanors as well as felonies, forbidden by law and for which, on conviction, the law prescribes a punishment. [5:1.11]

Open Field - Unoccupied land outside the curtilage of any dwelling, usually uncultivated and relatively remote, in which no person has a reasonable expectation of privacy. [6:1.06]

Overtake - Pursuit of a motorist, who does not yet realize that he is being pursued, in order to:

(a) Position the police vehicle so that audible and/or visual signals can effectively be communicated to the motorist; and/or
(b) Position the police vehicle so that the officer may more effectively observe the motorist, his vehicle, his passengers, and/or his load. [11:1.01]

Photo Identification Display - An identification procedure (also known as "photo display," "photo lineup," and "photo array") in which a group of photographs, preferably in color, are displayed together before the witness. [14:1.04]

Physical Strength and Skill - Any physical actions by one or more officers (e.g., holding, restraining, pushing, and pulling) which may include special skills (e.g., boxing, karate, and judo) but do not include the use of deadly force or any authorized or other weapon. [3:1.04]

Primary Pursuing Unit - The police unit which initiates a pursuit or any unit which assumes control of the pursuit. [11:1.06]

Private Premises - A permanent or temporary personal residence including, but not limited to, a house, and the grounds immediately surrounding it; an apartment; a hotel room; and a trailer. [1:1.09]

Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law. [1:1.10, 3:1.05, 5:1.12, 6:1.07, 7:1.01, 8:1.05, 9:1.05, 11:1.07]

Public Place - Any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. [1:1.11]

Reasonable Suspicion - An officer's rational belief, based on credible and articulable information and circumstances, that something may be true (e.g., that a person might be armed or involved in past, present, or future criminal activity). [6:1.08; 7:1.02; 8:1.06; 9:1.06, with variation]

Reckless Evader - A driver who, in order to escape or avoid apprehension by a police officer, drives his vehicle recklessly and/or at speeds which are so extreme under the conditions prevailing that his involvement in a collision is probable should he continue. [11:1.04]

Roadblock - Any method, restriction, or obstruction used to prevent free passage of motor vehicles on a highway, in order to effect the apprehension of an actual or suspected violator in a motor vehicle. [11:1.05]

Search Warrant - A written order, issued by a magistrate (on a showing of probable cause) and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate. [8:1.07]

Seizable Property - All property subject to seizure, including: unlawful weapons, drugs, and other contraband; stolen or embezzled property ("fruits of a crime"); equipment, devices, instruments, and paraphernalia for committing an offense ("instrumentalities"); and evidence of a particular crime ("mere evidence"). [6:1.09]

Serious Bodily Injury - Bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. [1:1.12, 3:1.06, 4:1.17, 5:1.13]

Sexual Abuse - The obscene or pornographic photographing, filming, or depiction of a child for commercial purposes, or the rape, molestation, incest, prostitution, or other such forms of sexual exploitation of a child under circumstances that appear to harm or threaten the child's health or welfare. [4:1.18]

Stop - A temporary investigative detention, generally including limited field questioning, of a suspect. [9:1.07]

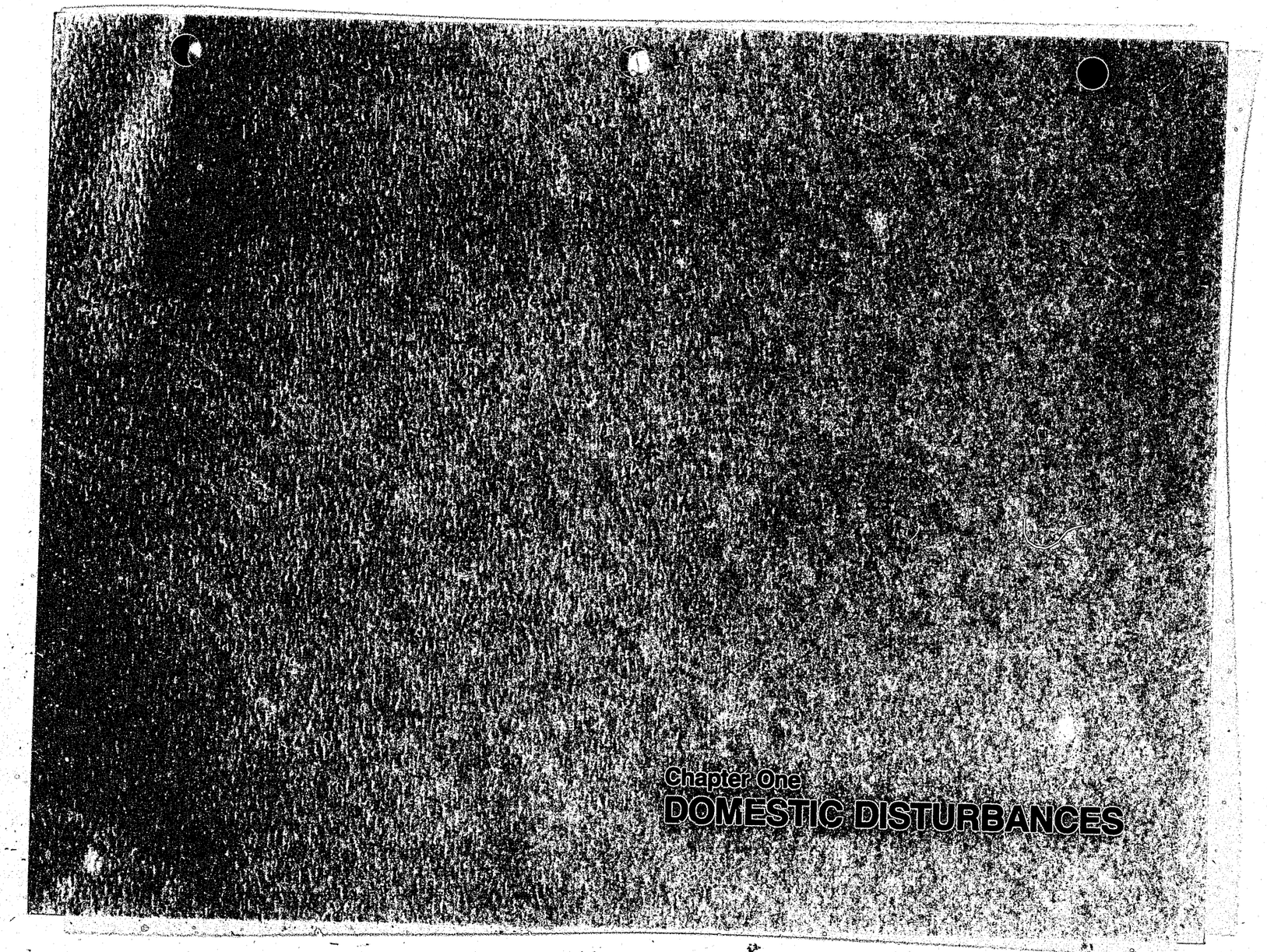
Suit Affecting the Parent-Child Relationship - A suit brought under Title 2 of the Texas Family Code in which the appointment of a managing conservator or possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought. [4:1.19]

Suspect - A person who an officer reasonably suspects of involvement in criminal activity. [9:1.08]

Violator - Any person at least 17 years old who an officer arrests, without an arrest warrant, for violating a municipal ordinance or committing a Class C misdemeanor other than a traffic violation. [2:1.06]

Voluntary Hospitalization or Voluntary Admission - A procedure in which the head of a mental hospital may admit as a voluntary patient any person for whom a proper application is filed, if he determines upon the basis of preliminary examination that the person has symptoms of mental illness or will benefit from hospitalization. [12:1.05]

Witness - A victim or an eyewitness to a crime. [14:1.06]



Chapter One
DOMESTIC DISTURBANCES

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Crime statistics have long confirmed the seriousness of domestic disturbances. For example, national statistics reveal that a high proportion of violent crimes, including approximately one-fourth of all murders, occur between family members. E.g., FBI Uniform Crime Reports: Crime in the United States, 1978, at 13 (1979). With increasing frequency in recent years, government and private studies have focused on domestic violence and spouse abuse (including "wife beating"). See, e.g., Project SHARE (US Dep't of Health & Human Services), Issues in Domestic Violence: A Bibliography (1980). Project SHARE, for example, estimates that 1,800,000 husbands abuse their wives. The compilation and analysis of this data has highlighted the scope and depth of this national problem.

Local law enforcement agencies are called on to play a crucial role in many domestic disturbances. Domestic disturbance calls comprise a high proportion of all calls received by police departments. Many of these calls involve "repeat" visits to problem addresses. In some, the level of violence escalates over time. Thus, each domestic disturbance call may present a potential opportunity for future crime prevention.

In addition, officers intervening in a domestic disturbance often face serious safety risks. One national study reported that 22 percent of officer fatalities and about 40 percent of officer injuries resulted during intervention into family disputes. Bard, Family Intervention Police Teams as a Community Mental Health Resource, 60 J. Crim. Law, Criminology

& Police Sci. 247, 248 (1969). More recent data, though showing reduced rates, still reveal a significant risk. FBI Uniform Crime Reports: Crime in the United States, 1978, at 307. Therefore, a law enforcement agency's approach to domestic disturbance calls may affect the safety of its officers.

The above information underscores the importance of departmental policies and procedures in this area. This chapter presents suggested guidelines for officers who answer a domestic disturbance call. Although this chapter recognizes that any one of a myriad of different factors in a domestic dispute may suggest a different course of action, this chapter attempts to provide as much specific direction as possible. For an extensive overview of this subject, see Domestic Violence: Hearings on H.R. 7927 & H.R. 8948 Before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 2d Sess. (1978).

SECTION ONE: DEFINITIONS

1:1.01. Assault - A criminal act which causes bodily injury to another, including one's spouse; a threat against another, including one's spouse, of imminent serious bodily injury; any threat against another, including one's spouse, made while brandishing a deadly weapon.

1:1.02. Bodily Injury - Physical pain, illness, or any impairment of physical condition.

1:1.03. Breach of the Peace - Any unauthorized and unwarranted act which involves violence, or which likely will provoke violence, and which significantly disturbs or threatens the peace and quiet of a community.

1:1.04. Child - A person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes.

1:1.05. Deadly Weapon - A firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or anything that in the manner of its use or intended use can cause death or serious bodily injury.

1:1.06. Domestic Disturbance - A dispute, whether of a civil or criminal nature, that occurs between members of the same family (or between persons who share a similarly intimate relationship) and results in contact with a law enforcement agency.

1:1.07. In the Presence of - When an officer, through one or more of his five senses, has probable cause to believe that an offense is being committed, that offense occurs "in the presence of" the officer.

1:1.08. Intoxication - Any disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

1:1.09. Private Premises - A permanent or temporary personal residence including, but not limited to, a house, and the grounds immediately surrounding it; an apartment; a hotel room; and a trailer.

1:1.10. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

(continued)

1:1.11. Public Place - Any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

1:1.12. Serious Bodily Injury - Bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Three considerations determined the definition of each of the terms in this section. The first was simplicity. Plain meaning usage of the language was preferred over technical terminology. Second, where practical, each definition was made consistent with current Texas law to minimize possible confusion. Finally, each was patterned for its relevance to domestic disputes. In this respect, a definition may be phrased more narrowly here than the general legal concept of that term, but only where a more inclusive description seemed unnecessarily broad.

The above definition of "assault" differs markedly from the Texas statutory definition (Penal Code sec. 22.01) in order to make it more wieldy, practical, and appropriate to the subject matter. Thus, this definition eliminates technical assaults involving noninjurious physical contact which a person "knows or should reasonably believe that the other [person] will regard . . . as offensive or provocative." Penal Code section 22.01(a)(3). In addition, the definition also excludes mere threats of "imminent bodily injury" (Penal Code sec. 22.01(a)(2)) not involving use of a deadly weapon. The definition does include, however,

threats of imminent serious bodily injury. This definition should serve as the best guideline to trigger arrest in domestic disturbances. It also frees the officer from any ultimate determination of "intent" or "knowledge" on the part of the aggressor.

The definition of "breach of peace," no longer a specified crime under Texas law, simplifies and adapts the views of the court in Woods v. State, 152 Tex. Crim. 338, 341, 213 S.W.2d 685, 687 (1948). The definition includes the traditional concept of that offense, although it omits outdated language. See also Head v. State, 131 Tex. Crim. 96, 96 S.W.2d 981 (1936). Similarly, "in the presence of" is defined as in Texas case law. The Texas Law Enforcement Handbook 13-15 (1976 rev. ed.).

The definition of "child" comports with Family Code article 11.01 and excludes emancipated persons in accordance with Family Code article 31.01 (Vernon Supp. 1980). (But see Family Code art. 51.02.) The term "domestic disturbances" includes disputes within both traditional families as well as other relationships which have an analogous depth of intimacy and emotional involvement. Thus, a "lover's quarrel" and a dispute between long-term roommates would each qualify as a "domestic disturbance." The term "probable cause" denotes the standard legal meaning in accordance with national and Texas case law. The definition of "intoxication" was taken from Penal Code section 8.04(d).

The definitions of "bodily injury," "serious bodily injury," and "deadly weapon" are taken from the Penal Code section 1.07. "Public place" is defined as in section 1.07(29) of the Penal Code. "Private premises" are nonpublic, residential places. The most obvious example is a person's own house or apartment, including the outside areas legally known as curtilage.

See The Texas Law Enforcement Handbook 53 (1976 rev. ed.). Logic and case law has expanded the definition of "private premises." Thus "private premises" include hotel and motel rooms, campers, trailers, and boats (if presently inhabited). However, as noted in Austin v. State, 57 Tex. Crim. 611, 124 S.W. 639 (1910), a private residence thrown open to the public generally for a single entertainment may become a public place for the duration of that entertainment. Conversely, a public place might also temporarily become a private premises. Nevertheless, such places as public streets could not generally become private premises.

SECTION TWO: INTRODUCTION

1:2.01. The nature of each particular domestic disturbance will determine the extent of appropriate intervention. However, officers must respond to a domestic disturbance and attempt to:

(a) Restore and maintain order;
(b) Render emergency assistance;
(c) Prevent escalation in the level of violence;
(d) Determine if a crime has occurred; and
(e) Inform the disputants of their alternative options and remedies, including specific social agencies and community resources (see Section Five).

A domestic disturbance often has both criminal and civil aspects. Regardless of the legal nature of a particular disturbance, each officer must fulfill his general duties to preserve the peace and to prevent and suppress crime. See Texas Code of Criminal Procedure article 2.13. In order to ensure the officers' personal safety as they fulfill their statutory duty to preserve the peace and prevent offenses, law enforcement personnel must respond to domestic dispute calls conscientiously and carefully.

The complex relationship of the parties and their property interests complicate domestic disputes. The privacy interests of the disputants and, if married, their community property rights, further complicate domestic disputes. In addition, as a result of the strong bonds which generally exist between disputing family members, they may redirect their anger against police officers who attempt to intervene in their dispute. Thus, special considerations must guide police conduct when dealing with "intimately related parties." For a general discussion of these issues, see

Crimes of Violence: A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence (1969).

Several police departments (e.g., Oakland, CA; New York, NY) have been sued because of their domestic disturbance policies which purportedly discouraged arrest and "screened calls" in a way which reduced the priority of domestic disturbance calls. For a thorough discussion by the Police Executive Research Forum of the issues involved in this type of litigation, see N. Loving, Responding to Spouse Abuse & Wife Beating: A Guide for Police (1980).

SECTION THREE: GENERAL PROCEDURE

1:3.01. Unless an officer has probable cause to believe that serious bodily injury will occur if he does not immediately intervene in a domestic disturbance, he should summon a back-up officer and not intervene until they can do so as a team.

1:3.02. If a third party initiated the call to the police, a breach of peace may have occurred and the officers should inform the third party of his right to file a formal complaint. The officers should generally not inform the disputants that a third party called the police. The officers must never reveal the identity of the third party to the disputants.

1:3.03. Whenever appropriate, upon intervening in the dispute, the officers should take charge of the situation immediately by separating the disputants, controlling access to weapons, and then limiting movement of all persons involved. If possible, they should direct the disputants into the most public area of the dispute location, such as the living room.

1:3.04. In attempting to ascertain the facts of the dispute, the officers should allow each disputant to present his/her story individually.

1:3.05. The officers should take measures (e.g., provide privacy) to minimize any alarm or embarassment felt by the disputants or others present.

1:3.06. The officers must remain impartial and should deal with the disputants tactfully by:

(a) Avoiding brusqueness, irrelevant interrogation, favoritism, and intimidation;
(b) Proceeding as informally and relaxed as possible; and
(c) Directing their manner and effort toward reducing tension and not making judgments.

Much of the literature in the area of "domestic crisis intervention" builds on the pioneering work of Morton Bard with the New York City Police Department. The current approach to police intervention pays more attention to the need to end the violent crimes involved in most domestic disturbance

calls. These analyses have found that traditional approaches overrelied on nonarrest remedies. E.g., Langley & Levy, Wife Abuse and the Police Response, FBI Law Enforcement Bull., May 1978, at 4. For a further discussion of these issues, see Wife Beating, IACP Training Key #245 (1976).

The danger to police officers inherent in domestic disturbance situations, as well as the mechanics of effectively settling disputes involving at least two parties, indicate the preference for two officers. The presence of two officers often minimizes the disputants' ability to involve the officers in their dispute and better enables the officers to calm the parties in order to ascertain the facts of the dispute. Although a lone officer may intervene when necessary, the increased effectiveness and personal safety which the presence of two officers provides often outweighs the need for intervention before a second officer arrives. For a discussion of these issues, see Serrill, The One-Man, Two-Man Debate, Police Mag., Mar. 1978, at 120.

Officers must ensure their own protection by controlling the disputants' movement and access to weapons, while initially "breaking up" the dispute by separating the parties. Separating the parties serves to distract them from their dispute by directing their attention away from the other emotionally involved disputant and toward the neutral force represented by the officer; it thus permits communication with the disputants in a calmer and more deliberate manner. While the officers may have to use physical force, they should only use the least amount of force necessary to achieve their purpose because the successful resolution of the dispute depends to a great extent upon the initial impression the officers make on the disputants. A firm but fair attitude indicates to the disputants that the officers

wish to help, aids in calming the parties, and offers the best chance for a peaceful resolution of the dispute.

By listening attentively to each party's individual explanation, and then comparing these explanations, the officers should be better able to analyze the situation objectively and to apply the appropriate remedies. Thus, even if each disputant explains the cause of the dispute in a manner most favorable to himself, these discussions will normally provide needed information to the officers. Moreover, speaking with a neutral officer allows the disputants to release at least some of their frustrations.

After stabilizing the situation, the officers' next goal is to obtain the disputants' confidence and cooperation by impressing upon them that the officers respect their feelings and sincerely wish to help them. The time and effort which the responding officers spend in seeking a satisfactory resolution to the dispute is well spent because it can limit additional calls concerning the disputants and prevent escalation in the level of violence. For a discussion of these issues, see Keogh, Crisis Intervention: A Practical Approach, Police Chief, Jan. 1980, at 56; Investigation of Wife Beating, IACP Training Key #246 (1976).

SECTION FOUR: ENTRY AND INTERVENTION ON PRIVATE PREMISES

1:4.01. Where one of the parties to a domestic dispute requests police intervention, the officers may enter the premises even if any other party objects.

1:4.02. Where one disputant locks out another disputant, the officers shall not assist the evicted party in forcing entry.

1:4.03. Where all parties to a domestic dispute voluntarily refuse to admit the officers to the dwelling, the officers shall not enter unless they have probable cause to believe that immediate entry is necessary to prevent serious bodily injury or to render emergency aid to an injured person.

(a) In assessing whether or not to make immediate entry, the officers should consider the nature of the refusal and other relevant circumstances.
(b) The officers should offer assistance if the dispute has not ended.

1:4.04. After the officers have entered on the consent of any or all of the disputants and subsequently all of the disputants voluntarily request that the officers leave, the officers must leave unless they have probable cause to believe that an assault or other offense is imminent. The officers' actions should be guided by the rules in Sections Five, Seven, and Eight of this chapter.

1:4.05. After the officers have entered on the consent of any or all of the disputants and one disputant subsequently requests that they leave, and no other disputant requests that they stay, the officers shall leave unless they have probable cause to believe that an assault or other offense will occur without their continued presence. If one disputant requests that they stay, the officers may remain until they believe that no assault or other offense will occur if they leave.

The officers' authority to enter private premises in this type of situation has two sources: (1) the parties' consent and (2) the officers' statutory duty and authority to preserve the peace and prevent crime. For example, article 6.06 of the Code of Criminal Procedure (Vernon Supp. 1980) authorizes intervention "[w]henever, in the presence of a peace officer or

within his view, one person is about to commit an offense against the person or property of another, including the person or property of his spouse, or injure himself. . . ." Similarly, article 6.05 of the Code of Criminal Procedure authorizes intervention to prevent "threatened injury."

When all parties consent to police entry, no question of the officers' authority to enter should arise for three reasons. First, the officers' duty to preserve the peace and prevent injury supports their presence. Second, the mere presence of the officers in an advisory capacity is, at most, a minor invasion of privacy cured by the unanimous consent. Finally, subsequent rules direct the officers to respect a change in the parties' wishes.

Rule 1:4.01 allows entry where only one party consents because it is both unreasonable and inconsistent with the statutory duty of the officers to deny assistance to one party because another party objects. The officers' entry for the purpose of assistance and investigation is not directed against any party and outweighs any intrusion on the objecting party's privacy.

Only the doctrine of necessity, which balances competing interests, justifies entry over the objections of both parties. (The Model Rules also recognize this principle in Chapter Six on Warrantless Search and Seizure.) Any rules on police intervention under these circumstances require extremely careful drafting in order to avoid unconstitutional behavior.

Thus, although the ALI Model Code of Pre-Arraignment Procedure, section 120.6(2) (1975), permits emergency entry onto private premises

without prior demand if the officer has reasonable cause to believe that a person he has authority to arrest for a felony or misdemeanor is present and that making a demand to enter would jeopardize himself or persons or property within the premises, the legality of such actions remains subject to challenge. The same caution applies to a similar provision (Rule 501) of Warrantless Searches of Persons and Places, a volume in the 1974 Model Rules for Law Enforcement Series of the Arizona State University College of Law and the Police Foundation. Rule 1:4.03, by seeking permission to enter, eliminates most of these legal questions.

The stringent criteria of serious bodily injury or emergency aid, in connection with entry not requested by either party, reflect the general legal policy of restrained intervention regarding misdemeanors. Also, in light of community property laws, prevention of property damage cannot alone justify entry where both parties prefer nonintervention.

After entry, if even one disputant requests the officers to leave, the officers must consider the privacy rights of that disputant in balancing and reevaluating the interests affected by continued police intervention. Thus, if it appears unlikely that violence will occur, the necessity of the circumstances and duty of the officers may no longer justify an intrusion upon even one party's privacy. These rules minimize antagonisms by requiring a reevaluation of the situation if the parties change their attitudes.

SECTION FIVE: NONARREST REMEDIES

1:5.01. In order to reduce the tension between the disputing parties and to minimize the potential for violence, officers should apply the most appropriate remedy involving the least police intervention necessary.

1:5.02. Possible remedies (generally listed in ascending order of the degree of intervention) include:

(a) Mediation;
(b) Informing disputants of appropriate social, medical, or legal counseling (including available social agencies and community resources);
(c) Temporary voluntary separation;
(d) Informing the disputants of possible criminal liability;
(e) Informing the disputants of civil protective order, peace bond, and complaint procedures;
(f) Voluntary surrendering of weapon(s); and
(g) Limited physical restraint.

1:5.03. When the officers reasonably suspect that a child has suffered, or is in danger of, abuse or neglect, they shall:

(a) Apply remedies to resolve the immediate dispute and
(b) Handle the matter in accordance with Chapter Four on Child Abuse.

An officer must never discourage a disputant from seeking an arrest, filing a complaint, or pursuing a civil remedy. In many family dispute calls, an officer can be most effective by acting with common sense as a mediator or by informing the disputants of appropriate social agencies, community services, and other alternative remedies. Thus, a policy of judicious restraint in the exercise of arrest power need not include a lax law enforcement approach toward "spouse abuse." For a discussion of these issues, see US Commission on Civil Rights, Battered Women: Issues of Public Policy (1978).

While officers should attempt mediation, in general, police officers have neither the time nor the particular expertise to attempt to resolve the underlying causes of domestic discord. Officers should become familiar with local social agencies and the services provided by these agencies so that they may suggest additional counseling to the disputants when the dispute involves a matter dealt with by a particular agency. The police department should prepare a written information sheet, bilingual if appropriate, with the names, addresses, phone numbers, and brief explanations of the services of the local social service agencies. If these information sheets are available, the officers should provide a copy to the affected disputant, if the appropriate circumstances exist.

Temporary separation of the disputants can also reduce both the tension between the parties and their capability of violence, by removing the individual causing the tension from the potential target of an assault. The disputants should voluntarily consent to such separation in order to reduce the danger of aggravating the basic conflict and to limit the possibility that the disputants will unite against the officers.

Officers should inform the parties that their behavior may require authoritative police intervention if it continues. Officers should also explain the availability of peace bond, protective order, and formal complaint procedures. (The peace bond procedure is discussed further in the commentary to Section Seven.) Sections 71.01 through .19 of the Texas Family Code (Vernon Supp. 1980) provide a civil procedure, separate and apart from a divorce action, for the use and protection of the victims of "family violence," including threatened physical force. This "protective order" procedure includes a hearing in which the court may issue an appropriate order against the assailant. The "protective order" may contain a broad array of prohibitions and

protective remedies. The order can remain effective for any time period not exceeding one year. On noticed motion, any party may seek to modify a protective order. Without a full hearing, the court may also issue an ex parte "temporary protective order" on a showing by the endangered family member of "a clear and present danger of family violence." This emergency order has validity for a maximum of three consecutive 20-day periods. Violation of a protective order carries criminal sanctions, including a maximum of a $2,000 fine and one year in jail. Section 71.18 obligates each municipal police department and sheriff to establish procedures to provide adequate information to law enforcement officers concerning the parties affected by protective orders.

Officers should confiscate weapons only when it appears that such action will significantly limit the parties' capability of violence. (This remedy is discussed in the commentary to Rules 1:8.10, 1:8.11, and 1:8.12.) Physical restraint without arrest is an extremely limited remedy, useful only where violence is imminent or in progress. Even then, the officers should emphasize the use of minimal force and apply it in conjunction with other remedies. The officers should not make any arrests because of minor resistance. (See the standards of Rule 1:6.03.) However, in accordance with constitutional law, a physical restraint may be construed as an arrest. Therefore, formal arrest procedures may be required under most circumstances of physical restraint. State law obligates peace officers to take certain actions when they encounter situations that appear to endanger the health or welfare of any child. Specific rules and the statutory sections which relate to these issues appear in Chapter Four on Child Abuse.

SECTION SIX: PHYSICAL ASSAULTS

1:6.01. Where an assault occurs in their presence, the officers may arrest the assailant. However, the officers shall arrest if the assault:

(a) Caused serious bodily injury, or
(b) Involved use of a deadly weapon.

1:6.02. Where an assault occurred prior to the officers' arrival, the officers shall arrest if they have probable cause that the arrested person caused:

(a) Serious bodily injury, or
(b) Committed the assault with a deadly weapon.

1:6.03. Where the officers are assaulted, they may arrest the assailant. Arrest should be made if the assailant:

(a) Causes bodily injury to the officers, or
(b) Substantially interferes with the performance of the officers' duty.

1:6.04. Where an assault occurs prior to the officers' arrival, they may not arrest without a warrant unless the criteria of Rule 1:6.02 are met. If no evidence of an assault exists other than the allegation of the victim, the officers should explain the complaint process. An officer shall never discourage any disputant from filing a complaint.

1:6.05. In all domestic disputes, officers shall consider the welfare and safety of all children present or otherwise under the care of the disputants.

(a) When necessary, officers must provide for the care of children.
(b) In general, officers must consider the care and protection of children in determining the appropriate action to take. (See Chapter Four on Child Abuse.)

Formulation of a proper response becomes most difficult where a domestic dispute results in an assault but the assaulted disputant will not proceed with the complaint process. In these cases, the fact that

criminally proscribed conduct has occurred creates a conflict with the preventive approach generally preferred in domestic disturbances. The low rate of success in attempting to pursue criminal sanctions against violent family members largely reflects the unwillingness of assault victims to support such actions because of their intimate or familial relationship to the assailant. Many victims also justifiably fear further violence or reprisals by the assailant. In addition, some victims who fail to follow through with their complaints also cite negative experiences with the criminal justice system.

To reflect these considerations, the Model Rules adopt a prospective approach geared to reduce the level of tension between the disputants. The short-term objectives include a prevention of renewed violence between the parties and elimination of the possibility of the redirection of frustration by any of the disputants against the community. In the longer term, the policy aims to offer recommendations for assisting the parties in the resolution of their underlying disagreements and to enhance police-community relations. Although "automatic" arrest may have an unsuccessful long-term effect in a particular domestic situation, an officer must never discourage one domestic disputant from filing a complaint against another disputant. For a discussion of these issues, see Potter, Police and the Battered Wife, Police Mag., Sept. 1978, at 40.

Because of the variety of possible situations, the Model Rules mandate arrest only where the parties' conduct, in itself, manifests a continued propensity toward violence. Under the criteria of Rules 1:6.01 and 1:6.02, such a situation exists when the possibility of serious violence requires an immediate and coercive response. For a thorough discussion of these

issues, see N. Loving, Responding to Spouse Abuse and Wife Beating: A Guide for Police (1980).

Rule 1:6.03 permits broad discretion because the paramount consideration is the safety of officers. Harrison v. State, 445 S.W.2d 216 (Tex. Crim. App. 1969); see also Code of Criminal Procedure article 14.01(b). However, the inherent emotionality of these disturbances often results in precipitous and unexpected reactions. Thus, again, arrest and prosecution may not be the best response.

Consequently, the Model Rules take a prospective approach and prefer to avoid arrest where warrantless arrest authority exists, but the circumstances do not indicate the appropriateness of exercising that authority. Alternative remedies should be considered. For example, in analyzing each disturbance, the officers should consider the following circumstances:

(a) The nature of the dispute;

(b) Intoxication (including drug use) of one or more of the disputants;

(c) Presence and type of weapon;

(d) Identity and background of complainants;

(e) Presence, number, and age of children; and

(f) Frequency and seriousness of prior incidents.

Intoxication may be an aggravating factor in an assault case since intoxication may exacerbate a dispute and will often limit the officers' ability to reason with the affected disputant. Thus, the effectiveness of nonarrest remedies would be correspondingly limited unless the assailant is no longer intoxicated or aggressive. However, voluntary

intoxication does not provide a defense to assault. Penal Code section 8.04.

Officers must always provide for the care of children who cannot care for themselves. Rule 1:6.05(a) simply emphasizes this point where, for example, one parent is arrested and the other may require medical treatment. In a less serious assault, Rule 1:6.05(b) allows the officer to weigh this factor in selecting the appropriate response. For additional information, see Chapter Four on Child Abuse.

SECTION SEVEN: VERBAL ASSAULTS

1:7.01. Officers should attempt to apply nonarrest remedies in order to eliminate the threat of future violence.

1:7.02. Officers may arrest if they have probable cause, based on the threats and all other circumstances, that bodily injury to a person will occur.

(a) When practical, officers should attempt alternative remedies prior to arrest. The officers should inform the appropriate party(ies) of peace bond, protective order, and criminal complaint procedures.
(b) When alternative remedies appear unlikely to reduce the potential for violence, officers should arrest the appropriate disputant(s).
(c) A deadly weapon, in plain view, is a major factor in determining the likelihood of violence.

Pursuant to Texas Penal Code section 22.01, a person commits an assault if he "intentionally or knowingly threatens another with imminent bodily injury, including his spouse." In addition, Texas Code of Criminal Procedure article 6.05 (Vernon Supp. 1980) sets forth the duty of a peace officer as to threats:

> It is the duty of every peace officer, when he may have been informed in any manner that a threat has been made by one person to do some injury to himself or to the person or property of another, including the person or property of his spouse, to prevent the threatened injury, if within his power; and, in order to do this, he may call in aid any number of citizens in his county. He may take such measures as the person about to be injured might for the prevention of the offense.

Within this statutory directive, officers have flexibility in how they respond to a given situation.

In domestic disputes the police should primarily focus on eliminating the potential for violence inherent in such disputes. That potential may continue to exist in disputes which have already involved physical violence or, as dealt with by Section Seven, may consist entirely of verbal threats of future violence expressed by the disputants or otherwise apparent to police officers dealing with the disputants. Section Five has previously set forth the policy regarding the use of nonarrest remedies in domestic disputes. Rule 1:7.01 restates this policy and focuses upon the desired result of its application.

Remedies which do not require the high degree of physical intervention involved in making an arrest, particularly suit situations which have not involved physical conflict between the disputants. Where the dispute has only involved threats, the resourceful application of nonarrest remedies should enable officers to settle the immediate dispute and should also help the parties constructively address their underlying problems. The application of such remedies will also enable officers to avoid endangering the safety of all parties by further antagonizing the disputants.

Section Seven does not prescribe specific nonarrest remedies. Rather, it emphasizes the usefulness of such remedies. Each dispute involves different facts and temperaments; officers must deal with such situations flexibly and attempt to apply remedies which can resolve the particular dispute they encounter. Rule 1:7.02 suggests the application of nonarrest remedies but retains the alternative of arrest when appropriate.

Rule 1:7.02 applies to situations in which bodily injury to a person is threatened. Subsection (a) suggests informing the threatened party of alternative legal remedies, including the peace bond. Texas Code

of Criminal Procedure article 7.01 provides that when a magistrate is informed upon oath that any person is about to, or has threatened to, commit an offense against the person or property of another, the magistrate shall issue a warrant for the accused's arrest. Under Code of Criminal Procedure article 7.03, when the accused appears before the magistrate and the magistrate hears proof of the accusation and finds that the accused intended to commit the offense or seriously made the threat, he may order the accused to post a bond to guarantee that he will not commit the offense or breach the peace toward the threatened party for a fixed period up to one year. If the accused fails to post the bond he will be committed to jail for one year, or until he gives the required bond. Code of Criminal Procedure articles 7.08 and 7.09. As a cautionary note, the constitutionality of the peace bond procedure has been questioned. E.g., Davidow, The Texas Peace Bond, 3 Tex. Tech L. Rev. 265 (1972). (For a discussion of protective order procedures, see the commentary to Section Five.)

Case law indicates that the peace bond procedure is not frequently employed in proceedings involving a husband and wife who live together, but it is commonly used when they are separated. The procedure conflicts with a situation in which the parties desire to maintain a close familial relationship. In addition, after one of the parties has filed for a divorce, the court has broad discretionary powers to issue orders respecting the parties. Family Code article 3.58. See also Florence v. Florence, 388 S.W.2d 220 (Tex. Civ. App.--Tyler 1965, writ dism'd) (temporary injunction prohibiting husband from entering family home or interfering with wife's peaceful possession during pendency of divorce

suit was valid). Explaining legal procedures may function as a warning to the threatening party by informing him that the threatened party has the power to involve him in legal proceedings which could have severe consequences.

Many factors may enter into the officers' determination of the likelihood of serious violence between the disputants. Rule 1:7.02(c) emphasizes that the potential for serious violence substantially increases where one or more of the disputants has secured instruments which could be used as deadly weapons. Many objects, as previously noted, can become deadly weapons depending on the manner in which they are used and the gravity of the wounds they inflict. Since such information often becomes available only after injuries occur, police officers must make decisions based on other factors. Therefore, the broad drafting of subsection (c) enables officers to apply their judgment and experience in determining the presence of deadly weapons in plain view.

SECTION EIGHT: OTHER OFFENSES

This section collects rules designed to guide responses to a variety of fact patterns or allegations frequently encountered in domestic disputes. Officers may encounter these problems individually or in combination with threats, assaults, or with each other. A combination of these problems complicates and generally aggravates the situation. Officers should consider the applicable rule for each problem and apply the appropriate remedies either singly or in combination.

Intoxication

1:8.01. Officers shall not arrest a person solely for alcohol intoxication within any private premises. The officers should fully explain this fact to the complainant. If chronic alcohol intoxication (or unsubstantiated but alleged drug use) appears to be involved, the officers may:

(a) Inform the parties of medical counseling, [the appropriate local social agencies], or
(b) When appropriate, inform the complainant regarding the filing of an alcoholic commitment petition.

(continued)

Although, when an assault has occurred Rule 1:6.06 makes the intoxication of the assailant an aggravating factor, Rule 1:8.01 recognizes that alcohol intoxication in private premises is not, by itself, an offense. For the statutory provisions on public intoxication, see Penal Code section 42.08.

Disorderly Conduct and Other Offenses Which Breach the Peace

1:8.02. Officers may arrest an individual involved in a domestic disturbance in a public place, or in a private residence which he has no right to occupy, if:

(continued)

(a) An offense involving a breach of the peace is occurring or
(b) The officers have probable cause to believe that an offense involving a breach of the peace is about to occur.

1:8.03. Where an offense involving a breach of the peace occurs, the primary duty of the officers is to prevent or abate a public disturbance. An arrest should not be made unless a specific offense occurred and:

(a) Alternative remedies prove ineffective or
(b) Only timely arrest will protect the disputants and the public interest.

(continued)

Often, a domestic disturbance also will involve a breach of the peace or the threat of a breach of the peace. Officers generally have warrantless arrest authority where such a breach is occurring in their presence or is about to occur. Code of Criminal Procedure articles 14.01(b) and 14.03. Where a breach of the peace has ended, this authority exists only to eliminate a danger of renewed breach. Woods v. State, 152 Tex. Crim. 338, 213 S.W.2d 685 (1948); Shaw v. State, 113 Tex. Crim. 169, 18 S.W.2d 628 (1929). Chapter 42 of the Texas Penal Code, "Disorderly Conduct and Related Offenses," sets forth the primary list of offenses which "breach the peace." For a further discussion of these issues, see Chapter Fourteen on Disorderly Conduct.

Rule 1:8.03 places the interest in public peace above nonarrest policy in domestic disputes. Such altercations should be settled with alternative remedies if they will not result in further significant public disturbance. Under these circumstances, a warning may be especially useful. Where the breach of the peace emanates from a private premises, such as the disputants' residence, the same procedures apply. At the very least, the officers can apply nonarrest remedies.

Removal of, Threats to, or Destruction of Property

1:8.04. Where a party to a domestic dispute is removing or attempting to remove property from the domestic dwelling, the primary duty of the officer is to prevent violence and to preserve the peace. If an officer has doubts about the ownership of the property in question, he should attempt to preserve the status quo, by not permitting removal of the property. The officer, if presented with a court order regarding the property, should attempt to determine the current validity of that court order. If he deems it appropriate, an officer may advise the parties to seek legal counsel and inform them that their conduct may have civil and criminal consequences.

1:8.05. Where a domestic disputant seeks an arrest on the basis of past property damage alone, the officers should inform the complaining party that community property considerations limit their authority and suggest consultation with legal counsel.

1:8.06. Where a party to a domestic dispute is damaging or destroying property in the presence of the officers, the officers may inform the parties of potential civil and criminal consequences of their conduct and suggest that the parties seek legal counsel to resolve their property rights. The officer should attempt to prevent the property damage. If necessary, the officers may arrest the offending disputant.

1:8.07. Where one of the disputants nonviolently threatens property damage alone, the officers shall apply nonarrest remedies. The officers should inform the threatening party of the potential civil and criminal consequences if that party carries out that threat. The officers may advise the disputants to seek legal counsel to resolve their property rights.

(continued)

Resolving domestic disputes involving property, real or personal, often requires the difficult determination of each party's ownership interest in the objects involved. Since complex community property issues often exist, and adequate civil remedies for destruction or conversion are available, the Model Rules attempt to reduce the burden on the officers of ascertaining those rights. Even a settlement agreement or court order is not conclusive because of possible modification or revocation. Moreover, such a determination would make the officer an adversary toward one of the parties. The

prevention of both present and future violence can best be accomplished through assurance to each party that his/her interests would be most certainly safeguarded by consulting legal counsel.

Rule 1:8.06 conforms with the general policy of police restraint regarding domestic disturbances. The officers should attempt to limit the use of arrest in attempting to prevent the destruction of property. Physical restraint and arrest, based solely on the property issue, may not be appropriate since no criminal offense may have occurred. Police action, however, is authorized on the basis of Code of Criminal Procedure articles 6.06 (Vernon Supp. 1980) and 6.07. In a domestic disturbance, the destruction of property can create a volatile situation which often erupts into personal violence. Thus, arrest may become necessary because an assault is occurring or a high probability exists that bodily injury will occur.

Note that Rules 1:8.04 and 1:8.07 do not authorize physical restraint and arrest in response to removal of or threats to property, whereas Rule 1:8.06 does so in order to prevent damage or destruction of property. Minor matters involving, for example, a temporary dispossession of personal effects do not warrant forceful restraint. Of course, special circumstances may change the appropriateness of a given response. For example, immediate threats of destruction regarding items of particular value or uniqueness might call for a higher level of intervention.

Rule 1:8.07 addresses the situation where only property damage is threatened. Texas has a community system of property rights between husband and wife. Tex. Const. art. XVI, sec. 15. Under this system, in simplified terms and unless they otherwise agree, all property of whatever

character acquired by the husband or wife during marriage becomes the community property of both spouses. See Family Code article 5.01. Property separately owned by the husband or wife before marriage remains the separate property of each and is subject to management, control, and disposition solely by the owner. Family Code article 5.21. The complexities of determining the status of property threatened by the disputants, and the need to prevent officers from assuming an adversary stance toward one of the disputants, generally makes arrest inappropriate where only property damage is threatened. Nonarrest remedies should enable officers to remove the threat to property. In particular, informing the party threatening damage that destroying the property of another is a criminal offense and that it constitutes a felony if the destroyed property has a value of $200 or more (Penal Code sec. 28.03 (4)(a)) should deter the threatened conduct.

If the situation escalates, and the disputant attempts to carry out his threat to destroy or damage property, the officers can make an arrest. However, someone who threatens to destroy his own property has not committed a property offense or triggered the peace-keeping duty of the police. However, threatened objects will often be either community property or separate property of the nonthreatening party, which an officer has the duty to protect. Moreover, destruction of property often poses an inherent danger of physical injury to the officers and the disputants. Again, the officers must attempt to prevent such injury, even to the threatening party. Finally, police intervention may also prevent an assault which could occur if the nonthreatening party attempted to prevent the destruction on his own.

Adultery

1:8.08. When one spouse seeks police intervention on an allegation of adultery:

(a) The officers shall primarily attempt to prevent an assault or other violence.
(b) The officers shall not arrest for adultery. They shall inform the parties that adultery is not a criminal offense and suggest that they pursue civil remedies or contact legal counsel.
(c) If the officers seek entrance into the premises, the rules of Section Four apply.

(continued)

When one spouse alleges adultery by the other, the officers may not arrest, since adultery is no longer a criminal offense in Texas. The officers should advise the parties that they may resolve such matters through legal counsel and/or divorce proceedings. This situation, however, is likely to be highly volatile. Of course, this rule does not preclude the use of alternative remedies to prevent the situation from escalating into a criminal offense.

Divorce/Child Custody

1:8.09. When one party to a domestic dispute alleges that an estranged spouse is violating a court order regarding custody of the children, the officers shall:

(a) Attempt to prevent violence and preserve the peace,
(b) Warn both parties of the possible civil and criminal violations involved in their conduct and suggest that they contact legal counsel,
(c) If either party demands additional action, inform him/her of his/her right to file a complaint.

(continued)

Rule 1:8.09 describes a situation that may have possible criminal consequences under Penal Code sections 25.03 and 25.04. However, as in pure property disputes, custody questions involve the potentially complex issue of determining the parties' rights. Again, this is best resolved by referral to legal counsel, particularly since children (especially younger ones) require protection. This consideration in itself may provide the officers with a powerful argument for voluntary restraint by the parties.

Removal of Weapon

1:8.10. When a weapon is present at the scene of a domestic dispute and the officers reasonably believe that it may become involved in the dispute, the officers shall:

(a) Request written permission [or use "consent form," if available] for the officers to take and maintain temporary custody of the weapon,
(b) Remove a firearm if one of the parties requests that they do so, and
(c) If the officers have probable cause to believe that alternative remedies have not alleviated the threat of serious violence involving use of a weapon, the officers should arrest the suspect and seize the weapon as an instrumentality of the offense.

1:8.11. Whenever an officer receives or removes a weapon, that officer shall issue a receipt to the owner and inform him that he can reclaim the weapon from the [property division of the police department in accordance with departmental precedures].

1:8.12. If an officer seizes a weapon in connection with an offense involving the use of a deadly weapon or an offense under Chapter 46 of the Penal Code, but not pursuant to a search or arrest warrant, the officer shall prepare and deliver to a magistrate a written inventory of such weapon. However, if the weapon is a "prohibited weapon" or is alleged to be stolen property, article 18.19 of the Code of Criminal Procedure sets forth certain alternative procedures.

(continued)

These rules provide for removal of deadly weapons when it appears likely that that weapon may be used against one of the disputants. Although the officers cannot remove all potential weapons from the scene of a domestic dispute, these rules apply particularly to firearms and to obvious and convenient weapons. Statistics suggest that homicides under these circumstances mostly involve unplanned crimes of passion, where a ready weapon may determine whether the crime occurs. Firearms and Violence in American Life: A Staff Report Submitted to the National Commission on the Causes and Prevention of Violence, vol. 7 (1970), at 43. Moreover, the fatality rate with firearms is approximately five times greater than the rate with a knife, the second most deadly weapon. Id. at 44-45. Hence, seeking to remove a deadly weapon which is in plain view and inconsistent with its surroundings, or where its use has been mentioned or threatened by a party, should significantly decrease the probability of serious consequences during a moment of passion. It must also be emphasized that, regardless of what action is taken under these rules, Rule 1:6.04 applies for the safety of the officers. These rules are directed at future protection of the parties.

Rule 1:8.10(c) requires an arrest of the suspect prior to the involuntary seizure of any weapon. This requirement avoids any legal questions regarding the warrantless seizure of a weapon which does not accompany an arrest. Rule 1:8.11 does not fix a "cooling-off" period; rather, it leaves the details to individual departmental procedures. A department may wish to couple a minimum waiting interval with a requirement that, before being able to reclaim the weapon, the owner would discuss the

situation with a police captain or other appropriate officer. Each department should provide its officers with appropriate "consent forms," as suggested by Rule 1:8.10(a). Each department should also have appropriate "property division" procedures in order to store the weapon without damage, physical alteration, or unreasonable risk of loss.

Rule 1:8.12 derives from article 18.19 of the Texas Code of Criminal Procedure. That article deals with the police seizure in connection with certain offenses, and without any warrant, of weapons. That article also sets forth rules regarding seizure of statutorily "prohibited weapons," "stolen" weapons, and other situations.

Chapter Two

MISDEMEANOR FIELD RELEASE BY CITATION

CHAPTER TWO

MISDEMEANOR FIELD RELEASE BY CITATION

Releasing misdemeanants who sign a "written notice to appear" is a relatively new concept in criminal justice. The mechanical process for doing this, however, is virtually the same as releasing a traffic violator who signs a citation in lieu of incarceration. (Traffic offenses, not included within the scope of these rules, receive special and separate treatment under Texas law. Tex. Rev. Civ. Stat. Ann. art. 6701d, sec. 147 et seq. Article 6701d, section 148, provides that under certain conditions officers may release traffic violators who sign a written promise to appear.) This concept, generally called "field release," emphasizes releasing the violator at the scene of the offense, rather than incarcerating him in the traditional fashion.

Field release improves efficiency in a police department. It saves time for the arresting officer, who usually must transport and start processing the misdemeanant. Field release speeds the arresting officer's return to active patrol. It also provides a way, short of a jailing, to penalize a person who commits a minor offense. In addition, the public generally supports the program. A field release policy can often improve community relations by putting the community on notice that the police department can respond to misdemeanors without wasting time or subjecting all misdemeanants to the indignities of arrest and incarceration, especially for minor offenses. A number of authoritative law enforcement studies have recognized the value of a field release program. For example,

the Report of the President's Commission on Crime in the District of Columbia 511-12 (1966), the US Task Force on the Administration of Justice in its Task Force Report: The Courts 40-41 (1967), and the National Advisory Commission on Criminal Standards and Goals in its Report on Police 83-85 (1972) reported favorably on misdemeanor field release. Misdemeanor field release has also proven successful in practice. E.g., Berger, The New Haven Misdemeanor Citation Program, Police Chief, Jan. 1972, at 46.

Despite its benefits, the creation of misdemeanor field release programs for Texas police departments faces an apparent obstacle. Texas law, like the law in most states, requires a police officer who makes any arrest to take the arrested person to appear before a magistrate without unnecessary delay. Tex. Code Crim. Pro. Ann. art. 14.06. Although a magistrate can issue a summons in lieu of a warrant (Tex. Code Crim. Pro. Ann. art 15.03) that procedure is no substitute for misdemeanor field release.

Several states, though not Texas, have resolved this apparent conflict through legislation which gives police officers the power to release a misdemeanant by citation. E.g., Ariz. Rev. Stat. Ann. sec. 13-3903 (1978); Cal. Penal Code sec. 853.6 (West Supp. 1980); D.C. Code Ann. sec. 23-1110(b)(1) (1973); La. Code Crim. Pro. Ann. art. 211 (West 1967). However, the absence of specific legislation need not thwart the use of an appropriate misdemeanor field release program which protects the rights of the misdemeanants. A police department can provide this protection by having its officers advise the arrested violator of his right to appear before a magistrate. Thus, the officer must present to the violator the choice of (1) being

immediately taken into custody to appear before the magistrate or (2) waiving this right by signing a "written notice to appear."

Before a Texas law enforcement agency can institute field release by citation, it would have obtained the approval of the appropriate local courts that hear misdemeanor cases. In addition, a municipal ordinance may authorize "field release." Prior to implementation, the agency should also plan and develop the citation format and the method of processing the citation. (The Appendix is a sample citation form which a law enforcement agency can customize to suit its individual needs.)

No misdemeanant has a right to field release. The arresting officer has the discretion to decide the appropriateness of a field release. In addition, an officer who made a field or identification release should continue to conduct postarrest investigations just as if he made a custodial arrest. Therefore, the officer may (to the extent permitted by statute, case law, and departmental policy) interrogate the violator and other witnesses, search for weapons or incriminating evidence, gather other evidence pertinent to the case, and complete written records.

Some police agencies that have a misdemeanor field release program have excluded certain types of offenses, such as sex and weapons offenses, from the scope of their rules. Police departments have justified these exceptions based on the need to fingerprint and photograph arrestees committing certain types of offenses. However, an "identification book and release" obtains the violator's picture and fingerprints but still permits release without incarceration.

SECTION ONE: DEFINITIONS

2:1.01. Field Release Citation ("the Citation") - The official departmental form that an officer issues to a violator and which states the offense allegedly committed. The Citation also contains both (1) a waiver of the arrestee's rights to appear, without unnecessary delay, before a magistrate, and (2) a "notice to appear," that obligates the violator to appear at a stated time and place to face the charges against him.

2:1.02. Custodial Arrest - A procedure in which an officer arrests and then transports a person to a detention facility to await bond or an appearance before a magistrate.

2:1.03. Field Release - A procedure in which an officer arrests a violator but immediately releases him after the violator signs the Citation's waiver and written notice to appear.

2:1.04. Book and Release - A procedure (also known as "identification release") in which an officer arrests the violator and takes him to be booked; the violator has a set of fingerprints and photograph taken (also known as "printed and mugged"); and the violator secures his immediate release by signing the Citation's waiver and notice to appear.

2:1.05. Misdemeanor - An offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail.

2:1.06. Violator - Any person at least 17 years old who an officer arrests, without an arrest warrant, for violating a municipal ordinance or committing a Class C misdemeanor other than a traffic violation.

Each department may create a particular format for the "field release citation." The Citation should, however, contain an adequate "waiver" and "notice to appear" as described in Rule 2:1.01. Rules 2:1.02, 2:1.03, and 2:1.04 define the three alternatives available to the police officer when he arrests a violator. Only the "field release" fully achieves the benefits of the "citation" procedure. Where practical, therefore, "field release" is the preferred method of making misdemeanor arrests under this rule.

The actual release under the field release procedure (i.e., the violator signing the notice to appear) will generally take place at the scene of the arrest. The definition of "book and release" ("identification release") contemplates photographing and fingerprinting the violator at a police station prior to release. However, where practical, a preferable method for "identification release" might involve taking the violator's picture and fingerprints at the scene of the offense or the arrest through the use of a mobile crime lab or other established field technique (e.g., having a camera and fingerprint kit available in the squad sergeant's vehicle). The definition of "custodial arrest" entails the incarceration of the violator. Section Four of this chapter sets forth the conditions under which a custodial arrest should occur.

The definition of "misdemeanor" repeats the statutory definition of Texas Penal Code section 1.07(21). The definition of "violator" excludes all persons under the age of 17. Texas law establishes special procedures for taking juveniles into custody and for the issuance of warning notices in lieu of such action. Tex. Fam. Code Ann. art. 52.01. The definition of "violator" also serves to require the police to arrest the offender before a misdemeanor field arrest can occur. Thus, peace officers must at all times observe Texas statutory and case law on misdemeanor arrest. (See Chapter Five on Arrest Without a Warrant.)

SECTION TWO: OPERATING PROCEDURES

2:2.01. An officer may use field release only if all the following factors are present:

(a) The officer witnessed the violation of a Class C misdemeanor or municipal ordinance;
(b) The violator has a local address and sufficient personal identification;
(c) The officer has no articulable reason to believe that the violator will fail to appear;
(d) The officer has no articulable reason to believe that after field release the violator will likely suffer injury, continue the violation, or commit a more serious violation;
(e) The violator is not the subject of an outstanding arrest warrant;
(f) The officer has no reason to suspect that the violator is involved in a more serious offense; and
(g) The violator voluntarily signs the notice to appear.

2:2.02. An officer may "book and release" a violator when factors (a), (c), (e), and (g) of Rule 2:2.01 are present but:

(a) Removing the violator from the scene of the incident appears necessary to prevent a further or more serious violation; or
(b) The violator lacks a local address or sufficient personal identification; or
(c) The violator, though suspected of other offenses at the scene of an arrest, is cleared after further investigation at the station before appearing in court; or
(d) The violator should be fingerprinted or photographed.

2:2.03. An officer shall make a custodial arrest of a violator in all situations not covered by Rules 2:2.01 and 2:2.02. (See Chapter Five on Arrest Without a Warrant.)

2:2.04. An officer's decision to conduct a field release or book and release does not limit his authority, established by law or departmental policy, to engage in police investigatory techniques such as search and seizure, collection of evidence, interrogations, and completion of written reports.

To meet the dual objectives of reduced arrest transportation and processing time and improved community relations, field release should become a standard method of arrest by patrol officers. Police departments using misdemeanor field release have found that some officers apparently resist using field release because they consider the humiliation of arrest and incarceration as part of the violator's punishment. This attitude must be eradicated before the misdemeanor field release policy can succeed. In-service training programs should help eliminate this attitude by explaining the field release program and its objectives.

On certain occasions, "book and release" becomes an important misdemeanor arrest technique (Rule 2:2.02). Rules 2:2.01 and 2:2.02 draw heavily on the rules of the Austin Police Department entitled "Field Release by Citation (Non-Traffic)." A particular police department may wish to limit the "field release" or the "book and release" procedures to enumerated misdemeanor and ordinance violations. (The Amarillo Police Department, for example, follows this method.) In addition, ongoing intelligence-gathering efforts may require custodial arrests for certain misdemeanors. For example, for violators arrested for a felony within the past three years, the officer should use identification release in order to obtain a set of fingerprints and a recent photograph. Unlike fingerprints, the changing nature of a person's appearance and the uncertainty of photographs makes it valuable to get a new picture of a criminal offender charged with committing one of the specified offenses. This chapter, however, makes no attempt to compile a list of applicable offenses.

The rationale for making custodial arrests mandatory in Rule 2:2.03 is that a failure to arrest would defeat the misdemeanor field release

policy and cause the police department to risk legal liability and public censure (e.g., violators not showing up in court).

In deciding whether to use a field release or a book and release, an officer must consider the violator's ties to the jurisdiction to determine the likelihood that the violator will honor his notice to appear. In determining if a violator has sufficient ties to the jurisdiction, the officer should consider whether the violator:

(a) Resides in the the jurisdiction,

(b) Has family ties to the jurisdiction, and

(c) Works within the jurisdiction.

The officer should ask the violator questions which relate to these three criteria. A negative response to any one of those questions would raise a suspicion that the violator would not appear for his trial. A negative response to any <u>two</u> questions would raise a substantial likelihood of nonappearance and necessitate a custodial arrest by the officer.

The nature of the offense and the violator's involvement in other criminal activity may mandate a custodial arrest. If the nature of the offense indicates that, if the officer left the scene without making a custodial arrest, the violator would continue the offense or likely cause injury to himself or another person, a custodial arrest is required. For example, if the violator was arrested for public drunkenness which endangered other persons or himself, a physical arrest would be necessary. A breach of the peace, such as a barroom fight or dispute between neighbors, might also require the custodial arrest of the violator to ensure that the offense would not continue when the officer leaves the scene. Other

common "continuing offenses" which may require custodial arrest include domestic disputes and landlord-tenant disputes.

An officer should also make a custodial arrest of a violator who the officer believes is involved in a felony activity which requires the violator's presence at the police department for questioning or other investigative action such as a lineup or blood test. For example, an officer might have personal knowledge that the violator is a suspect in a particular case. An officer might also have gained information of the violator's status in the case through other information sources (e.g., daily bulletins, memoranda from the detective division, etc.). An officer must so notify the investigator having direct concern with the case in which the violator is a suspect.

Texas law permits citizen's arrest for misdemeanors involving a breach of the peace committed in the citizen's presence or view. Tex. Code Crim. Pro. Ann. art. 14.01(b). An officer, as discussed in Chapter Five on Arrest Without a Warrant, has limited authority to arrest someone who committed a misdemeanor outside the presence of that officer. Therefore, an officer should not use a field release or a book and release in such circumstances. Rather, the officer should request the complainant immediately to accompany him to file a complaint under routine custodial arrest procedures. After the complaint is filed (or, if the court is closed, after the complainant signs a statement of facts) the officer would then have the option of using field release, book and release, or custodial arrest.

CONTINUED

1 OF 6

SECTION THREE: COMPLETING THE WRITTEN NOTICE TO APPEAR

2:3.01. Where the officer makes a field release or a book and release he shall use the Field Release Citation. An officer shall comply with the following procedures in completing the Citation:

(a) The front of the Citation shall include the violator's name, address, and other pertinent information.
(b) List each pertinent charge on the Citation.
(c) The officer shall write the date, time, and place where the violator shall appear in court. For a field or book and release, the appearance date must not be more than 10 days after the arrest, not including holidays and weekends. For a custodial arrest, the appearance date must be the following morning, not including holidays and weekends.
(d) For a field or book and release, the officer shall request the violator to sign a copy of the Citation and shall then issue the violator a duplicate copy of the Citation.
(e) An appropriate complaint shall be filed with the proper court as soon as practical.

This section guides the officer in completing a model Field Release Citation. The Citation, as shown in the Appendix, looks substantially like a traffic citation and will also serve as a written notice to appear.

Appendix

SAMPLE CITATION FORM:
COMBINED TRAFFIC AND NONTRAFFIC CITATION (DALLAS)

024565 MUNICIPAL COURT CITY OF DALLAS, TEXAS TRAFFIC CITATION ☐ NON TRAFFIC CITATION ☐

NAME OF DEFENDANT | COURT SETTING → MONTH | DAY | YEAR | HOUR M | COURT

ADDRESS | OPER. LICENSE | RES. PHONE | TIME OF OFFENSE M

BUSINESS ADDRESS | OCCUPATION | BUS. PHONE | DATE OF OFFENSE

RACE | SEX | DATE OF BIRTH | VEHICLE LICENSE | LIC.YR. | LIC. ST. | CAR YR. | MAKE | MODEL | TYPE | COLOR | ACCIDENT INVOLVED ☐ | DR. | BEAT

LOCATION:

SPEEDING _____ MILES PER HOUR | SPEED LIMIT _____ MILES PER HOUR | IMPROPER TURN ☐ | PROHIBITED ☐ | WRONG LANE ☐ | STREET CLASSIFICATION: FREEWAY ☐ RESIDENTIAL ☐ OTHER ☐

RAN RED LIGHT ☐ | FAILED TO STOP AT STOP SIGN ☐ | NO VALID TEXAS DRIVER'S LICENSE ☐ | LITTERING ☐ | DISORDERLY CONDUCT ☐ | STATE INSPECTION LAW VIOLATION ☐ | JAY WALKING ☐

OTHER VIOLATION

I AGREE TO APPEAR AS DIRECTED, THIS IS NOT A PLEA OF GUILTY

X

ARRESTING OFFICER BADGE

Soc. Sec. No. (VOLUNTARY)

Bkl. Serv. No.

Describe premises:

Serv. No.

Evidence

Value $

Tag No.

Witness or Complainant

1. ADDRESS PHONE

2. ADDRESS PHONE

Narration:

SAMPLE CITATION FORM:
SPECIALIZED FIELD RELEASE CITATION (AUSTIN)

CITY OF AUSTIN POLICE DEPARTMENT

Offense Number

Cause Number

You are directed to appear at MUNICIPAL COURT #1, 700 East 7th Street, AUSTIN, TEXAS, at 8:00 a.m. on any Tuesday not less than three (3) nor more than twelve (12) days from date hereof to receive disposition instructions.

DATE TIME AM PM

NAME (Print)

☐ CAUCASIAN ☐ ORIENTAL
☐ BLACK ☐ OTHER

RESIDENCE ADDRESS Phone (res.)

☐ MALE ☐ FEM. AGE DOB

BUSINESS ADDRESS Phone (bus.)

DR. LIC. #

OTHER IDENTIFICATION TYPE: NO.:

LOCATION

VIOLATION

REMARKS

List type of property seized as evidence in this case.

Officer Emp. No.

Officer or Civilian Witness

IMPORTANT—THIS IS NOT A PLEA OF GUILTY

I hereby acknowledge receipt of this notification and agree to appear at MUNICIPAL COURT #1, 700 East 7th Street, AUSTIN, TEXAS, at 8:00 a.m. on any Tuesday not less than three (3) nor more than twelve (12) days from date hereof.

DEFENDANT'S SIGNATURE

FIELD RELEASE CITATION

PD-0140A (9/75)

ROUTING: WHITE—To Court for Number; YELLOW—Disp. Copy; PINK—To Violator

Chapter Three

USE OF FORCE

CHAPTER THREE

USE OF FORCE

The use of force by police officers has developed into an issue of paramount concern to citizens, individual officers, and police administrators. In fact, no issue of law enforcement creates more controversy. For a thorough discussion of this area, see US Department of Justice (National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration), A Community Concern: Police Use of Deadly Force (1979). This controversy is understandable because no other law enforcement action involves such a dramatic, and potentially ultimate, exercise of state power.

Until the last half of the 1800s, existing technology provided no reliable or wieldy "long-distance" weapon. Thus, without accurate sidearms, a fleeing suspect was more likely to be chased than shot. In addition, historically (i.e., at common law), most felons routinely, if not automatically, received death as a punishment. Therefore, a felon's death merely cheated the executioner. Thus, the death of an apparent felon during an attempted arrest scarcely created interest.

In modern American society, however, a suspected criminal does not receive any formal punishment without first exhausting numerous constitutional rights and safeguards. Thus, for example, an accused person generally has the right to an attorney, the right to remain silent, the right to a full jury trial, the right to be found innocent unless proved guilty beyond a reasonable doubt, and the right to pursue appeals. In

addition to this array of protections, and numerous others not mentioned, even a person convicted of a felony (for which common law would have imposed death) might receive a relatively short jail sentence, or perhaps an even lesser penalty. Furthermore, most communities expect a very controlled application of police use of force, particularly deadly force.

Thus, it hardly seems appropriate to authorize an officer to use deadly force against a suspected felon, when, even if found guilty after exercising his full panoply of constitutional rights, that convicted felon would never receive the death penalty. This seems particularly true regarding property crimes. For a discussion of police rulemaking trends on the use of deadly force, see Cory, Deadly Force, Police Mag., Nov. 1978, at 8. See also, US Commission on Civil Rights, Consultation on Police Practices and the Preservation of Civil Rights (1978).

A natural place to look for guidance on questions concerning the use of force by police is the Texas statutes. The statutes, however, do not directly address these matters. Reliance on the Texas Penal Code (such as the chapter entitled "Justification Excluding Criminal Responsibility," sections 9.01-.63) provides inappropriate and insufficient guidance. In addition, the Penal Code only states when the government cannot prosecute behavior that would otherwise be criminal. It only outlines the cutting edge between criminal and noncriminal behavior. A court may construct a standard of civil liability that differs from the statutory or other standard of criminal liability. Tex. Penal Code Ann. sec. 9.06; Howsley v. Gilliam, 517 S.W.2d 531, 532 (Tex. 1975). Therefore, the Penal Code provides scant, if any, useful direction for constructing a suitable law enforcement policy on the use of force.

The Code of Criminal Procedure provides scant additional direction (e.g., art. 15.24).

This chapter attempts to combine the requirements and restraints of Texas and federal law with sound principles of police practice. This chapter approaches the use of force as an extension of the right to arrest. In short, this chapter requires an officer (who cannot make a peaceable arrest) to use the least amount of effective force necessary to make an arrest or stop violent behavior. An officer may only resort to deadly force when no alternative exists to prevent extreme violence. An officer's use of force must, under the circumstances, always be reasonable and necessary. This approach places an officer in an appropriate position at the front of the criminal justice system. (These rules do not address specific policies regarding jail security or operations.) Except for the identified emergencies, these rules leave the determination of guilt and the imposition of punishment within the judicial system.

This approach provides as much clarity and conciseness as the subject permits. Unavoidably, a determination about the propriety of the use of force in a particular case usually occurs after-the-fact as a subjective judgment based on incomplete evidence and inexact standards. Thus, the split-second and complex factors which produce the situation in which an officer uses force defy predictability and organization into a wieldy structure of specific rules. Since the misapplication of force can subject an officer to criminal and civil liability, this chapter strives to provide relatively direct and simple standards. This chapter does not attempt to fix the precise amount of force which an officer

should apply in each of a boundless variety of situations.

Thus, although the use of force occurs in unique and subjective situations, this chapter should help an officer faced with making a life-and-death decision. Even a law enforcement agency which has no express policy on the use of force has the implied "policy" of relying on the unguided individual discretion of each officer. As part of an overwhelming trend, however, most agencies have developed a written policy on the use of force. Written rules promote a rational, unified, and practical policy and provide essential guidance in this crucial area. For an in-depth study of police use of force, see C. Milton, J. Halleck, J. Lardner & G. Abrecht, Police Use of Deadly Force, 38-64 (1977).

SECTION ONE: DEFINITIONS

3:1.01. Authorized Weapon - A weapon approved by [this law enforcement agency] for official use by its officers. A firearm cannot be authorized unless it is registered with [this department] to a particular officer.

3:1.02. Deadly Force - Force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

3:1.03. Nondeadly Force - Force which, under the circumstances, is not reasonably capable of causing death or serious bodily injury.

3:1.04. Physical Strength and Skill - Any physical actions by one or more officers (e.g., holding, restraining, pushing, and pulling) which may include special skills (e.g., boxing, karate, and judo) but do not include the use of deadly force or any authorized or other weapon.

3:1.05. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

3:1.06. Serious Bodily Injury - Bodily injury that creates a substantial risk of death or causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

As defined, the term "deadly force" repeats the definition of Texas Penal Code section 9.01. Likewise, the definition of "serious bodily injury" directly tracks Texas Penal Code section 1.07(a)(34). The definition of "nondeadly force" includes a lesser degree of force with predictably less drastic consequences. Rule 3:1.06 defines "probable cause" in accordance with case law. An extended discussion of this definition appears in Chapter Five on Arrest Without a Warrant. See also J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer (1979).

The term "physical strength and skill" encompasses the preferred array of police responses to a situation requiring "nondeadly force." The rules anticipate that the appropriate and judicious use of nondeadly "physical strength and skill" will enable one or more officers to accomplish their lawful objective in the overwhelming percentage of situations which necessitate physical force.

SECTION TWO: GENERAL POLICIES AND PROCEDURES

3:2.01. In general, an officer must strive to achieve the following lawful objectives:

(a) To defend himself, or another, against unlawful violence to his person or property;
(b) To preserve the peace, to prevent commission of offenses, and to prevent suicide or self-inflicted injury;
(c) To make lawful arrests and searches, to overcome resistance to such arrests or searches, and to prevent escapes from custody; and
(d) To prevent or interrupt an intrusion on, or interference with, the lawful possession of property.

However, an officer shall only use force when circumstances (e.g., resistance by the suspect) prevent him from making a peaceable arrest in time to achieve one or more of the above objectives.

3:2.02. Before an officer may use any force against any suspect, the officer must:

(a) Have probable cause to arrest that suspect;
(b) Manifest his purpose to arrest and identify himself as a peace officer (unless the officer has probable cause to believe that the suspect already knows his purpose and identity or unless the officer cannot reasonably make that information known to the suspect); and
(c) Give the reason for the arrest, unless impractical.

3:2.03. The amount and degree of force which an officer may use to achieve an objective stated in Rule 3:2.01 must reflect the surrounding circumstances, for example:

(a) The nature and seriousness of the risk of injury to the officer or others;
(b) The age, physical condition, and behavior of the subject of the force;
(c) Relevant actions by any third parties;
(d) Physical conditions (such as visibility) at the scene;
(e) The feasibility and availability of alternative actions; and
(f) The opportunity and actual ability of the suspect to injure the officer or others.

3:2.04. An officer shall never use more force than is necessary and reasonable under the circumstances. An officer shall never use force in response to mere verbal provocation or abusive language directed at the officer. An officer shall never use deadly force except in the situations stated in Rule 3:4.03.

(continued)

3:2.05. An officer shall only apply force using the methods and weapons listed below. Unless impractical, an officer shall first exhaust every reasonable means of using the lowest level of force before escalating to a higher and more severe level of force.

(a) Physical strength and skill;
(b) Authorized chemical irritant;
(c) Authorized baton; and
(d) Authorized service revolver, or other approved firearm, with authorized ammunition.

However, an officer may use any unauthorized weapon (or use any weapon in an unauthorized manner) if emergency circumstances make it necessary to do so (e.g., using a baton if chemical irritant canister is inoperative or unavailable).

3:2.06. Without departmental approval, no officer shall in any material way modify or alter an authorized weapon.

3:2.07. An officer may draw and ready any of his authorized weapons for use only when he reasonably anticipates that he may have to use such weapon(s).

3:2.08. An officer must register all of his firearms with [this department]. An officer shall only carry and use an authorized weapon for which he has received proper training. ("Training" shall include both proficiency in technical and physical aspects of the use of the weapon, and also a thorough understanding of the law, these rules, and any other regulation regarding use of that weapon.)

3:2.09. An officer should always use handcuffs or other restraining device on an arrestee, unless unnecessary (e.g., for the elderly, young juveniles, crippled, injured, or other appropriate suspect). An officer should reasonably protect an arrestee from injury caused by handcuffs or other restraining devices. An officer shall not use a "straitjacket" unless he has received appropriate training.

3:2.10. An officer has no obligation to retreat or back down before resorting to the approved use of force, including deadly force. However, if it would not increase the risks to himself or others, an officer should consider retreat or withdrawal where delay (e.g., to secure assistance) could make a more peaceable arrest more likely.

As discussed in the introduction to this chapter, an officer's primary role in the criminal judicial process turns on his arrest

powers. An officer will never use any force unless he has probable cause to make an arrest. In addition, before using any force, an officer must state his purpose and identify himself as a peace officer. These requirements, stated in Rule 3:2.02, appear in Texas Penal Code section 9.51(a). In addition, whenever practical, an officer must explain the reason for the arrest. Even a simple and brief explanation will often prevent aggression and accelerated resistance from the arrestee.

In keeping the peace and enforcing the law, circumstances may compel an officer to use force, even deadly force, if he cannot make a peaceable arrest. Rule 3:2.01 lists objectives which an officer has the duty to pursue. In this pursuit, reasonable and necessary force becomes lawful. Although this chapter discusses when an officer may resort to force, it does not cover all circumstances. For example, this chapter does not address the particular procedures to use in riot control. (In addition, this chapter does not discuss rules regarding the use of force against animals, including "mercy" killings of dying animals. A particular department should coordinate its "animal" policies with other local agencies which might have jurisdiction over such matters. In general, an officer should not discharge a firearm in a nonemergency without obtaining departmental approval. Whenever practical, the officer should also obtain the written authorization of the owner of the animal. Regarding suspected rabid animals, certain other restrictions might apply, e.g., not shooting the animal in the head if possible.)

Rule 3:2.03 requires an officer to gauge the degree of force he uses on the nature of the situation in which he finds himself. For

example, the officer must use force in proportion to the severity of the offense and the resistance offered. Thus, the proper and reasonable amount of force will reflect and vary with the attending circumstances. A person subjected to an officer's unreasonable force has the right to resist and defend himself. As Texas case law states, "when aggression of an officer in making an arrest exceeds what is reasonably necessary to effect arrest, the right of self-defense inures to the party assaulted." Daugherty v. State, 146 Tex. Crim. App. 488, 495, 176 S.W.2d 571, 575 (1944). Thus, Texas Penal Code section 9.31(c) states:

> The use of force to resist an arrest or search is justified:
>
> (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and
>
> (2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

However, Penal Code section 9.31(d) limits the use of deadly force in such situations.

This places the officer in a precarious position. If the officer uses force greater than necessary to effect an arrest, the intended arrestee may lawfully resist. In turn, if the arrestee escalates his resistance, the officer might then escalate his force to subdue the resistance. Potentially, if the resistor uses a weapon to resist, the officer might resort to deadly force in self-defense. A court might find that the initial unreasonable use of force by the officer caused the unlawful death of the resistor. Thus, this incident could yield criminal and civil charges against the officer and a civil suit against

the governmental agency which employed the officer.

In general, an officer intervenes with force with the purpose of making an arrest. In making most arrests, an officer may only use as much force as necessary to control and take the arrestee into custody (Rule 3:2.04). If he uses more force, as noted, the officer commits an offense against the arrestee. The officer's duty to prevent offenses with appropriate force is governed by Texas Code of Criminal Procedure article 6.06 which states:

> Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, including the person or property of his spouse, or injure himself, it is his duty to prevent it; and, for this purpose the peace officer may summon any number of citizens of his county to his aid. The peace officer must use the amount of force necessary to prevent the commission of the offense, and no greater.

As noted, the officer must observe the same rules on the use of force as must the private citizen. Thus, the Code of Criminal Procedure article 6.07 states:

> The conduct of peace officers, in preventing offenses about to be committed in their presence, or within their view, is to be regulated by the same rules as are prescribed to the action of the person about to be injured. They may use all the force necessary to repel the aggression.

Rule 3:2.05 lists the authorized methods or weapons an officer may use to apply force to overcome resistance or to end a suspect's criminal action. The placement of chemical irritants between physical strength and the baton reflects its potential for physical damage, both immediate and long-term, and the perceived violence in its administration. These standard methods and instruments of police work may change as technical

advances produce additional nonlethal weapons. Regarding batons, the use of a lengthy flashlight (particularly the steelcased variety) as a striking device has caused serious injuries and even deaths. Therefore, a law enforcement agency may wish to prohibit or place special limitations on the use of these devices as weapons. (Other devices, such as a sap, brass knuckles, and blackjack merit outright prohibition.) A threatened use of force (Rule 3:2.07) must also be reasonable. See Tex. Penal Code Ann. sec. 9.04.

The last sentence of Rule 3:2.05 stresses that nothing should ever prevent an officer, who finds himself in an abnormal and emergency situation, from taking whatever unique or unauthorized measures he must to protect himself and others. Thus, an officer might have to resort to unauthorized weapons or methods if, for example, he is caught off-guard or empty-handed. In other words, the strictures of Rule 3:2.05 apply only when the officer has possession of his authorized weapons. Provided the use of force is appropriate under this chapter, these rules do not intend to thwart an officer from taking extraordinary measures in response to a life-threatening emergency.

No officer may carry or use any instrument (including the type of firearm ammunition) for which he has not received proper training (Rule 3:2.08) and departmental approval. Firearms training should, to the extent feasible, duplicate "real-life" situations. For a survey and discussion of police training in this area, see Teske & Niksich, Firearms Training for Law Enforcement Personnel, Police Chief, Oct. 1979, at 58. Furthermore, Rule 3:2.06 prohibits the unauthorized alteration or modification of approved police weapons. Thus, no officer may load

or weight an approved police baton or carry or use for police purposes any unauthorized ammunition, firearm, or chemical irritant (Rule 3:2.08). In order to accomplish this, departmental procedure must provide for each member to submit all weapons, used for police purposes, to the chief of police (or his designated subordinate) for inspection, approval, and departmental documentation. The use of unannounced "spot-checks" may improve compliance. The appendix to this chapter provides a sample form for an "Officer's Record of Firearms."

Rule 3:2.09 establishes a policy on the use of handcuffs and other restraining devices. This policy makes the use of handcuffs the rule rather that the exception in order to accomplish the primary police goal of safely getting a suspect into custody. An officer should guard against injuring the arrestee. Handcuffs, especially if they remain too tight, can cause serious nerve damage. Many departments have effectively used flexible handcuffs or tape, and thereby also avoided injuries to the arrestees.

This chapter makes no specific recommendations regarding any particular type or brand of weaponry. Many law enforcement agencies have strict rules on these matters. Other agencies provide general guidelines or leave this area open to each officer's personal preferences. For example, some departments fix a maximum and minimum caliber for sidearms. A department might also prohibit certain ammunition or the use of fully automatic firearms. A department might restrict the carrying of privately owned rifles or other firearms to a specific tactical situation, and only upon the approval of the officer's supervisor. A department might also loosen one or more of its firearms restrictions based on an individual

officer's specific training, years of service, or particular assignment. An officer must also be certain that any weapon he owns or carries does not violate any state or federal law.

SECTION THREE: USE OF NONDEADLY FORCE

3:3.01. To the extent necessary and reasonable, and in accordance with this chapter, an officer shall only use physical strength and skill, chemical irritant, or a baton to apply nondeadly force.

3:3.02. An officer may use chemical irritant to protect himself or another from assault or to subdue a person unlawfully resisting arrest. The proper and most effective use of chemical irritant requires holding the canister upright and spraying a short burst (one second or less) at the subject's face. An officer shall not use chemical irritant against someone already in custody in order to stop behavior (e.g., shouting) which does not physically endanger the officer or others.

3:3.03. An officer may use his baton to protect himself or another from assault or to arrest a person who unlawfully and violently resists arrest, if lesser methods have failed or if circumstances warrant the immediate use of the baton. (An officer may also use the baton as a barricade or to repel or control crowds.) However, an officer should:

(a) Avoid making baton blows capable of inflicting permanent injury;
(b) Not raise the baton above the head to strike someone or use the baton as a club or bludgeon; and
(c) Deliver only short and snappy baton blows, to vulnerable areas of the body, to incapacitate the opponent temporarily.

As defined in Rule 3:1.03, "nondeadly force" would include the proper use of physical strength and skill and the authorized chemical irritant and baton as authorized in Rule 3:3.01. However, improper or unreasonable use of any of these methods could cause serious bodily injury and even death. Thus, if abused, even these weapons have the potential to become an instrument of "deadly force." As noted in the last sentence of Rule 3:2.05, in an emergency which makes conformance with these weapons restrictions wholly impractical, an officer can use any available weapon to inflict the permitted level of force.

As established in Rule 3:2.05, to minimize the possibility of unnecessary force, an officer must generally follow an escalating scale of force. Within this scale, the use of physical strength and skill represents the least drastic way to overcome unlawful resistance. Thus, direct physical intervention generally provides the basic and most reasonable method for overcoming the resistance of an unarmed person who simply fails to submit to an officer's lawful attempt to arrest him. Surprisingly few situations require an officer to resort to greater force than physical prowess. Whenever appropriate, an officer should attempt to summon a back-up unit. In addition, on potentially hazardous calls for service, more than one officer (if available) should be automatically assigned.

To control a subject, one officer may have to resort to a greater degree of force than if two officers were available (who might then just have to restrain the individual). Although each may constitute the lawful use of force, because each was necessary and reasonable under the circumstances, the latter uses a far more desirable and effective police tactic. Thus, superiority of manpower frequently provides the key to overcoming resistance in the most peaceful manner.

An officer should use a chemical irritant only if physical strength and skill appear ineffective or impractical (Rule 3:3.02). Although chemical irritant usually works effectively, it does not always succeed and may even further anger the subject, producing increased aggression. Several law enforcement agencies have a specific set of rules on the use of chemical irritant. For example, the rules may suggest more specific procedures to suit the particular type of irritant used. E.g., Kansas

City (Kansas) Police Department Rules (Nov. 2, 1978, No. 78-5).

In instances where physical strength and skill and chemical irritant prove ineffective, or their use might constitute a danger to the officer or a third party, the officer may use his baton to overcome resistance and to end the conflict (Rule 3:3.03). Use of the baton represents the most drastic form of nondeadly force. An officer must use it judiciously and only if lesser methods have failed or their use would be impractical.

SECTION FOUR: USE OF DEADLY FORCE

3:4.01. To the extent necessary and reasonable (subject to emergency circumstances in accordance with Rule 3:2.05), and in accordance with this chapter, an officer shall apply deadly force only by using an authorized weapon.

3:4.02. To the extent an officer has reasonable time for consideration, he shall never use deadly force (i.e., use his weapon) which creates a greater risk to himself and others (such as hostages, bystanders, and other officers) of causing death or serious bodily injury than if he did not use such deadly force. This decision must reflect the circumstances, for example:

(a) The nature and seriousness of the risk of injury to the officer or others;
(b) The age, physical condition, and behavior of the subject of the force;
(c) Relevant actions by any third parties;
(d) Physical conditions (such as visibility) at the scene;
(e) The feasibility and availability of alternative actions; and
(f) The opportunity and actual ability of the suspect to injure the officer or others.

3:4.03. An officer shall not use deadly force except when immediately necessary to protect himself or another person from death or serious bodily injury.

3:4.04. An officer shall not discharge a firearm as a warning or a threat.

Rule 3:4.01 places general limits on how an officer may inflict deadly force. The circumscribed authority for using deadly force automatically tends to limit the type of weapon that will appropriately deliver that degree of force. In other words, an officer will only use deadly force when confronted by an emergency in which he cannot make an arrest to stop or otherwise prevent the suspect from committing a life-threatening felony. Thus, an officer will most likely use a firearm to deliver deadly force because the emergency situation has already surpassed

the practicality of using weapons intended for inflicting nondeadly force (e.g., chemical irritant and baton). (The introduction to this chapter discusses this policy in greater depth.)

Even though firing a service revolver or other firearm at someone will not always cause death or serious bodily injury, such action has the definite capacity to cause such injury. Therefore, regardless of intent, these rules consider it deadly force whenever anyone fires a firearm at someone else.

Rule 3:4.02 requires an officer, if time permits, to attempt to balance the competing risks which accompany almost every incident where a firearm is discharged. Rule 3:4.03 states the only circumstances which permit an officer to use deadly force. An officer always has the right to protect himself and others from deadly attack. An officer must realize that this chapter, although it establishes a highly selective policy on the use of force, should not cause him to hesitate to shoot at someone who is attacking (or is about to attack) him or another person with unlawful deadly force.

This section does not permit the use of deadly force in an attempt to apprehend a mere fleeing suspect, even one who apparently committed a violent felony and whose mere presence in the community may create an inherent danger. (The Federal Bureau of Investigation also follows this policy.) However, an officer has statutory protection from criminal prosecution if he does use deadly force against such a person (Tex. Penal Code Ann. sec. 9.51). As discussed in the introduction, the "use of force" policy stated in the rules of this chapter reflects a considered judgment on the appropriate role of law enforcement in light of current

legal developments and sound police practices. Thus, the Model Rules reject the so-called "fleeing felon" standard.

However, to assist a law enforcement agency that determines that it wants its officers to use deadly force against certain suspected felons, the following language may prove helpful:

> An officer shall not use deadly force against a fleeing suspect unless the officer has probable cause to believe that his own actions will not further jeopardize innocent bystanders and that the suspect:
>
> (a) Cannot be apprehended by using less force, and
>
> (b) Committed a felony that involved the use of deadly force (or otherwise caused death or serious bodily injury), and
>
> (c) Will likely cause death or serious bodily injury to others if the suspect's arrest is delayed.

This language, which draws on (but limits) Penal Code section 9.51, would apply to a narrow category of suspects. It, by necessity, lacks the straightforward clarity of Rule 3:4.03 and places a heavier burden on the officer faced with making a complex, split-second decision.

An officer who acts under any "fleeing felon" rule exposes himself to a broader risk of civil liability and disciplinary action. For these reasons, and as discussed elsewhere in this chapter, the Model Rules recommends the clear-cut and strict limitation on the use of deadly force as expressed in Rule 3:4.03. For a thorough discussion of these issues, see Boutwell, Use of Deadly Force to Arrest a Fleeing Felon, FBI Law Enforcement Bull., Sept. 1977 (pt. 1), at 27; Oct. 1977 (pt. 2), at 27; Nov. 1977 (pt. 3), at 9; C. Milton et al., Police Use of Deadly Force, 127-47

(1977); US Department of Justice (Community Relations Service), Police Use of Deadly Force (1979).

An officer should not fire his weapon as a threat or warning (Rule 3:4.04). Warning shots have proved ineffective and inherently dangerous, particularly in cities. Warning shots may endanger bystanders and prompt return fire. The same risk imbalance generally overrules, whenever an alternative is possible, firing at or from a moving vehicle. In addition, to the extent that a department adopts a less restrictive policy on the use of force, that department should consider the need to specify additional safeguards.

SECTION FIVE: REPORTING USE OF FORCE

3:5.01. An officer who discharges a weapon, applies force (other than physical strength and skill), or causes any injury to a suspect or other person must file the [appropriate report] with the [chief of police or other appropriate person or departmental unit] as soon as practical.

3:5.02. This report will receive executive review to:

(a) Ensure that the officer's particular use of force complied with state law and departmental policy,
(b) Determine if the officer's particular use of force indicates a need for special counseling or training, and
(c) Determine whether the situation requires further action.

This section establishes a reporting requirement for most uses of force, and for each weapons firing. This section, which appears in skeletal form, should be expanded and customized by each local law enforcement agency. Many, if not most, police departments have a "reporting" requirement in order to monitor the implementation of their particular policy on the use of force. Reports also provide assistance in training and in anticipating potential questions of legal liability. Therefore, the chief of the police department (or other designated person or group) should automatically investigate each serious use of force and firearm discharge.

Appendix

OFFICER'S RECORD OF FIREARMS

Name: _____ Emp. No.: _____ Date: _____
Division: _____ Shift: _____

SIDEARM

1. Make: _____ Model: _____ Caliber: _____ Action: _____
   Serial No.: _____ Finish: _____ Grips: _____ Barrel Length: _____
2. Make: _____ Model: _____ Caliber: _____ Action: _____
   Serial Number: _____ Finish: _____ Grips: _____ Barrel Length: _____
3. Make: _____ Model: _____ Caliber: _____ Action: _____
   Serial No.: _____ Finish: _____ Grips: _____ Barrel Length: _____
4. Make: _____ Model: _____ Caliber: _____ Action: _____
   Serial No.: _____ Finish: _____ Grips: _____ Barrel Length: _____
5. Make: _____ Model: _____ Caliber: _____ Action: _____
   Serial No.: _____ Finish: _____ Grips: _____ Barrel Length: _____
6. Make: _____ Model: _____ Caliber: _____ Action: _____
   Serial No.: _____ Finish: _____ Grips: _____ Barrel Length: _____

SHOTGUN

Make: _____ Model: _____ Gauge: _____ Action: _____
Serial No.: _____ Finish: _____ Barrel Length: _____

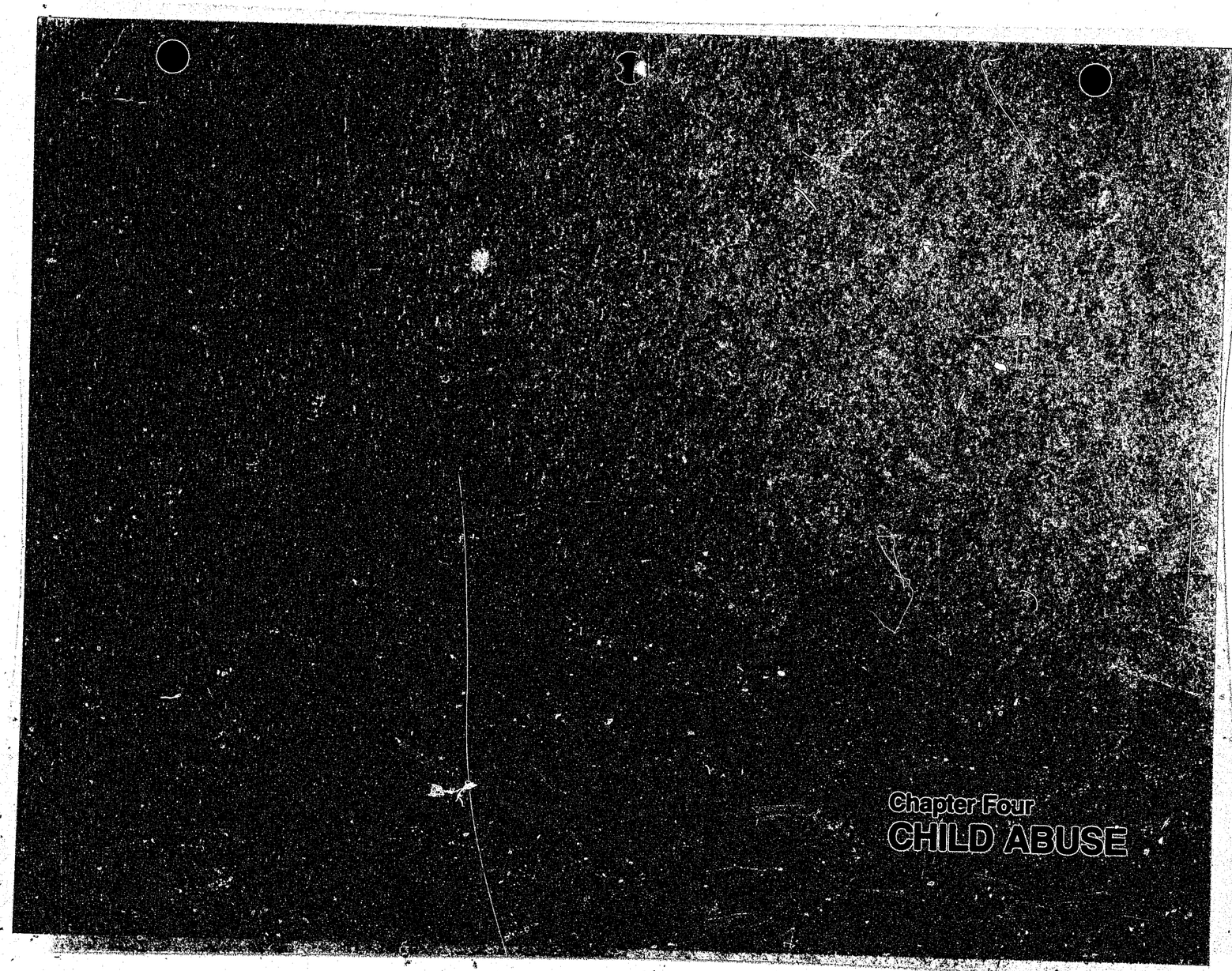
CARBINE

Make: _____ Model: _____ Caliber: _____ Action: _____
Serial No.: _____ Finish: _____ Barrel Length: _____

_____ SUPERVISOR'S SIGNATURE

_____ OFFICER'S SIGNATURE

SOURCE: Houston Police Department.


Chapter Four
CHILD ABUSE

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CHILD ABUSE

Child abuse and neglect occurs with alarming frequency. The National Center on Child Abuse conservatively estimates that 200,000 children a year suffer physical abuse and 800,000 per year suffer physical neglect. The National Center also estimates at least an additional 60,000 cases per year of sexual abuse and molestation. These figures do not even include the cases of emotional abuse and neglect or the number of children exploited economically or involved in the pornography market. Approximately 2,000 children die each year as a result of abuse and neglect. Department of Health, Education and Welfare, Resource Material: A Curriculum on Child Abuse and Neglect 9 (1979). As for Texas children, the Texas Council of Child Welfare Boards estimates the number of "youngsters in danger" at 283,000 to 400,000. Child Abuse in Texas 5 (1979).

Police officers play an expanding and crucial part in the discovery and handling of child abuse and neglect. In many communities, particularly smaller ones, only the police offer 24-hour service and have the ability and resources to respond to a situation quickly. Moreover, as federal funding has dwindled, the Texas Department of Human Resources (DHR) has established a strict set of priorities to select the limited number of cases that it can investigate within 24 hours. Children already in life-threatening situations and those under DHR care receive first priority.

An officer may investigate an initial complaint of child abuse or may encounter child abuse in the course of other duties. In either case, unless the situation is serious enough for a prompt DHR investigation, tactful techniques and a thorough knowledge of available community services (for communication to the parents or person in charge of the child) might be the only measure the officer can take to attempt to benefit the child. In addition, some statistical evidence also indicates that when police first investigate reports of child abuse and neglect, they are more effective than other agencies in substantiating these reports. See Groenevald & Giovanni, "Disposition of Child Abuse and Neglect Cases," 13 Social Work Research & Abstracts, no. 2, at 24-30 (1977).

The primary law enforcement functions in child abuse and neglect cases consist of (1) reporting, (2) identification on the scene, (3) intervention in emergency situations, and (4) criminal investigation. A large number of statutes in the Texas Family Code (Chapters 17 and 34), the Penal Code, and even the Code of Criminal Procedure govern the general actions of officers in such cases, but provide no explicit procedures. Moreover, the constitutional issues of due process, expectation of privacy in the home, and a parent's right to raise his children as he sees fit add to the legal confusion surrounding child abuse. These rules and commentaries attempt to provide officers with less ambiguous courses of action to take in abuse and neglect cases, to emphasize the need for police cooperation with social agencies, and to deal with the growing need for police involvement in child abuse and neglect cases. For a discussion of these issues, see Bernstein, Police v. Child Abuse, Police Mag., Nov. 1978, at 58.

SECTION ONE: DEFINITIONS

4:1.01. Abuse - Nonaccidental infliction or threat of infliction of physical injury or emotional or mental damage to a child by a person responsible for the child's health or welfare.

4:1.02. Bodily Injury - Physical pain, illness, or any impairment of physical condition.

4:1.03. Child - A person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes. Under statutes regarding crimes against children, however, the age of a "child" varies from under 14 to under 17.

4:1.04. Child Abuse and Neglect Reporting and Inquiry System (CANRIS) - The automated central registry of reported and investigated child abuse cases in Texas.

4:1.05. Child Abuse Hotline ("the Hotline")- A statewide, toll-free telephone number (1-800-252-5400) for 24-hour reporting of children in need of protection. The Hotline refers all reports it receives to local protective services staff.

4:1.06. Child Protective Worker - A staff member of the child protective services of the Texas Department of Human Resources (DHR) or another designated agency such as County Child Welfare, trained to investigate child abuse and to handle civil legal actions involving child abuse.

4:1.07. Court - The District Court or Family District Court which has jurisdiction in all civil proceedings affecting the parent-child relationship.

4:1.08. Designated Agency - An agency designated by the court to protect children, and to receive reports of child abuse.

4:1.09. Authorized Agency - A public social agency authorized to care for children or to place children for adoption, or a private association, corporation, or person approved for that purpose by the Department of Human Resources through a license, certification, or other means.

4:1.10. Emergency Removal - Removal of a child from his home without written consent of his parents and before a court hearing, upon reasonable cause to believe that an immediate danger exists to the child's physical health or safety.

4:1.11. Emotional Neglect - Failure of the parent or caretaker to provide adequately for the developmental needs of the child (such as stimulation and affection) and to provide consistent care for the child.

(continued)

4:1.12. Exploitation - The forcing or undue encouragement of a child to participate in activities detrimental to his well-being, by a person responsible for the child's health or welfare. (For example, exploitation may involve begging, stealing, exposure to immoral or degrading circumstances, inappropriate responsibilities for the child's age, and too many working hours for the child's age.)

4:1.13. Investigation Division - The division of the Department of Human Resources responsible for criminal investigations of child abuse.

4:1.14. Lack of Supervision - A failure of parents to account for a child's actions and whereabouts. (Examples of lack of supervision include a young child left unattended while the parents are working, or a preteen left to take care of very young children for long periods of time.)

4:1.15. Medical Neglect - A failure of parents to secure necessary medical, surgical, or psychiatric treatment to correct some condition in the child. (Examples of medical neglect include a long-term failure to treat a seriously ill child, a malnourished child, or an emotionally disturbed child.)

4:1.16. Neglect - Depriving the child of living conditions which provide the minimally needed physical and emotional requirements of life, growth, and development, by a person responsible for the child's health or welfare. (Examples of child neglect include inadequate housing, clothing, or food; lack of supervision; lack of needed medical attention; and abandonment.)

4:1.17. Serious Bodily Injury - Bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

4:1.18. Sexual Abuse - The obscene or pornographic photographing, filming, or depiction of a child for commercial purposes, or the rape, molestation, incest, prostitution, or other such forms of sexual exploitation of a child under circumstances that appear to harm or threaten the child's health or welfare.

4:1.19. Suit Affecting the Parent-Child Relationship - A suit brought under Title 2 of the Texas Family Code in which the appointment of a managing conservator or possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought.

No definition of child "abuse" (Rule 4:1.01) appears in the Texas Family Code. In addition, the Texas Penal Code does not contain a specific child abuse statute. This term usually is defined in light of the "rights, privileges, duties and powers existing between a parent and child" as stated in Texas Family Code section 12.04 (Vernon Supp. 1980). The duties of a parent to his child include "care, control, protection, moral and religious training, and reasonable discipline," as well as "support, including providing the child with clothing, food, shelter, medical care and education." The definition of "abuse" in Rule 4:1.01 is taken from Item 7211 of the Department of Human Resources' Social Services Handbook (1978) ("DHR Handbook").

Texas statutes also do not define child "neglect" (Rule 4:1.16). However, parents may lose their parental rights if they, for example, "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child" or "engaged in conduct or knowingly placed the child with persons who engage in conduct which endangers the physical or emotional well-being of the child" (Tex. Fam. Code Ann. secs. 15.02(1)(D) & (E) (Vernon Supp. 1980)). (These actions would also determine child abuse.) Texas Penal Code section 22.04 ("injury to a child") deals with one of the few offenses that may be committed with criminal negligence or by omission to act. The definition of "neglect" (Rule 4:1.16) also comes from the DHR Handbook, Item 7211.

"Medical neglect" (Rule 4:1.15), as a specific type of neglect, may not exist when the parent legitimately practices his religious beliefs and

thereby does not provide specified medical treatment to a child. However, the protective services of DHR or the designated agency can still investigate this situation, and a court can order treatment of the child. (See DHR Handbook, Item 7225.)

The definition of "sexual abuse" (Rule 4:1.18) is taken from the amendment to the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C.A. sec. 5104(a)(3)(A) (1978). This general definition encompasses all the sexual offenses against children listed under Texas criminal statutes (rape, incest, indecency with a child, compelling prostitution, solicitation, and sexual performance by a child). The definition of "exploitation" (Rule 4:1.12) also covers some forms of sexual exploitation under the same statutes. The definitions of "bodily injury" (Rule 4:1.02) and "serious bodily injury" (Rule 4:1.17) track the language of Penal Code section 1.07.

The definition of "child" in Rule 4:1.03, largely derived from Texas Family Code section 11.01(1), governs all civil actions concerning children under the provisions of the Family Code, including the child abuse reporting statutes, emergency orders, and suits affecting the parent-child relationship. Under Texas Family Code section 51.02(1) dealing with delinquent children, "child" is defined as

> . . . a person who is:
>
> (A) 10 years of age or older and under 17 years of age; or
> (B) 17 years of age and under 18 years of age, alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

For purposes of the criminal statutes dealing with various forms of child abuse, the age of the victimized "child" varies. For "injury to a child"

and "solicitation of a child" the upper age limit is 14; for "compelling prostitution," "rape of a child," "indecency with a child," and "sexual performance by a child," the upper age limit is 17. For "incest," no age limit exists.

Both CANRIS (Rule 4:1.04) and the Child Abuse Hotline (Rule 4:1.05) arose from a general requirement for a state system for reporting DHR investigations of child abuse in order to receive federal funds under the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C.A. sec. 5103 (1978). Texas Family Code section 34.06 authorizes the establishment of a central registry. DHR controls CANRIS and must cooperate with local child service agencies, hospitals, clinics, and schools, as well as other state reporting systems. Only authorized DHR staff members have access to CANRIS. Police officers and law enforcement agencies do not have direct access to CANRIS, but DHR includes information from CANRIS in reports to law enforcement agencies.

A child protective services staff member (see Rule 4:1.06) of DHR or another designated agency (such as the County Child Welfare Unit) differs from a staff member of the Investigation Division of DHR. As his primary goals, the child protective worker protects the child, investigates initial child abuse reports, provides social services to the members of the family in which child abuse has occurred, and expedites court orders for the welfare of the child. A staff member of the Investigation Division is an expert in the criminal investigation of child abuse. Each of the 12 regions established in Texas by DHR has at least one investigation unit. The Investigation Division investigates cases referred by other staff members, other agencies, or in cooperation with a law enforcement agency.

The term "designated agency" (Rule 4:1.08) arises out of the Child Abuse Reporting statutes (e.g., Tex. Fam. Code Ann. secs. 34.02 and 34.05) as the local social agency (actually a part of DHR) designated to receive reports of child abuse and neglect, to investigate such reports, and to supervise further protection of the child. "Authorized agency" (Rule 4:1.09), which tracks Family Code section 11.01(7), may include social agencies under contract to DHR, foster-care homes, and institutions which provide temporary or long-term care for children.

The definition of a "suit affecting the parent-child relationship" (Rule 4:1.19) primarily tracks Texas Family Code section 11.01(5). The court hearing such suit may issue a variety of temporary orders for the safety and welfare of the child, including the taking of the child into possession of the court, temporary conservatorship or temporary support of the child, and restraining any party from molesting or disturbing the peace of the child or another party. Tex. Fam. Code Ann. sec. 11.11(a).

SECTION TWO: REPORTING CHILD ABUSE AND NEGLECT

4:2.01. Any officer having cause to believe that a child's physical or mental health or welfare has been or may be affected by abuse or neglect shall file an appropriate departmental report. (A copy of his written report must be submitted to DHR or a designated agency within five days.)

4:2.02. An officer (or dispatcher) who receives a report of child abuse or neglect from an individual by telephone or otherwise should obtain the following information:

(a) Name, age, and address of the child;
(b) Name and address of the parents or persons in charge of the child;
(c) The incident or injury that prompted the report, or details to support the belief that child abuse has occurred;
(d) The present condition of the child; and
(e) Any siblings at the home.

Since 1967, all 50 states have had child abuse reporting statutes, but they differ as to who must report, types of incidents which must be reported, manner of reporting, agencies to which reports must be made, and the degree of immunity conferred on those who report. The Child Abuse Prevention and Treatment Act of 1974 restricts funding to states which meet certain provisions. Texas meets these provisions. The Act aims to protect and care for all abused and neglected children who may need such services. The Act also seeks the reporting and investigation of child abuse and neglect. "Investigation" in this context refers to "social investigation" by a social agency, not criminal investigation by the police.

The Texas Family Code section 34.01 apparently requires everyone, including peace officers and other professionals, to report suspected or threatened child abuse or neglect. Any local or state law enforcement agency, as well as DHR or an agency designated by the court to be responsible for the care of children (such as the County Child Welfare Unit), may receive such a report. However, depending on the social welfare resources available in a community, the type of response to a report of child abuse often turns on which agency receives the initial report. All reports of child abuse and neglect must ultimately be referred to DHR (or another designated agency) for investigation and for registry in CANRIS. Tex. Fam. Code Ann. sec. 34.02(c) (Vernon Supp. 1980).

A law enforcement agency receiving the initial report of child abuse or neglect must obtain certain information about the incident, to determine the urgency of the situation, and to relay this information to the designated social agency. Often the age of the child or children in question and a guess about the extent of the injury or threat to safety will determine the response required. Ideally, all reports should be referred to the designated social agency as soon as possible. Especially in small towns and rural communities, however, this is not always feasible.

A written report must follow, within five days, each oral report (Tex. Fam. Code Ann. sec. 34.02(d)). Whoever receives the initial report should also try to obtain the name of the complainant. However, "[a]nonymous reports, while not encouraged, will be received and acted on in the same manner as acknowledged reports" (Tex. Fam. Code Ann. sec. 34.02(d)). Although the name of the complainant is confidential information which usually should

not be revealed to the public or the parents or caretakers of the child allegedly suffering abuse or neglect, it helps further records checks to determine the validity of the report. Any officer (or other person) who, in good faith, reports child abuse or neglect to a police or social agency has statutory immunity from civil and criminal liability (Tex. Fam. Code Ann. sec. 34.03).

No cases have tested this personal immunity. Increasing municipal liability in many areas (e.g., Owen v. City of Independence, 100 S. Ct. 1398 (1980)) may become a factor in this situation. Any person who knowingly fails to report a child abuse or neglect, whether physical or emotional, commits a Class B misdemeanor (Tex. Fam. Code Ann. sec. 34.07). However, medical professionals (such as family physicians or psychotherapists) as well as clergymen and teachers, who often learn of child abuse in the course of treating family members, fear making a report which might disturb an already unstable family situation. Many states do not include lack of reporting as an offense. Certainly enforcement of this provision is secondary to concern for the best interests of the child. However, liability may arise for negligence in failing to file a report. For example, in Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976), the California Supreme Court ruled that a doctor and a hospital may be liable for malpractice for failing to report a suspected case of child abuse. In general, the rules of confidentiality, except between attorney and client, do not apply to reports of child abuse and neglect (Tex. Fam. Code Ann. sec. 34.04).

SECTION THREE: RESPONDING TO REPORTS OF CHILD ABUSE

4:3.01. An officer must respond to situations of child abuse or neglect when:

(a) He is assigned by his department; or
(b) He encounters child abuse while on a domestic disturbance call, on his regular beat, or otherwise.

4:3.02. An officer responding to a report of child abuse or neglect should act based on:

(a) His assessment of injury to the child,
(b) The potential risk to the child,
(c) The social agencies available to assist him at various times, and
(d) Community standards.

4:3.03. If the responding officer finds signs of child neglect at the scene (e.g., unsafe environmental conditions or lack of supervision) which do not require emergency removal, he should:

(a) Upon determining no adult is available, but before entering the home, have a supervisor present;
(b) Identify the location of the parents or persons in possession of the child;
(c) Arrange for temporary care in the home, whenever possible, with responsible adult relatives or neighbors, so that the child may remain in a familiar environment; and
(d) Immediately file a report with his supervisor (for purposes of social-agency investigation of the situation).

4:3.04. If the officer finds signs of noncritical child abuse at the scene (see Section Four on Identification of Child Abuse), he should:

(a) Attempt to speak to the parents about his concern for the safety of the child;
(b) Encourage the parents or person in charge to obtain any required medical treatment for the child;
(c) If asked, inform the parents about possible resources within the community to help them with the care of their children;

(continued)

(d) If necessary, inform the parents about the criminal consequences of child abuse; and
(e) File a report with his supervisor.

4:3.05. In all instances, the officer should observe the details of the home for any report he will make. These details include:

(a) Eating and sanitary facilities,
(b) Safety factors (e.g., plumbing, electrical wiring, windows),
(c) General cleanliness,
(d) Appearance and cleanliness of children,
(e) Behavior of the parents toward the child, and
(f) Reaction to the officer's presence.

4:3.06. As soon as possible, the officer should file the written report with his supervisor.

Law enforcement personnel and social workers must cooperate in handling child abuse cases. Social agencies, such as DHR (the County Child Welfare Units), and law enforcement agencies have overlapping responsibilities. Each agency aims to protect the child. However, the social agencies stress rehabilitation, therapy, and restoration of the family unit; law enforcement agencies focus on the investigation and prosecution of offenses committed against the children. This difference in emphasis can produce misunderstanding and conflict between the agencies. In order to lessen this problem, a police officer should know the resources and responsibilities of the agencies in his community and, whenever possible, work with these agencies.

On the other hand, an officer should continue his involvement in cases of child abuse. Social agencies, some of which seek to limit police involvement, argue that police officers "handle the situation differently." In

fact, police presence (contrasted with the presence of a social worker) may create a different response from the child abuser, but that does not make the end result worse. An officer's intimate involvement in the criminal justice system can, in itself, serve useful functions. Since many forms of child abuse involve criminal offenses against the child (as they would be if committed against adults), an abuser who realizes that he has committed unlawful acts might be deterred from repeating the offense. Similarly, prosecuting an alleged child abuser may be useful, even if it does not result in incarceration. The criminal court has the power to enforce psychological treatment and supervision of the abuser, which might also more successfully deter repetition of the offense than the work of a social agency. The primary concern--the welfare of the child--requires cooperation between law enforcement and the social agencies.

The officer may respond to a child abuse report at various points in the process. His report and contact with the family may be the first; he may have to assist the child protective worker. In addition, he may enter the investigation only after the Investigation Division of DHR has notified the law enforcement agency of the child's injury, or after the law enforcement agency has determined that the case warrants criminal investigation.

Specific procedures for handling child abuse cases vary greatly, often depending on the city's location, size, and social services available. Some cities (e.g., Dallas, Houston) have child protective workers on call 24 hours every day, as well as 24-hour intake services, where children removed from the home can be transferred to the care of child protective workers who assume responsibility for the necessary legal actions. The Child Abuse

Hotline is always available to everyone. However, the officer may feel that the followup on a report takes too long. The Hotline call is referred to the locality in question, but local workers may not always be available (although they should be). Some communities have emergency shelters for battered wives and children; other localities may rely on community organizations such as church groups to provide temporary foster care.

An officer has broad discretion. If he goes on a child abuse (or neglect) call, unaccompanied by a child protective worker, he must be able to identify the problem and the severity of the problem; determine to whom to refer it to at that time, and make some estimate of necessary police involvement in the case (although the district attorney decides whether to press criminal charges). An officer must also decide, tentatively, whether the maltreatment or neglect exceeds the general community situation (i.e., what he perceives as grossly inadequate conditions may appear to a social worker as quite common and therefore of low priority).

Child neglect sometimes requires more immediate police action than child abuse, simply because the absence of the caretaker may immediately endanger young children. The officer should attempt, depending on the condition of the child or children, to enlist the help of responsible relatives or neighbors for temporary care of the child, until child protective workers can take charge of the situation. If this help is not available, young children (up to the age of three) who face the greatest threat to safety should be removed from the home, with the assistance of child protective workers whenever possible, and an attempt made to notify the parents.

When investigating child abuse or neglect, the officer should observe the conditions of the home, the child, and the parent-child relationship.

An officer's observations will help him write his reports and aid other agencies' investigations. Even a report which does not immediately result in an investigation may later become important because it indicates an incident in a recurrent series of child abuse in a particular family.

SECTION FOUR: IDENTIFICATION OF CHILD ABUSE AND NEGLECT

4:4.01. An officer responding to a report of child abuse should be aware of the following indications of severe bodily injury:

(a) Burns, especially patterns of burns (e.g., those with a definite boundary that suggest immersion in hot liquid or a particular kind of instrument such as a hot iron), or cigarette burns;
(b) Injuries to the head or face;
(c) Bruises, especially if extensive, in various stages of healing, or suggest a specific type of instrument (e.g., coat hangers, electrical cords, wires); or
(d) Unexplained abdominal injuries indicated by swelling of the abdomen, tenderness, and serious vomiting.

4:4.02. The officer should take note of the following circumstances:

(a) The physical condition of the parent(s) (e.g., intoxicated, drugged, disoriented, helpless in dealing with the child),
(b) Explanations given for the injury (especially any inconsistencies in the explanations given),
(c) Indications that the parent(s) has tried to obtain medical treatment for the injuries (regardless of the explanation given),
(d) Indications that one child has been singled out for "punishment," and
(e) Bizarre forms of punishment (e.g., locking children in dark areas for long periods of time or signs of torture) which indicate mental instability on the part of the caretakers.

4:4.03. An officer responding to a report of child neglect should look for:

(a) Outright abandonment for long periods of time;
(b) Lack of supervision, taking into consideration the duration and time of day when the children are left alone, and the ages of any older children left to take care of younger children;
(c) The presence of possible environmental dangers (e.g., broken glass, leaking gas, poisons within easy reach, exposed wiring, lead paint);
(d) Inadequate food, clothing, or warmth;
(e) Inadequate alternative care arrangements (e.g., a landlady to "keep an eye" on several children from time to time);

(continued)

(f) General cleanliness of the dwelling and the children; and
(g) Indications that the children need medical or dental attention.

4:4.04. When investigating reports of sexual abuse of children, the officer should take note of:

(a) Difficulty in walking or sitting;
(b) Stained, torn, or bloody underclothing; or
(c) Plainly visible bleeding in the genital or anal areas.

4:4.05. The officer should be aware of the following additional factors which might indicate child abuse or neglect:

(a) Problems in talking,
(b) Poor physical development for the child's age,
(c) Extremely undernourished infants,
(d) Behavioral extremes, and
(e) Attempted or threatened suicide.

4:4.06. Whenever an officer has reason to believe that a child, with signs of child abuse, needs medical attention (but not emergency treatment), he should try to get the permission (or cooperation) of the parents for medical treatment.

An officer, in responding to a report of child abuse, must first decide the severity and immediacy of the danger to the child. The officer must determine whether (1) child abuse or neglect is occurring, (2) the child is at risk in the home, and (3) immediate intervention is necessary to ensure the child's safety.

Many types of physical injuries to the child can be observed, without medical examination, especially bruises, burns, injuries, and the presence of pain. Some of the more serious indications of physical child abuse (including sexual abuse) can only be determined by a detailed physical

examination, performed by medical personnel. Such an examination would include x-rays to show evidence of bone or skull fractures, examination for internal injuries and bruises on parts of the body not immediately visible, injuries to unusual areas such as the soles of the feet and around the ears, and examination of injuries that indicate sexual abuse (including tests for venereal disease in children). The possibility of emotional trauma caused by incest or sexual abuse might have to be determined by psychological or psychiatric examination, especially when the child is unwilling or unable to talk to investigators. (For the proper procedure, see Tex. Fam. Code Ann. sec. 34.05(c) (Vernon Supp. 1980).)

Neglect caused by abandonment or lack of adequate supervision appropriate to the age of the child is often apparent. Most cases of neglect, however, involve a chronic failure to provide physical and emotional support for a child. These cases can be identified only by observation over a period of time and by the kind of contact with the family that a social worker, rather than a police officer, can provide. In the identification of neglect, courts have considered community standards, the presence of poverty, and cultural expectations in child rearing.

In making the initial identification of child abuse, the officer must remember that reasonable discipline of the child is justified under Texas Penal Code section 9.61. For a young child, an officer may be able to ascertain whether "discipline" was unreasonable, but the question becomes harder to answer with an older child. The officer must determine if the discipline is appropriate to the child's age, condition, and transgressions, the nature and location of the physical force applied, and whether the other parent condoned the punishment.

The trained child protective worker, who will often accompany an officer to investigate a report of child abuse, frequently has a better opportunity, especially if he is of the same sex as the child, to check for physical injuries. A specialized unit within some police departments, such as a Youth Services Unit that frequently deals with child abuse cases, makes the accurate identification of serious cases of child abuse and neglect more likely.

SECTION FIVE: POLICE INTERVENTION

4:5.01. An officer must intervene on behalf of a child, whether in the home or otherwise, whenever:

(a) A child has suffered serious bodily injury as a result of neglect, lack of supervision, or physical abuse;
(b) Substantial likelihood exists that a child is in imminent danger of physical injury, either inflicted nonaccidentally or as a result of neglect or lack of supervision;
(c) A child has been sexually abused; or
(d) A child needs immediate medical attention to prevent death, severe disfigurement, or substantial impairment of bodily functions, and parents are unwilling or unavailable to provide or consent to needed treatment.

4:5.02. If an officer encounters a child in distress outside the home, he should:

(a) Identify the child's parents, or person in charge, whenever possible;
(b) Notify the parents or person in charge of the child, whenever possible, of the child's condition;
(c) Take the child and return him to the parents or person in charge;
(d) If a child refuses to return home, transfer the child to DHR or to any available emergency facility;
(e) When appropriate, take the child to a medical facility where the parents (or designated persons) can give consent to treatment; or
(f) Contact DHR or the designated agency, if the parents cannot be reached, to permit follow-up investigation by the social agency.

4:5.03. If the child is in the home, and the threat to the child requires intervention, but not immediate removal, the officer should:

(a) Remove the child from the home upon voluntary delivery of the child by one of the parents or persons entitled to possession of the child; or
(b) If the child needs medical attention, obtain the permission of one of the parents for medical treatment and take the parent and child to a medical facility.

Section Five provides guidelines for situations in which a police officer finds a child in need of help, either in the home or elsewhere, but the situation does not require emergency action, without either the voluntary permission of the parent(s) (or legal caretakers) or the order of a court. Whenever possible, the officer should seek the help of the parents, a child protective worker, or both, to remedy the situation. The guidelines for situations which require intervention are adapted from Wald, State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards, 27 Stanford L. Rev. 985 (1975).

Authority for Rule 4:5.02(c) comes from the Texas Family Code section 17.03 (Vernon Supp. 1980) which states in part:

> (a) An authorized representative of the Texas Department of Human Resources, a law enforcement officer, or a juvenile probation officer may take possession of a child without a court order under the following conditions and no others:
>
> (1) upon discovery of a child in a situation of danger to the child's physical health or safety when the sole purpose is to deliver the child without unnecessary delay to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child; . . .

Texas Family Code section 17.03(a)(2) (Vernon Supp. 1980) discusses the voluntary delivery of the child by the parent covered in Rule 4:5.03(a). Under section 35.04 of the Texas Family Code, a licensed physician or dentist, having reasonable grounds to believe that a child's physical or mental health has been adversely affected by abuse or neglect, can examine the child without the permission of the child or the parents or caretakers. However, only the parents (or persons designated by Texas Family Code section 35.01 when

parents cannot be reached) or a court order can authorize the physician to treat the child. If an officer cannot obtain permission from the parents, the officer should contact a child protective worker to expedite the court order for treatment of the child. The officer may, however, deliver the child to the treatment facility under certain circumstances (see Section Six on Emergency Removal).

SECTION SIX: EMERGENCY REMOVAL

4:6.01. An officer should remove a child from his home without parental consent (or the consent of persons entitled to possession of the child) or without court order only upon probable cause that the child faces immediate danger to his physical health or safety, and no time exists to obtain a temporary restraining order or attachment of the child.

4:6.02. Whenever an officer seeks to enter private premises, he shall first make diligent efforts to enter peacefully. However, an officer may use reasonable force to enter private permises and remove a child in an extreme emergency (i.e., to rescue a child when the officer has probable cause to believe that the child is in imminent danger of serious bodily injury).

4:6.03. An officer may use reasonable force after entry only to defend the child from serious harm, or to protect himself or the child protective worker. (See Chapter Three on the Use of Force.)

4:6.04. Upon removal of the child, the officer should:

(a) Deliver the child to the proper medical facility for examination, and contact DHR or other agency for assistance in obtaining a court order for treatment; or

(b) Deliver the child to a predesignated temporary shelter, if available.

4:6.05. An officer who removes a child must immediately submit a report that describes the circumstances of taking the child into possession, the details of the physical injury, threat of physical injury, or threat to safety, and the names of the people involved.

4:6.06. An officer shall not place a child who has been removed from his home, pursuant to this section, in jail or in a juvenile detention facility.

This section complies with the provisions of Texas Family Code section 17.03 (Vernon Supp. 1980) (Taking Possession of a Child Without Court Order) that authorizes either a law enforcement officer or a child protective worker

(or both) to remove a child from his home without a court order. The statutory standard for removal has changed several times. The current standard requires "an immediate danger to the physical health or safety of the child." Tex. Fam. Code Ann. sec. 17.03(a)(3) & (4) (Vernon Supp. 1980). Only about 10 percent of the cases of child abuse and neglect result in removal from the home.

The right to enter a dwelling in an emergency, although not granted directly by section 17.03 of the Texas Family Code, can be deduced by analogy. Judge Darrell Hester, in "Emergency Protection of Children," Child Abuse and Protective Services in Texas (1976) (hereinafter cited as "Hester"), argues that "the taking into possession of the abused or neglected child in an emergency under sec. 17.01 [now 17.03], Tex. Fam. Code Ann. and the delinquent child under sec. 52.01, are in many ways analogous to effecting an arrest." He cites the use of necessary force to secure an arrest, and the restriction of forceful entry for the purposes of making an arrest for felony offenses under article 15.25 of the Texas Code of Criminal Procedure. The judge (at C-10) makes the following suggestions:

> . . . (1) the use of force would not be justified solely to secure possession; (2) entry into private property accomplished without force is probably justified; (3) forceful entry into a habitation probably will be justified only in the extreme case of true rescue; (4) force could be used to defend against force initiated by another during the seizure process; (5) frequently the officer will be acting in defense of the child in the very act of taking into possession and then entitled to use reasonable force in defense of a third person. See sec. 9.32 [now 9.33] Tex. Penal Code Ann.

Moreover, an officer may be able to enter the premises in direct response to an emergency which requires prompt action under the concept of exigent circumstances. See Rule 6:5.01 in Chapter Six on Warrantless Search and Seizure.

Rule 4:6.03 depends upon the statutory authority of the Code of Criminal Procedure article 6.06 (Vernon Supp. 1980), which authorizes a peace officer to use "the amount of force necessary to prevent the commission of the offense [against another person], and no greater." Article 6.07 also allows the peace officer to "use all force necessary to repel the aggression" in preventing offenses about to be committed in his presence. However, Rule 3:2.02 of Chapter Three on the Use of Force requires that a peace officer have probable cause to arrest before he uses force against anyone. In order to protect the child and remove him from the premises, an officer may not always arrest at the time, but he should have probable cause to do so. Section 9.31 of the Texas Penal Code also allows the officer (as well as any other person) to use force against another "to protect himself against the other's use or attempted use of unlawful force." For a general discussion of these issues, see Chapter Three on the Use of Force.

The emergency possession of a child formerly required immediate delivery of the child to a court of jurisdiction and the filing of a petition "immediately on delivery of the child to the court." Tex. Fam. Code Ann. secs. 17.01 and 17.02 (1975). The requirement for delivery of the child before the court was often interpreted as constructive delivery, especially in the case of young children. For a discussion of this question, see Hester at C-10 to C-13. The 1980 revision of the Family Code seems to avoid this problem in section 17.03(b):

> (b) When a child is taken into possession under Subdivision (3) or (4) of Subsection (a) of this section, the person taking the child into possession shall, without unnecessary delay, cause to be filed a suit affecting the parent-child relationship and request the court to cause hearing to be held no later than the first working day after the child is taken into possession.

Rule 4:6.05 carries out this provision. The individual officer usually will not obtain a court order, but his report will be used for this purpose.

The Texas Family Code stipulates that a child protective worker or a peace officer may remove a child without civil liability if at the time "he had reasonable cause to believe that there was an immediate danger to the physical health or safety of the child." (Tex. Fam. Code Ann. sec. 17.08 (Vernon Supp. 1980).) Pierson v. Ray, 386 U.S. 547 (1967), indicates that an officer could assert defenses of good faith and probable cause (i.e., reasonable cause) against a claim of damages for deprivation of civil rights (e.g., family privacy and due process).

A recent federal case, Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), challenged the constitutionality of parts of Title 2 of the Texas Family Code by contending that the provisions infringed on family integrity and due process. The district court decision directly caused many of the changes included in the 1979 revision of the Family Code. It also produced changes in DHR's child abuse procedures. However, in Moore v. Sims, 442 U.S. 415 (1979), the US Supreme Court reversed the district court decision. The Court applied the Younger doctrine which required abstention in the absence of bad faith in state court proceedings. The Court also reasoned that the complexity of the issues warranted federal judicial abstention. The Supreme Court did not

comment on the constitutionality of various parts of the Texas Family Code. In addition, Sims never involved a challenge to the legitimacy of the state interest in seizing the children in an emergency.

The officer's actions regarding the disposition of the child once he has actually removed him from the home depend on the condition and age of the child. In most cases, the officer will need the assistance of a child protective worker to arrange either for medical treatment (if a parent or designated person does not give written permission), or for temporary care of the child. Some large cities have shelters for children and 24-hour intake service, where the officer can bring the child. DHR provides foster homes for abused and neglected children. However, a child removed from his home can be placed in one of these foster care facilities only with the assistance of a child protective worker. A child removed from his home may not be placed in a jail or juvenile detention facility, even on an emergency basis (Tex. Fam. Code Ann. sec. 17.03(g) (Vernon Supp. 1980)). A police officer should know the resources of his community, so that the removal of a child will involve the least trauma possible.

SECTION SEVEN: CRIMINAL INVESTIGATIONS - SOCIAL AGENCY COOPERATION

4:7.01. Whenever a child protective services staff member (or the Investigation Division of DHR) notifies a local law enforcement agency of serious harm or injury to a child, the law enforcement agency has the responsibility to investigate.

4:7.02. The following felony or misdemeanor offenses relate directly to child abuse:

- *(a) Homicide of a child (Tex. Penal Code Ann. sec. 19.01);*
- *(b) Injury to a child (sec. 22.04);*
- *(c) Rape and/or incest of a child (secs. 21.09 & 25.02);*
- *(d) Sexual abuse of a child (sec. 21.10);*
- *(e) Indecency with a child (sec. 21.11);*
- *(f) Sale, distribution, or display of harmful material to a minor (sec. 43.24);*
- *(g) Compelling prostitution (of a child) (sec. 43.05);*
- *(h) Solicitation of a child (sec. 25.06);*
- *(i) Sale or purchase of a child (sec. 25.06);*
- *(j) Sexual performance by a child (sec. 43.25); and*
- *(k) Contributing to delinquency of a child (Tex. Rev. Civ. Stat. Ann. art. 2338-1a).*

4:7.03. The investigating officer should ask for and obtain from DHR or the designated agency:

- *(a) Results of any civil (social) investigation of the family;*
- *(b) Plans by DHR or the designated agency to return a child to his home or to close the case;*
- *(c) Notice of court action removing the child from the home;*
- *(d) Notice of removal of the child by a child protective worker before obtaining a court order; and*
- *(e) A complete written report whenever sufficient ground exists for the institution of a suit affecting the parent-child relationship.*

4:7.04. The investigating officer has a right to receive information the child protective services staff may have about the family or the alleged abuser. (The child protective services worker cannot withhold this information.)

4:7.05. When particular expertise in interviewing children is needed, the investigating officer may ask the child protective services staff to assist in questioning:

- *(a) A child victim, or*
- *(b) A child who witnessed child abuse or neglect.*

(However, the child protective services worker cannot question the child without a court order or permission from the parents.)

(continued)

4:7.06. An officer may <u>not</u> ask a child protective worker to:

(a) Gather evidence from other sources, or
(b) Question any other person.

4:7.07. An officer may request information or assistance in making his investigation from the DHR Investigation Division in his region.

Section Seven provides guidelines for cooperation between law enforcement agencies and social agencies in the criminal investigation of cases of child abuse. The determination to conduct a criminal investigation (as distinct from a social investigation) may be made by (1) the law enforcement agency pursuant to an initial police investigation of a report of child abuse; (2) by the Investigation Division of DHR or a division of the local designated agency, and referred to the police; and (3) by the district attorney, upon notification of the death of a child, or serious injury to a child.

DHR staff must notify the law enforcement agency of serious harm or injury to children. As noted in Item 7230 of the <u>DHR Handbook</u>: "The obligation to notify a law enforcement agency of harm to children is analogous to the obligation of a person to report suspected child abuse to child protective services staff." In general, the social agency (either DHR or the designated local agency) must report felonies committed against children. Documented arrangements between DHR (protective services staff and Investigation Division) and local law enforcement agencies in the county, as well as county district attorneys and courts should be established to determine what types of harm or

injury to children should be reported. This arrangement should include: (1) what cases to report first to DHR's Investigation Division, (2) what cases to report first to which law enforcement agency, and (3) which cases will require the help of the Investigation Division, if requested. <u>DHR Handbook</u>, Item 7233.3.

A law enforcement agency conducting a criminal investigation of its own has the right to certain information, upon request, from the social agency's files and investigations. The social agency must provide information about the current status of any agency suit affecting the parent-child relationship (Tex. Fam. Code Ann. sec. 34.05(e)). An investigating officer may also request oral information about the family and the facts surrounding the alleged child abuse. However, an officer may not enlist the help of any child protective worker in a police criminal investigation (except in questioning the child), since such a demand would distort the basic function of the social services staff to protect and care for the child, and not to prosecute the child abuser. The regional Investigation Division of DHR may work in cooperation with a law enforcement agency and may share their special expertise in such matters. Once a criminal investigation is completed, the local district attorney decides whether to prosecute.

SECTION EIGHT: CRIMINAL INVESTIGATION INTERVIEWS

4:8.01. When questioning the parents or other persons suspected of committing child abuse, the officer shall:

(a) Inform them of their Miranda rights; and
(b) [Inform the parents or legal guardians of their rights to information in the social agency's child abuse report, and to records generated by the report.]

4:8.02. The officer need not tell the person under investigation the name of the person who reported the child abuse.

4:8.03. The officer should interview the parents (or other suspects) separately, and check for vagueness or inconsistencies in the explanations of incidents in the report of child abuse.

4:8.04. Whether an officer interviews a child (either the victim or another child in the home) depends on:

(a) Whether permission was given by the parents, legal caretakers, or court order;
(b) The child's age;
(c) The child's ability to evaluate what happened;
(d) The child's emotional state at the time;
(e) The possibility of retaliation against the child; and
(f) Previous interviews of the child by child protective workers.

4:8.05. Whenever possible, the interviewer should be of the same sex as the child victim, but especially in cases of reported sexual abuse or rape.

4:8.06. Parental permission should be obtained, whenever possible, to interview the child without the presence of the parents.

4:8.07. An officer should conduct the interview in language that the child can understand, and allow the child to explain the situation in his own way, as much as possible.

4:8.08. All other investigative procedures in child abuse and neglect cases should follow departmental guidelines.

Section Eight concerns only those interviewing procedures unique to the criminal investigation of child abuse. An officer may readily find evidence of child abuse. However, an officer will often have difficulty getting reliable evidence that identifies the abuser. Thus, whenever practical, an officer should carefully develop his case. Where the officer lacks probable cause to believe that the alleged abuser might leave the jurisdiction, it may prove counterproductive to make an immediate arrest. Further, if the abused child has died or has been removed from the dangerous environment, the primary objective--protection of the child--no longer requires immediate arrest.

Moreover, "[t]he mere fact that a petition alleging child abuse or neglect has been or will be filed in juvenile court does not require that the parents be arrested." International Association of Chiefs of Police (IACP), The Police Perspective in Child Abuse and Neglect 29 (1977). Often, the effect on the family structure following arrest (with or without successful prosecution) must be weighed. However, arrest may be appropriate as an officer's initial response to a report of child abuse when (1) the injury to the child is very serious, (2) necessary to gain entrance to the home in order to protect the child, or (3) necessary to preserve the peace. See Chapter Five on Arrest Without a Warrant.

Parents or caretakers interviewed on a criminal charge of child abuse are entitled to the same Miranda warnings as any other suspects and cannot be interviewed without a lawyer present, unless they voluntarily waive their rights. In addition, according to DHR regulations, DHR personnel must explain the results of the investigation to the parents or caretakers, the child if interviewed, and the complainant (if a professional person

working with the family). See Texas Department of Human Resources, Child Welfare Services, Rule 326.50.72.037(i), 5 Tex. Reg. 3807 (1980). However, they have no right to information about the identity of the reporter of child abuse. Such information must be deleted from any record they obtain from DHR. DHR does not have to release the name to the parents or guardians. An investigating officer may choose to reveal the name of the reporter of child abuse, at his discretion, as an investigative technique.

When questioning parents or caretakers about an incident of child abuse, an officer should always be aware of inconsistent explanations of the injuries. Thus, whenever practical, an officer should interview each parent or caretaker separately. An officer should try to adopt a neutral attitude regardless of the feelings he may have about child abuse. An officer should not display anger, horror, or repugnance at the injuries to the child or the attitude of the parents or caretakers. His attitude is important not only to elicit information, but to avoid adding hostility to an already volatile situation.

A child may be interviewed in the home as well as at school, at a medical facility, or at a child care agency. If the child has already been removed from the home, DHR will have control over the child and parental consent to interview the child is not needed. However, if the child is at home, permission of the parents will be necessary. It takes a skilled interviewer to establish the facts of child abuse, given that a child: (1) is often eager to please adults, (2) may feel that he deserved punishment, and (3) may desperately wish to live with his parents, regardless of the fear or violence he has encountered at home. For all these reasons, it is best to

interview the child separately, if the parents will allow it, and to let the child tell his own story, although the narrative may be indirect. Also, a child who has suffered through a traumatic experience should not have to relive it by telling the story too many times.

In cases of sexual abuse (and whenever else possible, if the child is young), the interviewer should be of the same sex as the child. In addition, "[p]articularly in cases of sexual abuse, the officer should accept and use whatever terms for genitals and sexual acts the child uses while also asking for clarification and eliciting specific information regarding what has occurred." D. Broadhurst, The Role of Law Enforcement in the Prevention and Treatment of Child Abuse and Neglect 39 (1979).

Chapter Five

ARREST WITHOUT A WARRANT

CHAPTER FIVE

ARREST WITHOUT A WARRANT

SECTION ONE: DEFINITIONS

5:1.01. Arrest - The intentional seizure, whether actual or constructive, of a person by an officer acting under real or assumed legal authority, coupled with a recognition of the custody by the seized person, for the purpose of charging him with a criminal complaint. (Chapter Nine on Stop-and-Frisk discusses temporary restraints which fall short of "arrest".)

5:1.02. Bodily Injury - Physical pain, illness, or any impairment of physical condition.

5:1.03. Breach of the Peace - Any unauthorized and unwarranted act which involves violence, or which likely will provoke violence, and which significantly disturbs or threatens the peace and quiet of a community.

5:1.04. Close Pursuit - (The term used in Louisiana for "fresh pursuit".) Under Louisiana law, an officer's immediate pursuit of a person, continuously or intermittently in the presence of the officer, in order to apprehend and arrest that person for the commission of an offense. (Chapter Eleven on Emergency Driving defines and discusses "high-speed pursuit" (or "vehicular hot pursuit").)

5:1.05. Continuing Misdemeanor - A misdemeanor which occurs over a period of time and without intermission.

5:1.06. Felony - An offense so designated by law or punishable by death or confinement in a penitentiary.

5:1.07. Fresh Pursuit - (Commonly known as "hot pursuit.") Pursuit of a person without unreasonable delay, but not necessarily instantly or immediately, in order to apprehend and arrest that person for the commission of an offense. (Chapter Eleven on Emergency Driving defines and discusses "high-speed pursuit" (or "vehicular hot pursuit").)

5:1.08. In the Presence of - When an officer, through one or more of his five senses, has probable cause to believe that an offense is being committed, that offense occurs "in the presence of" that officer.

5:1.09. Misdemeanor - An offense so designated by law or punishable by fine, by confinement in jail, or by both fine and confinement in jail.

(continued)

5:1.10. Offender - A person whom an officer has probable cause to arrest or detain.

5:1.11. Offense - An act or omission, including misdemeanors as well as felonies, forbidden by law and for which, on conviction, the law prescribes a punishment.

5:1.12. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

5:1.13. Serious Bodily Injury - Bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

In large part, these definitions derive from current Texas law and the common usage of the terms in law enforcement. The definition of "arrest" is the customary one. In order to constitute an arrest, custody and control must be assumed over the person, either by force or with his consent. Wyatt v. State, 120 Tex. Crim. 3, 47 S.W.2d 827 (1932). The officer need not make actual physical contact with the person. An arrest does not require the use of formal words. Bonatz v. State, 85 Tex. Crim. 292, 212 S.W. 494 (1919); Shannon v. Jones, 76 Tex. 141, 13 S.W. 477 (1890). However, the mere fact that the officer told the person that he was under arrest is not sufficient to complete the arrest. Smith v. State, 153 Tex. Crim. 230, 219 S.W.2d 454 (1949). There must be custody or detention and submission to arrest.

Texas Code of Criminal Procedure article 15.22 defines "arrest" as follows:

> A person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant.

The statute's failure to define "restraint" or "custody" limits its usefulness as a guide for police action. Therefore, Rule 5:1.01 attempts to expand the definition in order to provide additional clarity.

The definitions of "bodily injury," "felony," "misdemeanor," and "serious bodily injury" track the language of Texas Penal Code sections 1.07(7), 1.07(14), 1.07(21), and 1.07(34) respectively. The term "probable cause" denotes the standard legal meaning in accordance with national and Texas case law. This definition includes "reasonable grounds" and other synonymous terms.

The definition of "breach of peace," no longer a specified crime under Texas law, combines and adapts the views of the court in Woods v. State, 152 Tex. Crim. 338, 213 S.W.2d 685 (1948), with more basic language. The definition includes the traditional concept of that offense, although it omits outdated language. See also Head v. State, 131 Tex. Crim. 96, 96 S.W.2d 981 (1936). Similarly, "in the presence of" is defined as in Texas case law. The Texas Law Enforcement Handbook 13-15 (1976 rev. ed.). The definition of a "continuing offense" has particular applicability to offenses which breach the peace. Also, as defined, something may occur "in the presence of" an officer but outside his "view".

The phrase "close pursuit" applies solely to interstate pursuit into Louisiana in accordance with article 231 of the Louisiana Code of Criminal Procedure. Official Revision Comment (b) to article 231 explains

this term as follows:

> In adopting the Uniform Act [on the Fresh Pursuit of Criminals Across State Lines], Louisiana employed the term "close pursuit" in lieu of the Uniform Act's "fresh pursuit." The definition of "fresh pursuit" in section 5 of the Uniform Act specifically includes "fresh pursuit as defined by the common law," and further states that it "shall not necessarily imply instant pursuit, but pursuit without unreasonable delay." Louisiana's more limited authorization of arrest by a foreign peace officer who is in "close pursuit" of the criminal meets the needs of the normal situation, and provides a test which may be understood without resort to the common law or to artificial definition.

Therefore, this chapter adopts a strict definition in light of both the limited intent expressed in Comment (b) and the apparent shortage of clarifying case law.

The definition of "fresh pursuit" comports with the statutory definition of that term as set forth by the remainder of the states which share a border with Texas. See Arkansas Code of Criminal Procedure section 43-513(1); New Mexico Code of Criminal Procedure section 31-2-5; and Oklahoma Code of Criminal Procedure section 225. These statutes, and Rule 5:1.08, are consistent with the common law definition. The definition also conforms with the holding in Schindelar v. Michaud, 411 F.2d 80 (10th Cir.), cert. denied, 396 U.S. 956 (1969). That case applied a Colorado statute which incorporates the same version of the Uniform Act on the Fresh Pursuit of Criminals Across State Lines enacted by Arkansas, New Mexico, and Oklahoma. In applying this definition of fresh pursuit, the court held that an officer who departed from the scene of the crime for approximately 45 minutes, in order to get help, could still engage in "fresh pursuit." The court, in dicta, noted that the cases stood for the proposition that "considerable time may be needed to procure necessary assistance."

Additionally, when faced with determining whether or not officers engaged in fresh pursuit of a suspect, a court will rely primarily on the reasonableness of the officer's action. For example, in Parker v. State, 372 S.W.2d 320 (Tex. Crim. App. 1963), an officer, at about 11:30 p.m., received a man's billfold allegedly found in an automobile in which a rape had occurred. The officer found information in the suspect's billfold giving an out-of-town address, and other papers indicating the suspect's local place of employment. The officer proceeded to the suspect's place of employment, where he obtained the suspect's local address and the address of his brother-in-law. The officer arrested the suspect, without a warrant, in his brother-in-law's apartment at 1:15 a.m. The Court of Criminal Appeals sustained this warrantless arrest and upheld the admissibility of evidence found in the search made incident to that arrest.

SECTION TWO: GENERAL PROCEDURE

5:2.01. An officer who has reasonable time and opportunity to obtain an arrest warrant shall do so. An officer shall not make a warrantless arrest except as provided in these rules or otherwise expressly authorized by statute. Although the authority to arrest without a warrant is entirely statutory, an officer should exercise restraint in resorting to this authority.

The majority of arrests occur without warrants and, as a result, receive no prior judicial scrutiny. The US Supreme Court has declined to transform the widespread judicial preference for the use of arrest warrants into a constitutional requirement. United States v. Watson, 423 U.S. 411, 423-24 (1976). See Payton v. New York, 100 S. Ct. 1371 (1980). Thus, because the decision to arrest without a warrant ultimately flows from the discretion of the individual officer, each police department should offer guidance in order to promote uniformity and prevent abuse of that discretion.

As noted, in Texas the authority to arrest without a warrant derives entirely from statute. E.g., Giacona v. State, 164 Tex. Crim. 325, 298 S.W.2d 587 (1957); Heath v. Boyd, 141 Tex. 569, 175 S.W.2d 214 (1943). Any officer who acts outside his authority in making such an arrest subjects himself to both civil and criminal liability. See Tex. Penal Code Ann. sec. 20.02(d).

The primary Texas statutes authorizing warrantless arrests appear in the Code of Criminal Procedure articles 14.01 through 14.06. These statutes can be divided into two categories: those which authorize warrantless arrests for offenses committed (1) in the officer's presence

or (2) outside his presence. In addition to the provisions of Chapter 14, several miscellaneous statutory provisions expressly confer authority to arrest without a warrant, for example: Tex. Alc. Bev. Code Ann. secs. 101.02, 103.04 (Vernon 1978) (liquor control act violations); Tex. Code Crim. Pro. Ann. art. 8.04 (dispersing a riot); Tex. Code Crim. Pro. Ann. art. 18.16 (preventing consequences of theft); Tex. Code Crim. Pro. Ann. art. 51.13, sec. 14 (authority under Uniform Criminal Extradition Act); and Tex. Rev. Civ. Stat. Ann. art. 6701d, sec. 153 (violation of traffic regulations).

SECTION THREE: PROBABLE CAUSE FOR ARREST WITHOUT WARRANT

5:3.01. The officer shall employ his special training, skills, and experience as a peace officer in determining whether probable cause exists.

5:3.02. The officer may consider all lawfully acquired information available to him at the moment of the arrest regardless of its admissibility at trial.

5:3.03. The officer shall record all the facts and surrounding circumstances available to him at the time of the arrest.

5:3.04. Though an officer shall not rely solely on wholly subjective and undefined suspicion or speculation to justify an arrest, he may use these factors as an initial step toward establishing probable cause to arrest.

5:3.05. Generally suspicious conduct not suggesting a specific kind of criminal conduct is alone insufficient to establish probable cause to arrest. In order to establish probable cause, an officer may further investigate his suspicions.

5:3.06. An officer may have probable cause to arrest a person without a warrant if he knows that such person committed an offense, even if the officer does not know which particular offense was committed. To establish probable cause the officer does not need proof beyond a reasonable doubt that a person has committed an offense. Probable cause only requires that amount of evidence which reasonably shows that a person probably or most likely committed an offense.

5:3.07. When an officer relies on information from an informant to establish probable cause, the officer must be able to articulate:

(a) His reason(s) for believing the informant to be reliable, and
(b) The underlying circumstances from which the informant concluded that a particular person committed an offense.

5:3.08. An officer's good faith will not alone justify an invalid arrest.

5:3.09. If circumstances permit, an officer shall seek some corroboration or confirmation of the information he receives from a victim or witness. For example:

(a) The officer shall determine whether the victim or witness was able to observe and remember what happened.
(b) Visible results of an offense can help confirm whether an offense occurred.

(continued)

Where the circumstances suggest that the victim's or witness' allegations may be untrue the officer shall investigate further before making an arrest without a warrant. The more doubt an officer has about the victim's or witness' veracity, sincerity, or ability to perceive, the more he will need to confirm the information.

5:3.10. An officer may make an arrest without a warrant when requested to do so by another officer, provided that the arresting officer has no reason to doubt that the officer requesting the arrest has probable cause to make that arrest.

The requirements to establish probable cause in connection with warrantless arrests are at least as stringent as those applicable to the issuance of arrest warrants. Whiteley v. Warden, 401 U.S. 560 (1971); Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972). Unfortunately, since no fixed formula exists for determining the existence of probable cause, each case must be judged on its own particular facts. Wong Sun v. United States, 371 U.S. 471 (1963). In discussing probable cause in Brinegar v. United States, 338 U.S. 160, 175 (1949), the Supreme Court stated:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . .
>
> . . . Probable cause exists where "the facts and circumstances within their (the [arresting] officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 [1925]. . . .

Though probable cause is defined in terms of what a reasonable person would believe, an officer can evaluate the existing facts in light

of his total police experience. E.g., Terry v. Ohio, 392 U.S. 1 (1968); Baity v. State, 455 S.W.2d 305 (Tex. Crim. App. 1970). Oftentimes, conduct which appears innocent in the eyes of an untrained observer may appear otherwise to an experienced officer.

An officer may consider numerous factors which determine whether he has probable cause to arrest, but he must consider them together and in the context of the total situation. These factors may include:

(a) Suspicion, rumor, gossip;

(b) A person's general reputation;

(c) A person's criminal record;

(d) A person's appearance, statements, and conduct;

(e) A person's furtive actions or flight at the approach of strangers or officers;

(f) The high crime rate in a particular place or area, recent criminal activity in a particular area or place;

(g) The possession, disposal, or concealment of an article; the attempt to dispose of or conceal an article;

(h) Information provided by a victim, witness, or informer;

(i) Official information received from other officers or through official channels; and

(j) Direct observation of an offense in the view or presence of the officer.

With the exception of the direct observation of an offense, the presence of any one factor alone is rarely sufficient to justify an arrest.

An arrest must be based on what the officer knows at the time of the arrest and cannot be justified by what he discovers afterwards. Beck v. Ohio, 379 U.S. 89 (1964). Neither should it be based on information which was unlawfully obtained. E.g., Texas v. Gonzales, 388 F.2d 145

(5th Cir. 1968); Wong Sun v. United States, 371 U.S. 471 (1963). However, the officer is not limited to evidence which would be admissible at trial but may properly consider factors such as a person's reputation and prior criminal record. Baity v. State, 455 S.W.2d 305 (Tex. Crim. App. 1970).

Rule 5:3.04 states that an officer may not arrest on the basis of a hunch or mere suspicion. Brinegar v. United States, 338 U.S. 160, 175 (1949). Probable cause, an objective test, requires some substantial and concrete basis for the officer's belief that the person arrested committed a crime. Mere suspicion is so subjective and insubstantial that it cannot be articulated or rationally examined. Even reasonable suspicion will not support an arrest, although it will justify an investigatory stop which may lead to information sufficient to establish probable cause. (See the rules in Chapter Nine on Stop-and-Frisk.) Probable cause also requires more than the existence of suspicious conduct. See, e.g., Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), aff'd, 446 F.2d 904, cert. denied, 404 U.S. 1062 (1972); Talbert v. State, 489 S.W.2d 309 (Tex. Crim. App. 1973); Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972); Baker v. State, 478 S.W.2d 445 (Tex. Crim. App. 1972). (The Baker, Brown, and Talbert cases are discussed further in Chapter Nine on Stop-and-Frisk, Commentary to Section Four.)

As stated in Rules 5:3.04 and 5:3.05, rather than jeopardize his case with an illegal arrest, an officer who is unsure whether probable cause exists should continue his investigation or await new developments. Information, though insufficient to establish probable cause, can frequently lead to new facts which will justify and support an arrest.

Rule 5:3.05 sets forth the amount of evidence needed to establish probable cause. This chapter rejects the standard which limits arrest to situations where it is "more probable than not" that a particular person has committed a crime. See the similar result of the American Law Institute (ALI) A Model Code of Prearraignment Procedure sec. 120.1 and Commentary at 294-96 (1975). In place of that standard, Rule 5:3.09 requires independent judgment of the validity of each arrest: i.e., whether a reasonably prudent officer would believe that the person arrested had committed a crime. Thus, two or more persons (not accomplices) may be arrested for the same crime, provided probable cause supports each arrest. For example, the officer sees A and B bending over dead man D. A and B each accuse the other of murdering D. Although the officer cannot determine if either or both of them did the killing, he has probable cause to arrest each of them. He may therefore arrest either one or both. Restatement (Second) of Torts section 119, illustration 2 (1965). Similarly, two officers may each unknowingly make a separate arrest for a single crime.

Although the police may arrest more than one person for a particular crime, "dragnet" arrests remain illegal. There is no magic maximum number of persons who may be arrested for a single offense; the only test is whether probable cause justifies each arrest.

Under Rule 5:3.06 an officer may make an arrest even though he cannot determine the particular felony which has been committed. In part this distinction reflects the difference between the decision to arrest and the decision to charge. An officer should not be required to know all the legal

subtleties involved in determining with which offenses the offender should be charged. Equally important, the officer may have to take immediate action without yet knowing exactly what offense has occurred. E.g., Bell v. United States, 280 F.2d 717 (D.C. Cir. 1960). See also, Dodd v. Beto, 435 F.2d 868 (5th Cir. 1970), cert. denied, 404 U.S. 845 (1971).

Rule 5:3.07 concerns the reliability of information received by an officer from an informant. Rule 5:3.07 reflects the Supreme Court's holding in Spinelli v. United States, 393 U.S. 410 (1969), which extended the "two-pronged Aguilar test" (Aguilar v. Texas, 378 U.S. 108 (1964)) to cases where hearsay plus corroboration can establish probable cause. Consequently, whether the officer relies on hearsay alone or hearsay plus corroboration, he must be able to explain in detail how the informant previously has proved his reliability. Pertinent considerations include: whether the officer has relied on the informant's information on numerous past occasions and whether his information proved accurate and if such past information has led to convictions. The mere fact that the officer relied on the information in the past does not establish the informant's reliability. Draper v. United States, 358 U.S. 307 (1969).

The second requirement in Rule 5:3.07 and in Spinelli, that the officer be able to state how the informant knows what he told him, applies to both the commission of the offense and the identity of the perpetrator. If the information has sufficient detail to permit verification, such specificity may be used to demonstrate that the informant has obtained his information in a reliable way. Stoddard v. State, 475 S.W.2d 744 (Tex. Crim. App. 1972).

An officer may also receive information from an alleged victim or witness (Rule 5:3.09). Here too, the officer must be concerned with the

reliability of the information he receives. The officer should take precautions to ensure that he does not make an arrest based on information received from a person who did not observe, cannot remember, or cannot adequately describe what happened. Similarly, the officer should have some concern about the veracity of the accuser. He can frequently confirm at least the commission of a crime because the results of the offense are directly observable. When such confirmation is not available, an interview with the alleged victim or witness may suffice. However, where the circumstances suggest that the story may be fabricated, further investigation is required, particularly when the victim or witness may have a motive for making a false accusation. Of course, in certain situations where an officer must take immediate action, verification becomes unnecessary. For example, an officer responding to a call reporting a crime in progress would be justified in arresting a person who is fleeing from the scene and has been identified by bystanders as the culprit.

An arresting officer who does not have probable cause for arrest can rely on a radio broadcast which requests a specific arrest; he can assume that the officer requesting the arrest had probable cause to justify it. Muggley v. State, 473 S.W.2d 470 (Tex. Crim. App. 1971). When one officer makes a warrantless arrest (Rule 5:3.10) at the request of another officer, the validity of that arrest turns on whether the information known to the requesting officer is sufficient to establish probable cause. Miller v. State, 442 S.W.2d 340 (Tex. Crim. App. 1969).

SECTION FOUR: OFFENSES COMMITTED IN THE OFFICER'S PRESENCE

5:4.01. An officer acting within his jurisdiction may, without a warrant, arrest an offender for any offense committed in the presence of that officer.

5:4.02. The officer shall obtain an arrest warrant where the offender is committing a continuing misdemeanor in the presence of the officer but the officer has previously acquired the facts establishing probable cause over a period of time.

5:4.03. While outside his jurisdiction but within the state, an officer may, as a private citizen, arrest a person without a warrant for a felony or for an offense that breaches the peace which occurs in his presence or view.

An officer's authority to arrest without a warrant for offenses committed in his presence derives from Texas Code of Criminal Procedure article 14.01(b). Rule 5:4.01 restates this authority.

In accord with the definition of "in the presence of" (Rule 5:1.08), an officer need not actually see the offense being committed. Rather, he need only obtain direct knowledge of the offense through any of his senses. Clark v. State, 117 Tex. Crim. 153, 35 S.W.2d 420 (1931). However, the officer cannot just be in a position where he might have detected the offense had it come to his attention; he must actually detect the offense during its commission. U.S. Fidelity & Guar. Co. v. Henderson, 293 S.W. 339 (Tex. Civ. App.--Texarkana), rev'd on other grounds, 298 S.W. 404 (1927); Russel v. State, 37 Tex. Crim. 314, 39 S.W. 674 (1897).

The essential factor in determining the legality of a warrantless arrest for an offense allegedly committed in the officer's presence is not whether the person arrested is convicted of the offense, but whether the officer had

probable cause to believe that the person was committing an unlawful act. Hardin v. State, 387 S.W.2d 60 (Tex. Crim. App. 1965); Henderson v. State, 422 S.W.2d 175 (Tex. Crim. App. 1967). The officer must know that an offense was being committed; he must also be able to identify the person he arrested as the one he observed committing it. Morris v. Kasling, 79 Tex. 141, 15 S.W. 226 (1890); Cortez v. State, 47 Tex. Crim. 10, 83 S.W. 812 (1904). With respect to continuing offenses dealt with in Rule 5:4.02, no reason generally exits to arrest without a warrant, since the officer knew the facts long enough to obtain one.

Rule 5:4.03, which also derives from Texas Code of Criminal Procedure article 14.01, recognizes that an officer who is outside his jurisdiction (but still in Texas) has the same authority as any citizen to arrest without a warrant for offenses committed within his presence. Consequently, he may make such an arrest only if the offense constitutes a felony, a breach of the peace, or falls within a specific statute.

SECTION FIVE: FRESH PURSUIT AND WARRANTLESS ARREST

5:5.01. This section discusses fresh pursuit (hot pursuit) as a concept relating to warrantless arrest. Chapter Eleven on Emergency Driving discusses "high-speed vehicular pursuit."

5:5.02. A peace officer may, in accordance with this chapter, pursue an offender and arrest him without a warrant even:

(a) If the officer is outside his normal jurisdiction and/or
(b) After the offense has occurred.

5:5.03. An officer may, without a warrant, pursue an offender who is escaping from the officer's presence only in the following cases:

(a) When the officer has probable cause to believe that the offender has committed a felony, or
(b) When the offender has, in the presence of the officer, committed a felony or misdemeanor which involves a breach of the peace, and a reoccurrence or continuation of the offense is likely.

5:5.04. A peace officer shall not engage in fresh pursuit if at any time he delays such pursuit for an unreasonable amount of time, or for an extraneous reason.

5:5.05. An officer may use fresh pursuit in order to arrest an offender anywhere within Texas. (Chapter Eleven, which covers Emergency Driving, discusses high-speed vehicular pursuits and fresh pursuit into neighboring states.)

5:5.06. When an officer apprehends an offender outside the officer's own jurisdiction or outside the jurisdiction where the offense occurred, he shall take the person arrested, without unnecessary delay, before the nearest available magistrate of the county in which he made the arrest.

"Fresh pursuit" (also known as "hot pursuit") is a legal concept without any inherent "speed" factor; thus, fresh pursuit may occur on foot, on bicycle, or via any other mode of transportation. Chapter Eleven, on Emergency Driving, incorporates the rules and policies of "high-speed vehicular pursuits."

In general, the law of fresh pursuit authorizes a peace officer to make a delayed arrest, after the commission of an offense, even at a place outside the officer's normal legal jurisdiction. In order to come within the ambit of these rules, an officer must first have had authority to arrest the offender at the time and place of the commission of the offense. Fresh pursuit rules then determine when the arrest may be made at a later time and in a different place. In addition, in some cases, fresh pursuit itself may sometimes be an "exigent circumstance" authorizing arrest and search without a warrant. See Warden v. Hayden, 387 U.S. 294 (1967). Texas has no clear statutory authority for fresh pursuit. Therefore, case law provides much of the authorization. All the rules in this chapter assume that the officer has grounds to arrest the offender before he engages in fresh pursuit.

Rule 5:5.04 addresses the inherent factor of delay in making an arrest after a fresh pursuit. Normally, without a warrant, an officer must make an arrest without delay at the time he first detects the offense. (See Section Seven of this chapter which discusses delay in making an arrest.) This rule emphasizes that the officer cannot "unreasonably delay" the initiation or continuance of the pursuit. While pursuit need not be instantaneous or immediate under the common law definition, there must be good cause for the delay in initiating pursuit. This is especially true in cases of breach of the peace.

Texas law clearly prohibits a warrantless arrest for a breach of the peace if there is any delay at all between the termination of the offense and the attempted arrest, even if the breach of the peace occurs in the

officer's presence. The officer may not make the arrest if the offender has stopped his illegal act and fled, if there is no danger of a continuation or reoccurrence of the breach of the peace. Woods v. State, 213 S.W.2d 685 (Tex. Crim. App. 1948). As stated in Woods (at 688):

> . . . [T]he right . . . to arrest without warrant for a breach of the peace committed in his presence or view is limited to the time the offense is committed or while there is continuing danger of its renewal and does not include the right to pursue and arrest for the purpose of insuring the apprehension or future trial of the offender.

Rule 5:5.03(b) incorporates this standard. The presence of a felony lessens the strictness of the limitation regarding delay. The Texas statutory authority (Code of Criminal Procedure art. 14.04) applicable to felony arrests provides:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

Thus, an officer can pursue a warrantless arrest only if he has reason to believe that the offender is about to escape. Chivers v. State, 481 S.W.2d 125 (Tex. Crim. App. 1972); Green v. State, 470 S.W.2d 901 (Tex. Crim. App. (1971). Article 14.04 uses the language "representation of a credible person" which Texas courts have interpreted as substantially equivalent to "reasonable grounds to believe." See Brown v. State, 481 S.W.2d 106 (Tex. Crim. App. 1972). Code of Criminal Procedure article 14.01 authorizes arrest for a felony or a misdemeanor committed in the officer's presence. Thus, articles 14.01 and 14.04, together with their interpretive cases,

support Rule 5:5.03. Rule 5:5.05 deals with the issue of how far the pursuit may continue. Fresh pursuit, where authorized, may extend at least to the state line. In some cases, as prescribed in Chapter Eleven, it may continue beyond the state line. The authority for Rule 5:5.05 derives from statutes and cases defining the authority to arrest in Texas. The leading case, Minor v. State, 153 Tex. Crim. 242, 219 S.W.2d 467, 472 (1949), holds that all acts from the time the pursuit begins until the offender is in custody "constitute part and parcel of the act of arrest." Thus, the court (at 470) stated:

> . . .[W]here a police officer has the right to arrest without warrant for an offense committed within the confines of his city and initiates a pursuit of the malefactor, being in immediate pursuit, he can continue such pursuit, although such continuance leads him outside the corporate limits of the city, if necessary, his rights being the same as those of the sheriff in such event.

Dicta in Minor seems to imply that pursuit could only go as far as the county line. However, the court also observed that it would be "illogical" to allow a criminal to defeat the law simply by crossing an imaginary line dividing two political subdivisions of the state, when the authority for the arrest emanates from the state itself." The court also noted that there is "nothing in [the law of Texas] to fix the limit of the pursuit in Texas" and that "[i]t would be a deterrent to law enforcement if we should fix one." Minor at 472 (Beauchamp, J.). The accepted interpretation of Minor is that it authorizes pursuit throughout the state.

Rule 5:5.06 implements Code of Criminal Procedure article 14.06 which provides:

> In every case enumerated in this Code, the person making the arrest shall take the person arrested or have him taken without unnecessary delay . . . before some magistrate of the county where the arrest was made. . . .

This requirement must be complied with in order to protect the accused's rights, and to avoid jeopardizing the state's case against the person arrested. See Code of Criminal Procedure article 15.17; McNabb v. United States, 318 U.S. 332 (1943); Ward v. Texas, 316 U.S. 547 (1942).

SECTION SIX: OFFENSES COMMITTED OUT OF THE OFFICER'S PRESENCE

5:6.01. An officer shall obtain an arrest warrant whenever he has reasonable time and opportunity to procure one. An officer need not obtain an arrest warrant if it would result in:

(a) The loss or destruction of evidence,
(b) The escape of the offender, or
(c) Potential bodily injury to the officer or others.

5:6.02. An officer is authorized to make a warrantless arrest of a person when:

(a) A magistrate verbally orders the officer to arrest the person if that person has committed, in the presence of the magistrate, a felony or an offense which breaches the peace.
(b) The officer finds a person in a suspicious place and under circumstances that give the officer probable cause to believe that such person:

(1) Has committed a felony,
(2) Has committed an offense which is a breach of the peace and which will likely continue,
(3) Threatens to commit some offense against the law, or
(4) Is about to commit some offense against the law.

(c) A credible person informs the officer that a particular person has committed a felony (not in the presence of the officer) and:

(1) The officer has probable cause to believe that a particular person committed a felony, and
(2) The offender is about to escape, and
(3) There is no time to procure an arrest warrant.

Rule 5:6.01 expresses the overriding policy favoring the use of arrest warrants for offenses committed out of the officer's presence or view. Foremost among the reasons which support this policy is the fact that obtaining a warrant interposes the judgment of a neutral and detached judicial officer into the arrest process. This protects everyone by providing an objective predetermination of probable cause. Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471 (1963).

The rule does recognize that certain situations arise which would make it absurd to require the officer to obtain a warrant before making an arrest. For instance, if he sees an offender who appears likely to escape if not arrested immediately, he should not forego making the arrest because he did not have a warrant.

In addition to certain miscellaneous statutes, such as those listed in the Commentary to Section One, Texas has three statutory provisions (Tex. Code Crim. Pro. Ann. arts. 14.02, 14.03, and 14.04) which give an officer authority to arrest without a warrant for offenses not committed in his presence. Since these three provisions are not mutually exclusive, more than one of them may authorize a single arrest.

Rule 5:6.02(b) is based on Code of Criminal Procedure article 14.03 which provides:

> Any peace officer may arrest, without warrant, persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws.

This statute does not authorize an arrest on the basis of suspicion alone. An officer can make an arrest pursuant to this statute only where the circumstances amount to probable cause to believe that a felony or breach of the peace has been committed. Brown v. State, 447 S.W.2d 908 (Tex. Crim. App. 1969).

Rule 5:6.02(c), which restates Code of Criminal Procedure article 14.04, permits the officer to make a warrantless arrest if, in addition to having probable cause to believe that a felony has been committed, he believes that the offender is about to escape. This provision has

been subject to considerable interpretation by the courts. A "credible person" is one "worthy of belief." Beeland v. State, 149 Tex. Crim. 272, 193 S.W.2d 687 (1946). The "offender" must be named by the credible person or be accurately described so that the officer can arrest the proper suspect. Cortez v. State, 44 Tex. Crim. 163, 69 S.W. 536 (1902). For example, in Chivers v. State, 481 S.W.2d 125 (Tex. Crim. App. 1972), the court held that a description such as "a Negro male with no upper teeth and a fuzzy looking moustache" was adequate.

Without the element of escape, the officer must get a warrant. Chivers v. State; Green v. State, 470 S.W.2d 901 (Tex. Crim. App. 1971). If he does not know or have information that the offender is about to escape, the officer may not proceed under this provision. This rule complies with the limited "emergency" exception to the arrest warrant requirement as enunciated in Payton v. New York, 100 S. Ct. 1371 (1980). Payton held that, absent exigent circumstances, the fourth amendment prohibits the police from making a warrantless, nonconsensual entry into a suspect's private residence to make a routine felony arrest.

Whether there is "time to procure a warrant" is determined by considering the time of day, day of the week, and the availability of a magistrate at the moment in question. The legislature intended that article 14.04 apply only where the officer makes the arrest in fresh pursuit or close in time to the commission of the felony. Whenever the officer has the time and opportunity to obtain a warrant, such as during a delay, he must do so. Local ordinances may also provide direction in this area. See, e.g., Laube v. State, 417 S.W.2d 288 (Tex. Crim. App. 1967).

SECTION SEVEN: SELECTIVE ENFORCEMENT

5:7.01. Except as to felonies, an officer does not have to make an arrest every time he has probable cause to do so. In some circumstances, and for good cause consistent with the public interest, he may decline to arrest notwithstanding the existence of probable cause to arrest.

5:7.02. When an officer declines to make an arrest, despite probable cause, he should inform the suspect:

(a) That his conduct has come to official attention, and
(b) That he will be arrested if he continues or repeats such conduct.

5:7.03. An officer shall be able to articulate the reason(s) for his failure, despite the presence of probable cause, to arrest a particular suspect.

5:7.04. In determining whether to arrest, the officer shall not consider the race, creed, religion, or any other arbitrary classification of the suspect or victim.

5:7.05. An officer shall not arrest anyone for conduct which the officer has provoked.

5:7.06. An officer shall not make an arrest as a pretext for conducting a search or for any other reason.

Notwithstanding Code of Criminal Procedure article 2.13, which mandates a peace officer to "arrest offenders without warrant in every case where he is authorized by law," the Model Rules recognize that full enforcement of all laws, regardless of its desirability, is impossible. Therefore, rather than continue to leave the entire arrest decision to the unguided discretion of the individual officer, these rules provide the officer with some basic factors to consider in determining the appropriate course of action in each case. These rules do not eliminate the officer's discretion; they structure it, make it more uniform, and facilitate review.

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Each department may wish to implement a formal method of recording and/or reviewing these decisions.

The American Bar Association (Special Committee on Standards for the Administration of Criminal Justice), in Standards Relating to the Prosecution Function and the Defense Function, section 3.9 (Approved Draft, 1971), set forth guidelines for the exercise of discretion by the prosecutor in the charging decision. Rule 5:7.01, which presumes the existence of probable cause to arrest, draws on those standards and proposes to guide the officer in determining whether he should nevertheless refrain from making a misdemeanor arrest. For example, an officer may properly consider the following factors in determining whether to arrest:

(a) If the victim expresses no serious interest in prosecution because:

(1) He desires restitution only,
(2) He has a continuing relationship with the suspect, or
(3) He is in a domestic or family-type relationship with the offender.

(b) If the suspect can be referred to another agency which is better equipped to deal with the problem;

(c) When an adequate civil remedy is available to the injured party; and

(d) Whether arrest would result in unnecessary harm to the victim or offender which would outweigh the risk of nonarrest.

In essence, the rule provides the officer with a "but for" test, i.e., he shall arrest "but for" the existence of one or more of these considerations. Subparagraph (a) deals with three of the most common situations where the victim, usually the complainant, manifests a reluctance to prosecute despite the fact that he may have summoned the police. The victim of a minor property crime is often interested in restitution only, particularly in shoplifting cases involving items of small value. In

such cases, the officer may properly decide not to arrest. Subparagraph (a)(2) contemplates a situation (such as an employer-employee or landlord-tenant relationship) in which the disputants may best resolve their differences by terminating their relationship or seeking a civil remedy. Family-type relationships, are discussed in depth in Chapter One on Domestic Disturbances.

Subparagraph (d) contemplates a situation where there is little likelihood that the suspected misdemeanant will engage in further criminal conduct, and arrest would unduly harm him because of his age, personality, or other individual characteristics. Similarly, in certain cases, arrest and prosecution might cause the victim or his family great stress or embarrassment by requiring degrading testimony in court. (When time permits and an officer is uncertain whether arrest is appropriate under such circumstances, he should consult with his superiors or with the prosecutor before obtaining an arrest warrant.) As regards an informant's immunity, a determination of which criminal activities will be tolerated in exchange for information should be made on a departmental basis.

An officer should also consider countervailing factors in order to determine whether to make a misdemeanor arrest, even in a situation where he usually would not arrest. For example, an officer should consider:

(a) If the suspect is under investigation for another offense and in-custody investigation is desirable,

(b) If arrest is necessary to safeguard witnesses or evidence,

(c) If arrest is necessary to prevent the suspect from warning his conspirators,

(d) When arrest is necessary to protect the offender from harm,

(e) When arrest is necessary to promote compliance with the law.

Subparagraph (a) refers only to those instances in which an officer arrests a suspect primarily to have an in-custody investigation of that suspect in connection with another offense in which he is believed to be involved. However, an officer should not make even a legal arrest as a subterfuge to a search for evidence of an unrelated crime, since a court will not admit the proceeds of an incidental search if the arrest (even though legal) occurred as a mere pretext for conducting the search. United States v. Lefkowitz, 285 U.S. 452 (1932); Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968). Of course, without a bona fide arrest, both the arrest and the ensuing search are illegal.

Subparagraph (b) enables the officer to arrest a suspect who appears likely to harm himself or be harmed by others if he is not taken into custody. For example, in a situation where the officer would normally not arrest a suspect for public intoxication, he might do so because the suspect appears unable to get home safely on his own. While subparagraph (e) provides that the officer may arrest a person in order to promote compliance with the law, it does not sanction "spite arrests," where a person is arrested merely because he has incurred the disfavor of a particular officer. Criticism, a refusal to obey, or a rude reply to an officer are not necessarily attacks on his authority, and the officer should refrain from arresting for such conduct alone.

Rule 5:7.04 concerns the impact on selective enforcement of the constitutional guarantee of equal protection of the laws. The United States Supreme Court has said that, although equal protection covers

the enactment of fair and impartial legislation and extends to the application of these laws, the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." However, the selection may not be based upon an "unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456 (1962).

Each police department should formulate and promulgate policies concerning whether or not to arrest in specific situations involving specific offenses. A similar recommendation was made by the President's Crime Commission in The Challenge of Crime in a Free Society: The Police 104; support for the concept is gradually increasing. See, e.g., K. C. Davis, Discretionary Justice (1971); National Advisory Commission on Criminal Justice Standards and Goals, Report on Police, Standard 1.3 (1973).

A selective enforcement policy developed at the police administrative level would be more visible and better subject to review than the present informal practices of individual officers. Such a policy should be formulated through established departmental rulemaking procedures. The following factors merit consideration in determining which offenses should or should not be enforced:

(1) The amount of available law enforcement resources,

(2) Ambiguity in statutory language which makes it unclear whether certain conduct is proscribed, and

(3) History of nonenforcement of certain statutes with community acquiescence.

SECTION EIGHT: DELAY IN MAKING AN ARREST

5:8.01. An officer shall obtain an arrest warrant in order to arrest someone who committed a misdemeanor in the presence of that officer, if that officer did not immediately make the arrest:

(a) At the time the misdemeanor occurred, or
(b) While there was a continuing danger of a renewal of the misdemeanor, if it was a breach of the peace.

5:8.02. An officer shall obtain an arrest warrant if a felony is committed in his presence and he fails to arrest the offender within a reasonable time, under the circumstances, after the offense occurred. A delay in making the arrest is reasonable when:

(a) Necessary to overcome resistance by the offender,
(b) Necessary for the safety of the officer or others, or
(c) The officer is in fresh pursuit of the offender.

While a delayed arrest is not necessarily improper and may at times be good police practice, an officer should carefully weigh the consequences when considering delay. The United States Supreme Court addressed the issue of delay in Hoffa v. United States, 385 U.S. 293, 310 (1966):

> . . . There is no constitutional right to be arrested. [Footnote omitted.] The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect. . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause. . . .

However, delay in obtaining an arrest warrant may deprive a defendant of a constitutional right by "showing that the delay . . . was prejudicial or part of a deliberate, purposeful and oppressive design for delay." United States v. Wilson, 342 F.2d 782, 783 (2d Cir. 1965).

Rule 5:8.01 provides that an officer may not make a warrantless arrest for a misdemeanor committed in his presence if there is any delay between the termination of the offense and the attempted arrest. Moreover, if the offense is a breach of the peace, he may arrest without a warrant only as long as there is a continuing danger of its renewal; he also may not pursue and arrest in order to ensure the apprehension or future trial of the offender. Woods v. State, 152 Tex. Crim. 338, 213 S.W.2d 685 (1948). Thus, if the offender has stopped his illegal act and fled, and there is no danger of its renewal, the officer may not arrest him without a warrant.

While the rules do not prohibit delay in making an arrest for a felony committed in the officer's presence, an officer who does delay may risk departmental discipline or civil liability if he fails to obtain a warrant when he had reasonable time and opportunity to do so. Generally, when delay does not result from exigent circumstances a warrant will be required. Thus, if an officer is diverted to other matters or delays in order to obtain more evidence, he must obtain a warrant. If, however, he delays in order to plan strategy or await assistance, he could properly make a warrantless arrest. Delay may also have an impact on search and seizure since "every time there is a delay in the making of the arrest and there is a search made as incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search." Carlo v. United States, 286 F.2d 841, 846 (2d Cir. 1961).

Rule 5:8.02 requires an officer to obtain a warrant whenever he has reasonable opportunity to do so. Since reasonableness depends upon the

particular circumstances in each case, time may be only one of several criteria. For instance, a magistrate may not be available or the suspect's identity may not be known. Since it would be impossible to anticipate all circumstances in which delay would be reasonable, the rules make no attempt to do so.

SECTION NINE: MISCELLANEOUS

5:9.01. The officer shall ensure that the person arrested knows that he is being placed under arrest. When appropriate, the officer should give the arrested suspect the Miranda warnings. If the suspect is in custodial arrest, an officer cannot question the suspect without first giving the Miranda warnings.

5:9.02. When not in uniform, an officer making an arrest shall display his badge (and/or other suitable identification) and state that he is an officer.

5:9.03. When not impractical, the officer shall inform the person he is arresting of the following factors:

(a) That the officer intends to take him into custody, and
(b) The reason for the arrest.

Impractical circumstances include: e.g., when the person is in the act of committing the offense or fleeing from the scene of the crime or when such disclosure would endanger the officer or imperil the arrest.

5:9.04. The officer may place an unconscious, mentally ill, or injured person under arrest even though such person is incapable of understanding that he is under arrest.

5:9.05. Each arrested person shall be taken without unnecessary delay before a magistrate of the county where the arrest was made.

As an essential element of an arrest, the person arrested must understand that he is being arrested. The test is whether the facts would reasonably create the impression in his mind that he is under arrest. Gilbreath v. State, 412 S.W.2d 60 (Tex. Crim. App. 1967). The rules of this section direct the officer to take several steps in order to ensure that the offender comprehends his situation. However, under certain circumstances such action could be unnecessary or impractical.

Rule 5:9.05 basically restates Texas Code of Criminal Procedure article 14.06 which requires the arrested offender to appear before a magistrate. The arresting officer may either take him there himself or have him taken by another officer or other appropriate person.

Chapter Six

WARRANTLESS SEARCH AND SEIZURE

CHAPTER SIX

WARRANTLESS SEARCH AND SEIZURE

As a general rule, an officer should obtain a search warrant whenever possible. Grounded on fundamental constitutional principles, the use of warrants based on probable cause provides the primary mechanism to balance the goal of thorough and efficient law enforcement against the desire to protect each citizen from unreasonable searches and seizures. The fourth amendment of the US Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The preference for first obtaining a warrant arises "because it places responsibility for deciding the delicate question of probable cause with a neutral and detached judicial officer." J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer 121 (1979). This removes the decision to search and seize "from the sometimes hurried and overzealous judgment of law enforcement officers engaged in the competitive enterprise of investigating crime." Ferdico at 122.

With the decision of Katz v. United States, 389 U.S. 347 (1967), the emphasis of fourth amendment cases shifted from the historical concern with protected places to the modern focus on protecting personal privacy interests. In Katz, the US Supreme Court first enunciated the principle that the fourth amendment protects people, not places. The

FBI had recorded Katz' incriminating conversation by attaching a listening device to the top of a phone booth which Katz was using. The prosecution argued that because they did not physically intrude into the phone booth, they did not violate Katz' constitutional rights. In rejecting this argument the Supreme Court (at 351-52) reasoned:

> . . . What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .

In a concurring opinion, Justice Harlan (at 360) stated that this standard was to be tested by whether or not a person possessed a "reasonable expectation of privacy." In other words, the Constitution only protects a person who exhibits an actual, if subjective, expectation of privacy which society recognizes as reasonable. Since Katz reasonably expected that his conversation was private, the Constitution protects it from government intrusion. Thus, the fourth amendment protects a person from unreasonable searches and seizures in an infinite variety of places, wherever a person has a reasonable expectation of privacy.

Assuming that a particular situation falls within the scope of the fourth amendment, an officer must decide whether the search or seizure is unreasonable, and thus prohibited. The US Supreme Court has often stated the principle that searches and seizures conducted without a warrant are per se unreasonable under the fourth amendment subject to only a few specifically established and well-delineated exceptions. E.g., Katz v. United States, 389 U.S. 347 (1967). Thus, only after determining that the warrant requirement is excused can the search and seizure be judged against the fourth amendment standard of reasonableness: was

the intrusion both properly conducted and properly limited in scope.

This chapter limits its discussion to nonstatutory warrantless search and seizures. For a background discussion, see Warrantless Searches of Persons and Places, a volume in the 1974 Model Rules for Law Enforcement Series by the College of Law of Arizona State University and the Police Foundation. Texas state law does authorize warrantless seizures in certain limited instances. For example, Texas Alcoholic Beverage Code section 103.03 (Vernon 1978) provides for the seizure of illicit alcoholic beverages, and related items, without a warrant. In addition, Texas Code of Criminal Procedure article 18.16 gives all persons the limited "right to prevent the consequences of theft by seizing," without a warrant, any stolen personal property, as long as such person has a "reasonable ground to suppose the property to be stolen."

This chapter also does not discuss "border" searches, administrative and regulatory searches, or "impounded" vehicle or inventory searches. The US Supreme Court has stated that vehicle "inventories pursuant to standard police procedures are reasonable." South Dakota v. Opperman, 428 U.S. 364, 372 (1976). However, if the defendant's arrest has no connection with an automobile, a warrantless search or inventory of that automobile may be unjustified. Stoddard v. State, 475 S.W.2d 744, 749 (Tex. Crim. App. 1972). For a discussion of impounded vehicles, see Texas Law Enforcement Handbook 63-65 (1976 rev. ed.).

An officer who gains custody of allegedly stolen property must follow certain statutorily prescribed disposition procedures. Tex. Code Crim. Pro. Ann. arts. 47.01-.11. Other statutes may apply to other types

of property. E.g., Tex. Code Crim. Pro. Ann. arts. 18.17 (abandoned or unclaimed property), .18 (gambling devices and prohibited weapons), .19 (prohibited weapons).

SECTION ONE: DEFINITIONS

6:1.01. Abandoned Property - Discarded object or property (other than land) over which all persons have fully relinquished ultimate control and any reasonable ownership or privacy interest.

6:1.02. Access Area - The area (also known as the "area of immediate control") into which an arrestee might reach in order to grab a weapon or destructible evidence.

6:1.03. Curtilage - The yard and buildings which relate to domestic activities and surround a residence or dwelling place, generally including garages, sheds, outhouses, driveways, barns, fenced-in areas around the house, and the like. It does not include vehicles, commercial business structures, or open fields surrounding a residence. For apartments or multi-unit dwellings, it also does not include fire escapes, lobbies, or common hallways.

6:1.04. Custodial Arrest - A procedure in which an officer arrests and then transports a person to a detention facility to await bond or an appearance before the magistrate.

6:1.05. Frisk - Jargon referring to a weapons search of a person generally limited to a patdown of his outer clothing to ensure the safety of the officer and others. (For a detailed discussion, see Chapter Nine on Stop-and-Frisk.)

6:1.06. Open Field - Unoccupied land outside the curtilage of any dwelling, usually uncultivated and relatively remote, in which no person has a reasonable expectation of privacy.

6:1.07. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

6:1.08. Reasonable Suspicion - An officer's rational belief, based on credible and articulable information and circumstances, that something may be true (e.g., that an offense may have occurred or that a particular person may have committed an offense).

6:1.09. Seizable Property - All property subject to seizure, including: unlawful weapons, drugs, and other contraband; stolen or embezzled property ("fruits of a crime"); equipment, devices, instruments, and paraphernalia for committing an offense ("instrumentalities"); and evidence of a particular crime ("mere evidence").

In order to aid the interpretation and implementation of these rules, this chapter uses few technical terms. Any word or phrase not specifically defined within this section has the plain meaning of that term to an ordinary and reasonable person. In addition, J. N. Ferdico, in Criminal Procedure for the Law Enforcement Officer (1979), analyzes each of these terms and the legal issues and case law associated with them.

The law on "abandoned property" has a long and complex history. In attempting to assess whether someone has actually abandoned a particular object, an officer should consider (Ferdico at 223-38) at least the following factors:

(a) The nature of the property,

(b) The nature of the place where the officer finds the property,

(c) Indications of an intent to abandon the property,

(d) Reasonable expectation of privacy in the property, and

(e) Lawfulness of police behavior and presence.

Courts never presume abandonment. The prosecution must prove it. Therefore, the officer must be able to articulate specific factors and details which caused him to conclude that property was actually abandoned. This problem often becomes acute in determining whether someone intended to abandon "trash" or "garbage."

For a discussion of "access area," see Section Three of this chapter. A discussion of "curtilage" appears in Chapter Eight on the Execution of Search Warrants. The definition of "custodial arrest" receives a more detailed discussion in Chapter Two on Misdemeanor Field Release by Citation.

The definition of "frisk" summarizes the applicable rules and commentary contained in Chapter Nine on Stop-and-Frisk. A thorough examination of the parameters of "seizable property" appears in Chapter Eight on Execution of Search Warrants. "Probable cause" receives considerable attention in other chapters; for example, see Chapter Five on Arrest Without a Warrant.

The definition of "open field" attempts to summarize a vague and lengthy legal history. In determining whether an area is an "open field," an officer should consider (Ferdico at 209-23) at least whether the land was:

(a) Occupied or included within someone's residential yard,

(b) Cultivated or enclosed by a fence,

(c) Used by the public,

(d) Distant or remote from a dwelling,

(e) Used in connection with a dwelling for family purposes, and

(f) Subject to someone's reasonable expectation of privacy.

As with "abandoned property," because of the trend marked by the US Supreme Court decision in Katz v. United States, 389 U.S. 347 (1967), the approach to analyzing the "open field" doctrine should increasingly emphasize the issue of protecting each citizen's "reasonable expectation of privacy," with less regard to the location of the intrusion.

SECTION TWO: MERE OBSERVATION AND PLAIN VIEW

6:2.01. An officer, without a warrant, may seize any seizable property if the situation satisfies all of the following requirements:

(a) The officer lawfully occupied his vantage point when he observed the property,
(b) The officer can observe and seize the property without unreasonably intruding on any person's reasonable expectation of privacy,
(c) The officer actually observes the property through his senses,
(d) The property actually observed by the officer lies in open view,
(e) The officer immediately realizes that the observed property is "seizable property," and
(f) The observation of the property occurred inadvertently.

When practical, and if the imminent destruction or removal of the property appears unlikely, an officer should obtain a search warrant. If necessary and practical, an officer may guard the property until the search warrant can be executed.

This section draws on the analysis by J. N. Ferdico in Criminal Procedure for the Law Enforcement Officer 171-86 (1979). An officer's observation of the seizable property must have occurred from a location that the officer lawfully occupied (Rule 6:2.01(a)). The officer must often occupy that place as the result of a prior valid intrusion. For example, these areas include any place:

(a) Normally accessible to the public, whether public or private;

(b) Where the officer was lawfully effecting an arrest or search incident to arrest;

(c) Where the officer was lawfully executing a search or arrest warrant (or other court order);

(d) Where the officer lawfully engaged in fresh (hot) pursuit;

(e) Where the officer responded to an emergency; or

(f) To which the officer received valid consent to occupy.

Rule 6:2.01(b) requires the officer to avoid intrusion into any person's reasonable expectation of privacy. For example, peeking (without probable cause) into private buildings, in order to see things that someone has chosen not to expose to the public, would violate his reasonable expectation of privacy. See Texas v. Gonzalez, 388 F.2d 145 (5th Cir. 1968); People v. Triggs, 8 Cal. 3d 884, 891, 506 P.2d 232, 236-37, 106 Cal. Rptr. 408, 412-13 (1973). However, the observation of objects exposed to public view, for instance through an open door or uncurtained window, would not amount to a search. Nevertheless, the method of seizure could violate Rule 6:2.01(b) and require a warrant.

Under Rule 6:2.01(c), "actual observation" means direct and personal observation. The observation can occur through any of the senses, however, it generally occurs visually. Nevertheless, the "sensory observation" does not justify a search. See People v. Marshall, 69 Cal. 2d 51, 57, 442 P.2d 665, 668-69, 69 Cal. Rptr. 585, 588-89 (1973). (Held illegal: after a legal entry into a residence, smell of fresh marijuana led officers to search for and seize a closed bag inside a carton in a closet.) As to the "open view" requirement, an officer may use mechanical or electrical aids to observe the property, without unreasonably intruding someone's privacy expectations. This would include routine use of a flashlight or binoculars. E.g., United States v. On Lee, 274 U.S. 559 (1927); Marshall v. United States, 422 F.2d 185 (5th Cir. 1970).

Thus, the term "plain (open) view" only applies where the officer

has made a justifiable intrusion into a protected area before he sees the seizable items. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Harris v. United States, 390 U.S. 234 (1968). The plain view doctrine supplements a valid intrusion by extending the seizure perimeter to those things within "plain view" from that legitimate vantage point. The plain view doctrine also requires that the sighting be inadvertent (Rule 6:2.01(f)). In other words, an officer cannot plan a warrantless seizure based on "plain view." If he knows in advance the location of the item and intends to seize it, he must have a justification other than plain view. This inadvertence requirement prevents the police from evading the warrant requirement by making an ostensibly legitimate entry into a protected area as a subterfuge for a "plain view" reconnoitering. An officer cannot contrive an "investigatory reconnaissance" or plan a "plain view reconnoitering." Brown v. State, 15 Md. App. 584, 292 A.2d 762, 776 (1972).

SECTION THREE: CONTEMPORANEOUS SEARCH INCIDENT TO CUSTODIAL ARREST

6:3.01. An officer may search a person incident to that person's lawful custodial arrest. An officer shall only conduct a "strip search" (which cannot include a search of body cavities or extend beneath the body surface) if he has probable cause to believe that such a search is necessary to detect seizable evidence of a particular crime or a hidden weapon.

6:3.02. An officer shall confine a search incident to an arrest to the person arrested and that person's access area at the time of the arrest. An officer may also search beyond the arrestee's access area for other persons who the officer has reason to believe endanger the safety of the officers. The search shall be limited to locating and controlling the movements of such persons.

6:3.03. An officer shall not make an arrest, even though legal, as a pretext to search for evidence. An officer should not plan an arrest in order to create a particular opportunity to conduct a search incident to that arrest.

6:3.04. Whenever practical, an officer shall obtain a search warrant whenever he obtains an arrest warrant if he has probable cause to believe that seizable items will be found at the expected place of arrest.

As regards the rights to search incident to an arrest, the courts have not distinguished between an arrest pursuant to a warrant and an arrest made without a warrant. However, for a valid search, the arrest itself must be lawful in all respects. Beck v. Ohio, 379 U.S. 89 (1964). Anything found as a result of a search incident to an unlawful arrest is inadmissible in court. Moreover, an unlawful arrest cannot be validated by what a subsequent search uncovers. The validity of this type of search also turns on whether the search is reasonable in view of the surrounding circumstances. Such a search must be reasonable as to time, place, and the manner in which the police conducted it.

Time. A valid "incident search" must occur substantially contemporaneous with the arrest. While the search will usually immediately follow the arrest, it may precede it, provided the officer quickly makes the arrest based on probable cause he had before the search. The precise sequence of happenings has little importance as long as the arrest and search occurred as close in time to the arrest as practically possible and as part of one continuous event. Thus, courts examine the reasonableness of the search under the circumstances, even if the search occurs long after the arrest.

For instance, in Broussard v. State, 166 Tex. Crim. 224, 312 S.W.2d 664 (1958), the court upheld a stationhouse search of a woman lawfully arrested at her home. The court held that the right to search continued until the police could get her to a matron. Similarly, in Lara v. State, 469 S.W.2d 177 (Tex. Crim. App.), cert. denied, 404 U.S. 1040 (1971), the police apprehended, handcuffed, and cursorily searched the defendant, who (along with several other persons) fled from a house as the officers approached. An officer then left to attempt to apprehend the other fleeing suspects. The officer later returned and took the defendant to the house from which he had fled, gave him his Miranda warnings, and then thoroughly searched him and discovered heroin. The court upheld the search on the grounds that, without allowing the other suspects to escape, the officer could not make more than a cursory search when he first apprehended the defendant. The US Supreme Court expressed a similar approach in United States v. Edwards, 415 U.S. 800 (1974). In Edwards, the Court allowed a delayed search because the officer had good reasons to delay and the duration of the delay related to these reasons.

Place. In Chimel v. California, 395 U.S. 752 (1969), the US Supreme Court limited an incident search to the "access area," within the immediate control of the arrested person, at the time of the arrest. The court concluded that such a limitation met the two legitimate objectives of an incident search: (1) it removed any weapons which the arrestee might use to escape or resist arrest and (2) it prevented the arrestee from destroying or concealing evidence. Thus, in practical terms, the access area consists (at 763) of only that area from which an arrestee "might gain possession of a weapon or destructible evidence." Consequently, the officer may search an unlocked desk or similar container and all property within the person's reach at the time and place of arrest.

Any search beyond the person's access area must have an independent justification; without such justification the search will be invalidated. In Agnello v. United States, 269 U.S. 20 (1925), the US Supreme Court refused to sustain a search of the defendant's house, which was several blocks from where the arrest occurred. Similarly, in Shipley v. California, 395 U.S. 818 (1969), the Supreme Court held that a search of the defendant's home did not occur incident to his arrest since he was arrested as he alighted from his car parked outside the house. In James v. Louisiana, 382 U.S. 36 (1965), the Supreme Court prohibited the search of the defendant's car, which the police located two blocks from the site of the arrest. However, an officer who accompanies an arrestee into his dwelling because, for example, the arrestee wants to change his clothes, may make sufficient search to ensure his safety. The officer could also seize any seizable property he finds in "plain view." E.g., United States

v. Broomfield, 336 F. Supp. 179 (E.D. Mich. 1972); Giacalone v. Lucas, 445 F.2d 1238 (6th Cir.), cert. denied, 405 U.S. 922 (1971).

The Texas Court of Criminal Appeals has construed Chimel as prohibiting "only routine searches of the area beyond the arrestee's reach." Simpson v. State, 486 S.W.2d 807, 810 (Tex. Crim. App. 1972). Consequently, even after safely restraining the arrestee, the officer may look over the premises including other rooms, but not drawers or closets, if he has reason to believe that other persons on the premises might possibly harm him. While he has no right to search for seizable items, he may seize items he finds in plain view during the course of a check for other persons.

In United States v. Chadwick, 433 U.S. 1 (1977), the US Supreme Court dramatically limited police authority, without a search warrant, to search luggage and other personal property seized incident to arrest. In Chadwick, the officers searched a double-locked footlocker, over which they had exclusive control, an hour and a half after they had arrested the defendants. The Supreme Court found no justification for that warrantless search; the situation lacked exigent circumstances and the search occurred remote in time and place from the arrests. The Court (at 15) reasoned:

> . . . Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.
>
> . . . In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property

> to be searched comes under the exclusive dominion of police authority. . . . [Footnote omitted.]

Thus, the warrantless search (at 13-14 n.8) violated the defendant's "legitimate expectation that the footlocker's contents would remain private." See United States v. Jankowski, 470 F. Supp. 464 (W.D. Pa. 1979).

Search of the Person. In United States v. Robinson, 414 U.S. 218, 235 (1973), the US Supreme Court held that a lawful custodial arrest authorizes a full search of the person as an exception to the warrant requirement of the fourth amendment, and also as a "reasonable" search under that amendment. The Court concluded that a full-scale personal search incident to any lawful custodial arrest requires no additional justification. Consequently, the arresting officer has the right to search the person whether or not he has probable cause to believe that the person has weapons; contraband; or instrumentalities, fruits, or evidence of any crime. If in the course of the search the officer discovers any seizable items, he should seize them. See Gustafson v. Florida, 414 U.S. 260 (1973).

In Schmerber v. California, 384 U.S. 757, 769-70 (1966), the US Supreme Court rejected the proposition that the government has an unrestricted right to search the person of the accused as incident to lawful arrest.

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beneath the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

The Court also concluded that an officer ordinarily must procure a warrant for a search beneath the body surface. Nevertheless, it upheld the warrantless, forcible taking of a blood sample from a drunk driver since the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." Had the officer waited for either a search warrant or the driver's consent, the alcohol present in the blood would have dissipated.

However, under Texas law (Rev. Civ. Stat. Ann. art. 6701ℓ--5, sec. 1), a person "shall not be deemed, solely on the basis of his operation of a motor vehicle upon the public highways of this state, to have given consent to any type of chemical test other than a chemical test, or tests, of his breath." Thus, in Texas, a warrantless blood sample cannot be legally taken without the consent of a person suspected of a traffic-related offense. Tex. Att'y Gen. Op. No. H-736 (1975). Texas case law also prohibits warrantless, nonconsensual blood samples in nontraffic offenses. E.g., Smith v. State, 557 S.W.2d 299 (Tex. Crim. App. 1977).

Like the search of a premises, the search of a person may be invalidated because of the way it is done. A search of the arrestee's body might include hair samples, nail clippings, blood, and drugs hidden within the body. Nevertheless, the procedures used in obtaining the evidence must be reasonable and painless. If the method of obtaining the evidence from a person is so brutal and offensive to human dignity as to shock the conscience, the search will not be upheld. Thus, in Rochin v. California, 342 U.S. 165 (1952), the US Supreme Court held

that it was unreasonable to extract morphine from a person's stomach against his will by means of a stomach pump. However, an officer may use reasonable force, such a grabbing the person by the throat and putting his finger in his mouth in order to prevent the person from swallowing evidence. See McLeod v. State, 450 S.W.2d 321 (Tex. Crim. App. 1970). An officer may also have to force a person to submit to an examination. Blackford v. United States, 247 F.2d 745 (9th Cir. 1957).

Although the courts recognize a search incident to arrest as a valid exception to the warrant requirement, when the conditions in Rule 6:3.04 exist, an officer has no valid reason for failing to obtain a search warrant at the time he gets an arrest warrant. An officer's reliance on a search warrant substantially increases the likelihood that the search will be upheld. In addition, a search pursuant to a warrant may have a considerably broader scope than a search incident to an arrest. Moreover, by using a warrant, an officer decreases the possibility of being held civilly liable in the event of a mistake.

Rule 6:3.03 provides that an officer cannot make an arrest, even though legal, as a pretext to conduct an otherwise illegitimate search. Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968). The officer should also be aware that "every time there is a delay in the making of the arrest and there is a search made incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search." Amador-Gonzalez, at 314, quoting from Carlo v. United States, 386 F.2d 841, 846 (2d Cir.), cert. denied, 366 U.S. 944 (1961).

SECTION FOUR: CUSTODY SEARCHES

6:4.01. An arrested person may be searched during the booking process in order to:

(a) Remove any seizable property and items he might use to escape or to injure himself, and
(b) Inventory and protect his property from damage or theft while he is incarcerated.

6:4.02. A penetration of an arrestee's body cavities shall only be conducted based on probable cause and under sanitary conditions by medical personnel in a medically approved manner. All other searches extending beneath the body surface shall be conducted under sanitary conditions by appropriate medical personnel in a medically approved manner. When an officer has probable cause to believe that a person has seizable evidence in his mouth, the officer may use reasonable force to recover the evidence.

The police routinely make a thorough search of the prisoner during the booking process. While both state and federal courts uphold the right of the police to take possession of and inventory clothes and other belongings on the person of an arrestee who is being jailed, some courts do not recognize this jailhouse search as distinct from a search incident to arrest. However, each type of search is based on a different premise. The legality of the jailhouse search rests upon the need to ensure both the efficient operation and administration of the jail and the safety of the prisoner and the officers.

SECTION FIVE: LIMITED SEARCH UNDER EXIGENT CIRCUMSTANCES

6:5.01. In an emergency, an officer may enter a premises or vehicle without a search warrant if he has probable cause to believe that he must make immediate entry to:

(a) Aid persons in immediate danger of death or bodily injury, or
(b) Prevent, if appropriate, the imminent destruction of property.

Prior to involuntary or forced entry, and within the limits allowed by the particular emergency, the officer shall reasonably attempt to obtain voluntary admittance to the premises or vehicle. Following entry, the officer may search the premises or vehicle only to the extent necessary to carry out the purposes of the entry.

6:5.02. An officer in fresh (hot) pursuit of a fleeing suspected felon may pursue him into a vehicle or premises in order to arrest him. Following entry, the officer may search the premises only to the extent necessary to locate the suspect and to protect himself or others. Once he has arrested the suspect, any further search must comply with the other rules of this chapter.

Rule 6:5.01 permits the officer to enter and search a premises without a warrant, or an underlying arrest, if required by exigent circumstances. However, an officer must be responding directly to an emergency which requires prompt action; the initial entry and search must have nothing to do with discovering or preserving seizable property. Thus, an officer may act under Rule 6:5.01 only to save human life, prevent personal injury, render aid to an endangered person, or prevent damage to property. For example: while walking past a house an officer hears a scream followed by two gunshots. He runs into the house and finds a person with a serious gunshot wound. He can then immediately search the house for the perpetrator and for any weapons.

Courts strictly interpret emergency circumstances. E.g., United States v. Jeffers, 342 U.S. 48 (1951); Root v. Gauper, 438 F.2d 361

(8th Cir. 1971). Only the existence of an emergency can justify an otherwise illegal entry and search. Wayne v. United States, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); Bray v. State, 597 S.W.2d 763 (Tex. Crim. App. 1980). Bray also notes (at 765) that the state has the burden to show that a particular incident falls within an objectively defined "emergency doctrine." The US Supreme Court has shown reluctance to expand the exceptions to the warrant requirement, particularly with respect to dwellings. See Chimel v. California, 395 U.S. 752 (1969). The Supreme Court has also stated that the imminent danger of the destruction or disappearance of seizable property does not alone authorize a warrantless entry into a dwelling. E.g., see Vale v. Louisiana, 399 U.S. 30 (1970); Agnello v. United States, 269 U.S. 20 (1925).

Nevertheless, many courts support the principle that a warrantless search is justified when the officer has both probable cause to search and probable cause to believe that seizable property will disappear or be destroyed if a search is delayed while the officer obtains a warrant. E.g., United States v. Allard, 600 F.2d 1301 (9th Cir. 1979); United States v. Davis, 461 F.2d 1026 (3d Cir. 1972); United States v. Nelson, 459 F.2d 884 (6th Cir. 1972); United States v. Brown, 457 F.2d 731 (1st Cir. 1972); Kleinbart v. United States, 439 F.2d 511 (D.C. Cir. 1970); United States v. Pino, 431 F.2d 1043 (2d Cir. 1970).

Rule 6:5.02 provides that fresh (hot) pursuit, as an exigent circumstance, justifies a warrantless entry and limited search of a premises or vehicle for the purpose of arresting a fleeing suspected felon. In Warden v. Hayden, 387 U.S. 294 (1967), the US Supreme Court upheld the

right of the officers to make a warrantless search of premises in order to find an armed suspected felon who had run into the house moments before the officers arrived. While the search must be limited to finding the suspect and protecting the officers, an officer may legally seize inadvertantly discovered incriminating evidence. (See Rule 6:2.01.)

SECTION SIX: OPEN FIELDS AND ABANDONED PROPERTY

6:6.01. An officer may, without a warrant, search for and seize any seizable property found in any open field. (However, an officer shall not commit criminal trespass under Penal Code section 30.05.)

6:6.02. An officer may, without a warrant, search and seize any abandoned property.

The fourth amendment's guarantee against unreasonable searches and seizures does not extend to open fields and woods. Consequently, an officer needs no warrant for search and seizure within such areas. Hester v. United States, 265 U.S. 57 (1924). Moreover, even if the officer was trespassing on private property, the search or seizure in an open field does not become illegal. E.g., Atwell v. United States, 414 F.2d 136, 138 (5th Cir. 1969).

The curtilage, or area in the immediate vicinity of the dwelling, is not an open field. Care v. United States, 231 F.2d 22 (10th Cir. 1956). While courts usually consider both the ground and buildings immediately surrounding the dwelling as part of the curtilage, and thus subject to fourth amendment protections, the extent of the curtilage will depend upon the facts of each case. Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966). (For a more detailed definition and discussion of curtilage, see Chapter Eight on Execution of Search Warrants.) Under the open fields doctrine, Texas courts have upheld searches in the following places:

> Three-fourths of a mile from the defendant's residence. Wolf v. State, 110 Tex. Crim. 124, 9 S.W.2d 350 (1928).

> Across a road and near a canal about 40 yards from the defendant's house. Sheffield v. State, 118 Tex. Crim. 329, 37 S.W.2d 1038 (1931).
>
> A pasture or enclosure 125 yards, 200 yards, and 400 yards from the building described in the warrant. McTyre v. State, 113 Tex. Crim. 31, 19 S.W.2d 49 (1929); Davis v. State, 145 Tex. Crim. 69, 165 S.W.2d 732 (1942); Melton v. State, 121 Tex. Crim. 195, 49 S.W.2d 803 (1932).
>
> An abandoned house on premises rented by the defendant but located 300 or 400 yards from his dwelling. Robie v. State, 117 Tex. Crim. 283, 36 S.W.2d 175 (1931).

With the decision in Katz v. United States, 389 U.S. 347 (1967), as noted, the emphasis in fourth amendment cases has shifted from the protection of property interests to personal privacy interests. 1 W. R. LaFave, Search and Seizure, at 331-38 (1978) discusses the application of Katz to the open fields doctrine. While some courts have begun to analyze open fields cases in terms of the Katz test, the Fifth Circuit has applied the open fields doctrine without mentioning Katz. E.g., United States v. Brown, 473 F.2d 952 (5th Cir. 1973); United States v. Hollon, 420 F.2d 302 (5th Cir. 1969); Atwell v. United States, 414 F.2d 136 (5th Cir. 1969). Accordingly, Rule 6:6.01 does not restrict the doctrine by limiting it to an individual's "reasonable expectation of privacy."

The courts have long recognized an officer's right to seize and search abandoned property. Hester v. United States, 265 U.S. 57, 58. However, only since Katz have they viewed abandonment in terms of whether the suspect had given up his reasonable expectation of privacy in the item. United States v. Colbert, 474 F.2d 174 (5th Cir. 1973). According to this line of reasoning, the fourth amendment does not protect abandoned property. As a result, an officer may seize contra-

band that a suspect abandoned to prevent it from being found on his person following a police confrontation. Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970). However, property abandoned as a result of unlawful police conduct will be inadmissible in court. An officer may also seize a seizable item which a suspect conceals in a place where a member of the public might have discovered it. In United States v. Brown, 473 F.2d 952 (5th Cir. 1973), the court determined that the defendant had abandoned a suitcase by leaving it buried in an unused chicken coop in an open field; therefore, the officers could open it without a search warrant. An officer may also search a vehicle abandoned by a pursued suspect. United States v. Edwards, 441 F.2d 749, 751 (5th Cir. 1971). Nevertheless, when the officer has probable cause to search an abandoned premises, and time permits, he should obtain a search warrant.

SECTION SEVEN: CONSENT SEARCHES

6:7.01. Whenever an officer wants to make a warrantless search he may request consent to search from any person who has authority over the thing or place to be searched.

6:7.02. The officer shall advise the person whose consent he seeks that:

(a) He has the right not to consent, and
(b) If he consents, anything found may be seized and used as evidence.

6:7.03. If appropriate, such as when the subject cannot read or write, an officer should attempt to have a neutral third party (such as a neighbor) explain these rights to that person. Whenever possible, an officer shall not conduct a consent search unless the authorized person consents and signs the departmental consent form (see Appendix to this chapter).

6:7.04. If the consent to search is later revoked, the officer must immediately stop the search. If the consent to search is later limited, the officer must restrict it to the new limit. However, the officer may still seize all seizable property discovered prior to the withdrawal or limitation of consent. (In addition, an officer may then seek a search warrant.)

6:7.05. An invitation to enter the premises does not give the officer consent to search.

6:7.06. An officer who seeks consent to search from a person in custody or under arrest shall inform the person that:

(a) He has the right not to consent;
(b) If he consents, anything found may be seized and used as evidence; and
(c) He has the right to consult with an attorney, before deciding whether or not to consent.

In general, an officer may seek consent to search in any situation. However, an officer should seek a consent search if he cannot obtain a search warrant and when no other exception justifies a warrantless search. For a further discussion of consent searches, see Cox, A Practical Approach to Consent Searches, Police Chief, Feb. 1978, at 16.

In order to justify a consent search, when the subject of the search is not in custody, the state must demonstrate that the consent was voluntarily given. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the US Supreme Court stated that the totality of surrounding circumstances determines voluntariness. Schneckloth (at 231-32) does not require a particular or formalized warning. Although knowledge of a right to refuse consent does not prove voluntariness, courts will consider such knowledge. Other factors include the details of the police request and the age, intelligence, and education of the party. For this reason, Rule 6:7.02 requires the officer to warn the person from whom consent is sought that he has a right to refuse permission to conduct the search. However, giving such a warning does not conclusively establish the voluntariness of a consent.

Courts have recognized that a person's consent does not become involuntary just because he is under arrest or detained by the police. Weeks v. State, 417 S.W.2d 716, cert. denied, 389 U.S. 996 (1967). Nevertheless, since the custodial situation implies intimidation and coercion, custody may increase the prosecution's burden of proving the voluntariness of consent. Ribble v. State, 503 S.W.2d 551 (Tex. Crim. App. 1974). Therefore, Rule 6:7.06 applies the principles of Miranda v. Arizona, 384 U.S. 436 (1966), when the police seek consent from a person in custody.

Rule 6:7.01 makes a consent to search sufficient if it comes from someone who has authority over the thing or place to be searched. That person need not be the owner or even the party whose privacy is invaded. As long as the person has the right to use and occupy the thing or place

to be searched, he may give consent to search it. Lowery v. State, 499 S.W.2d 160 (Tex. Crim. App. 1973). However, when two persons who have equal rights over the thing or place to be searched are present, and one consents while the other refuses, the officer must obtain a warrant. On the other hand, if only one of these persons is present, his consent is binding and he assumes the risks. United States v. Matlock, 415 U.S. 164 (1974). Where a person already under arrest allegedly gave consent to search, courts will scrutinize the circumstances of that consent.

As to the following, for example, an officer may obtain consent from persons other than the suspect or defendant:

(a) A defendant's spouse, in general. Burge v. State, 443 S.W.2d 720 (Tex. Crim. App.), cert. denied, 390 U.S. 934 (1969). A spouse's consent can override a suspect's refusal. Swinney v. State, 529 S.W.2d 70 (Tex. Crim. App. 1975).

(b) The woman who owned the apartment and with whom the defendant was staying. Powers v. State, 459 S.W.2d 847 (Tex. Crim. App. 1970).

(c) A suspect's parents, in certain circumstances. Stephenson v. State, 494 S.W.2d 900 (Tex. Crim. App. 1973).

(d) A person in lawful possession of an automobile. Jefferson v. State, 452 S.W.2d 462 (Tex. Crim. App. 1970); Johnson v. United States, 358 F.2d 139 (1966).

(e) A person who controls, manages, and possesses the premises. Craft v. State, 107 Tex. Crim. 130, 295 S.W. 617 (1927).

(f) A lessor, but only as to areas not covered by a lease. Self v. State, 107 Tex. Crim. 148, 296 S.W. 292 (1927).

(g) Joint occupants with equal rights, in general. Swift v. State 509 S.W.2d 586 (Tex. Crim. App. 1974).

(h) A joint user and possessor of a duffel bag. Frazier v. Cupp, 394 U.S. 731 (1969).

A hotel clerk may not consent to the search of a rented room, even if unoccupied. Stoner v. California, 376 U.S. 483 (1964). Similarly, an

owner of a house may give consent to search a room used in common but not to the part of the house assigned solely to the defendant. Persons visiting or temporarily residing at a house cannot give consent to search that house. Moffett v. Wainwright, 512 F.2d 496 (5th Cir. 1975).

Rule 6:7.05 distinguishes a consent search from an invitation to enter the premises. A person who invites an officer to enter his premises does not thereby consent to a search. Gonzalez v. State, 467 S.W.2d 454 (Tex. Crim. App. 1971). However, an officer invited to enter a premises may seize seizable items in plain view. E.g., United States v. Glassel, 488 F.2d 143 (9th Cir.), cert. denied, 416 U.S. 941 (1973). (See Rule 6:2.02.) However, silence, or lack or protest to a search, does not equal "consent."

SECTION EIGHT: SEARCH OF VEHICLES AND OCCUPANTS

6:8.01. When an officer lawfully stops a vehicle (e.g., when he reasonably suspects a traffic law violation), if he reasonably suspects that a person in that vehicle has a weapon on his person or in his access area, the officer should require that person to exit the vehicle and submit to a frisk. (For further rules on this situation, see Chapter Nine on Stop-and-Frisk.)

6:8.02. Whenever an officer makes a custodial arrest of a person in a vehicle, the officer should search that person, and his access area, for evidence and weapons. This search should occur at the time and place of the arrest. However, if the officer only issues a traffic citation to a person and then releases him, the officer shall not search that person. (Although he may frisk that person under Rule 6:8.01.)

6:8.03. When an officer has probable cause to believe that a vehicle contains seizable property, he shall obtain a search warrant for the vehicle. However, when it appears that delay in obtaining a search warrant would probably cause the destruction, removal, or disappearance of seizable property, the officer need not obtain a search warrant. An officer should consider at least the following factors in determining whether a search without a warrant is appropriate under this rule:

- *(a) Whether the vehicle could be easily removed from the jurisdiction,*
- *(b) Whether any person might obtain access to the evidence believed to be contained in the vehicle,*
- *(c) Whether the nature of the evidence makes it likely to be destroyed by the passage of time or exposure to the elements, and*
- *(d) The likelihood that any person with access to the vehicle would know of the intended search and be inclined to remove or destroy the evidence.*

6:8.04. When an officer has grounds under Rule 6:8.03 to search a vehicle he may search:

- *(a) Any part of the vehicle where the item sought could be located,*
- *(b) Whether or not an arrest (or a search incident to that arrest) was made, and*
- *(c) Either at the place where he first locates the vehicle or at a more convenient location where he moved the vehicle.*

Searches of vehicles and their occupants raise several special legal issues. The basic warrant requirement remains the same, and the general categories of exceptions to the warrant requirement do not change when vehicles are involved. Nevertheless, the application of the general rules to vehicles requires some special interpretations. For a background discussion of these issues, see Searches, Seizures and Inventories of Motor Vehicles, a volume in the 1974 Model Rules for Law Enforcement Series by the College of Law of Arizona State University and the Police Foundation. This section deals with warrantless searches incident to arrest or based on probable cause, when the object of the search is a vehicle or a person in or near a vehicle. Section Three of this chapter further discusses "search incident to arrest." Rules 6:8.03 and 6:8.04 deal with searches based on probable cause and not on an underlying arrest.

The stop-and-frisk rule of Terry v. Ohio, 392 U.S. 1 (1968), applies to persons in vehicles as well as to persons on foot (Rule 6:8.01). When a vehicle has been stopped for any reason, and the officer has a reasonable suspicion that an occupant is armed, that person may be ordered out of the car and "frisked." (See Chapter Nine on Stop-and-Frisk for further discussion of this point.)

The matter of searching a person incident to a traffic arrest is governed by United States v. Robinson, 414 U.S. 218 (1973). As stated in Robinson, a person in custodial arrest may be completely searched incident to that arrest, even if the arrest was for a traffic offense which involved no discoverable evidence. The possibility of injury to the officer or other persons from concealed weapons, or of destruction

of seizable property, and the relatively minor further intrusion upon the arrested person's privacy, combine to make searches incident to custodial arrest "reasonable." Rule 6:8.02 reflects this. However, when the person is merely issued a citation and released, as for a minor traffic violation, he should not receive a full search. Although technically an arrest, issuance of a citation does not equal a "full custody arrest" under Robinson. Thus, without evidence to be discovered or prolonged contact with the officer, a person may not be searched. See Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968). Where the search occurs incident to a custodial arrest, Chimel v. California, 395 U.S. 752 (1969), requires that it be made contemporaneously with the arrest. If the arrestee has been moved, so that he could no longer have access to weapons or evidence in the vehicle, a search is not justified.

Carroll first acknowledged that a warrantless vehicular search, undertaken because a reasonable belief existed that it contained seizable items, could comply with the prohibitions of the fourth amendment. Carroll involved the search of an automobile stopped on the open highway by agents who had good reason to believe that the car contained prohibited liquor. The US Supreme Court, in Carroll, recognized that the mobility of an automobile presents a threat that the automobile might be removed from the jurisdiction while a warrant is being obtained. The Court held that this possibility justified an otherwise unjustifiable warrantless search of the automobile. The Carroll rationale, through the years, has helped develop the doctrines that have arisen to define an acceptable, warrantless, "probable-cause" search of an automobile. See also Brinegar v. United States, 338 U.S. 160 (1949).

Courts regard warrantless searches with a jaundiced eye. In their efforts to protect the efficiency of the fourth amendment, courts have frequently overturned searches based upon probable cause, which would have justified the issuance of a warrant, simply because the police did not obtain the warrant beforehand. As stated in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inference which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. [Footnotes omitted.]

Rule 6:8.03 reflects this preference for warrant searches and requires an officer to obtain a warrant unless specified "exigent circumstances" makes it impractical to do so. Courts will inquire into the reasonableness of the decision to conduct a search without first obtaining a warrant. E.g., United States v. United States District Court, 407 U.S. 297 (1972).

Federal courts routinely open their discussion of warrantless vehicular searches with a statement from Katz that all warrantless searches, even those based upon probable cause, are "per se unreasonable under the Fourth Amendment--subject to only a few specifically established and well delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). In reality, the exceptions are neither few nor well delineated.

However, the "exigent circumstances" doctrine does seem to encompass most exceptions, and courts increasingly use it as a standard by which to measure the constitutionality of challenged searches. Stated simply, "only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." Katz at 357. Circumstances which render the "opportunity to search . . . fleeting" may move a court to ratify a warrantless search. Chambers v. Maroney, 399 U.S. 42, 51 (1970). Yet, courts have relied on this language to strike down searches as unconstitutional. E.g., Coolidge v. New Hampshire, 403 U.S. 443, 460-62 (1971); United States v. Payne, 429 F.2d 169, 171 (9th Cir. 1970).

The mobility of vehicles frequently creates an "exigent circumstance" which makes the warrantless search reasonable. Thus, the possibility that the car in Carroll, stopped on the open highway, could be removed from the jurisdiction before a warrant could be obtained, caused the court to ratify the search. Numerous cases have followed this "Carroll Doctrine." Rule 6:8.03 presents the movability-of-the-vehicle rationale (the "Carroll Doctrine") as a specific circumstance that authorizes warrantless search. Rule 6:8.03 also includes the "destructibility of the evidence" language of Chambers as a general statement of conditions that authorize such a search. This should cover all the situations in which a court would ratify a warrantless search.

A few cases discuss a "vehicular exception" to the warrant requirement, as if the police can automatically subject all vehicles to an exhaustive and warrantless search. This is not true. With vehicles, as with anything else, the situation must simultaneously satisfy two

prerequisites to warrantless search: probable cause and exigent circumstances. Confusion arises because vehicles routinely involve "exigent circumstances." Certain cases (for instance, an auto up on blocks and without tires) do not satisfy the mobility requirement. In addition, without probable cause, an officer never has authority to conduct a warrantless search not incident to an arrest.

Vehicle searches on probable cause most often take place concurrently with or just following arrests, with both arrest and search arising out of the same circumstances. See Anderson v. State, 391 S.W.2d 54 (Tex. Crim. App. 1965). However, Carroll recognized (at 158-59) that a probable cause search is independent of arrest activity:

> The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. . . .

Rule 6:8.04(b) reflects this position. Nevertheless, several courts have confusingly interpreted the right to search independent of arrest as an "extension" of the rule in Carroll. E.g., United States v. Castaldi, 453 F.2d 506, 509 (7th Cir. 1971), cert. denied, 405 U.S. 992 (1972); Gutierrez v. State, 423 S.W.2d 593 (Tex. Crim. App. 1968).

An officer has significant discretion to decide how to conduct a warrantless vehicle search based on probable cause. Usually, the officer will want to search immediately at the scene. Sometimes, though, this may not be feasible or desirable. Thus, a vehicle search based on probable cause may occur at any convenient location. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). Hostile crowds, lack of lighting, and other factors may enter into a

determination to conduct the search at the stationhouse or elsewhere. Rule 6:8.04(c) gives the officer the latitude to make this determination.

Chambers v. Maroney, 399 U.S. 42 (1970), answered the question whether an officer can move a vehicle before searching it. Chambers involved the search of an automobile after the police towed it to the stationhouse. After affirming that the police had probable cause to make the search, the Court addressed whether the police should have obtained a warrant and then asked (at 51-52) whether the police could move the car before searching it:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained. . . . For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> . . . [The car] could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. . . .

Chambers has been widely cited as justification for the delayed search of an automobile provided that an immediate Carroll-type search would have been valid. E.g., Coolidge v. New Hampshire, 403 U.S. 443, 463 & n.20 (1971). The Court in Chambers seems to see the following as interchangeable alternatives:

(a) Immediate warrantless search on-the-spot.

(b) Removal of the car followed by warrantless search at the new location, justified because the two factors needed for a warrantless search (probable cause and mobility of car) still exist.

(c) Seizure of a car, with or without removal to a new location, pending application for a search warrant. (Search warrant required because the seizure immobilized the car.)

Coolidge and other cases indicate that the validity of a warrantless search on probable cause, after the police move the car to a new location, requires a three-step justification. First, the police must have probable cause to search. Second, under Carroll, some exigent circumstance must exist that makes the search reasonable without a warrant. Third, invoke Chambers to validate the warrantless search after the police move the car.

Appendix

CONSENT TO SEARCH AND WAIVER OF RIGHTS

DATE: _____ LOCATION OF SEARCH: _____

TIME: _____ _____

_____

I, _____, hereby authorize officers of [name of law enforcement agency] to conduct a complete search of [describe person, place, or thing to be searched]. I am the owner or person in charge of the item or premises to be searched. These officers have my permission to take any potentially relevant evidence (e.g., stolen or illegal property, items used in a crime, evidence of an offense) which they may find and desire to take.

I understand that the officers do not have a search warrant authorizing this search. I know that I have a constitutional right to refuse to consent to this search. I also understand that anything discovered during the search can and may be used against me in a court of law.

I give this written permission voluntarily. No one has threatened me or promised me anything in return for permitting this search.

SIGNED: _____

_____
(Please print or type full name.)

WITNESSES:

_____

_____

[A law enforcement agency in an area with a significant non-English speaking population should prepare this form in the appropriate language(s).]

[When seeking consent of a person under arrest, the arrestee should also be advised of his right to consult with his attorney.]

[For a further discussion of consent searches, see J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer 141-69 (1979).]

Chapter Seven
EXECUTION OF ARREST WARRANTS

CHAPTER SEVEN

EXECUTION OF ARREST WARRANTS

SECTION ONE: DEFINITIONS

7:1.01. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

7:1.02. Reasonable Suspicion - An officer's rational belief, based on credible and articulable information and circumstances, that something may be true (e.g., that a person might be armed or involved in past, present, or future criminal activity).

Rule 7:1.01 defines "probable cause" in accordance with case law. An extended discussion of this definition appears in Chapter Five on Arrest Without a Warrant. "Reasonable suspicion," as defined in Rule 7:1.02, also derives from case law. An extended discussion of this term appears in Chapter Nine on Stop-and-Frisk. See also J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer (1979).

In this chapter, as throughout the Model Rules, the terms "chief" and "chief of police" are used for convenience. These terms, however, are meant to refer generally to any chief executive or administrator of a law enforcement agency. This includes, for example, a sheriff or constable.

SECTION TWO: GENERAL DUTIES

7:2.01. Unless permitted under the rules of Chapter Five on Arrest Without a Warrant, an officer shall never arrest anyone without an arrest warrant.

7:2.02. An officer shall never alter the information on any arrest warrant in any manner.

7:2.03. An officer shall presume that any arrest warrant, which appears in proper form, is valid. To be in proper form and valid on its face, an arrest warrant shall:

(a) Issue in the name of "The State of Texas";
(b) Specify the name of the person whose arrest is ordered (if name unknown, specify some reasonably definite description);
(c) State that the person is accused of a named state offense; and
(d) Be signed by the magistrate (whose office must be named).

7:2.04. An officer shall execute a valid arrest warrant as provided by law and these rules.

7:2.05. If the arrest warrant lacks proper form, the officer shall not execute it but shall return it to the magistrate who issued it.

7:2.06. If an officer has any question about the details or current validity of an arrest warrant, he shall attempt to verify the information on the warrant before making an arrest based on such warrant. Whenever practical, an officer shall automatically verify the currency of any arrest warrant issued 30 days or more before the date of execution.

This section sets out the general prohibition on arrest without warrant. It also establishes an officer's general duty to execute valid arrest warrants. Rule 7:2.01 emphasizes the preference for an intervening magisterial determination of probable cause by limiting warrantless arrests to defined categories. Texas Code of Criminal Procedure article 15.01 defines an arrest warrant as:

> . . . a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law.

An officer has no discretion to ignore the warrant or to fail to execute it if he has the power to do so. E.g., Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958). However, an officer has the discretion (in accordance with this chapter) to determine the way to serve the warrant.

Rule 7:2.03 authorizes an officer to rely on an arrest warrant which appears regular on its face. The requirements of an arrest warrant track Code of Criminal Procedure article 15.02. The officer is not liable for any defects in the issuance of the arrest warrant. Williamson v. United States, 285 F.2d 65 (5th Cir. 1960); W. Prosser, Handbook on the Law of Torts sec. 25 (4th ed. 1971). On the other hand, the officer has no authority to alter the warrant (Rule 7:2.02) even to correct a typographical error in a critical term such as a name or number. Newburn v. Durham, 32 S.W. 112 (Tex. Civ. App. 1895, no writ).

Under Rule 7:2.06, an officer must attempt to determine the accuracy and currency of a questionable warrant. An inquiry becomes automatically indicated when an arrest warrant is 30 days old. This procedure should help avoid the execution of "stale" warrants, where the named person has already been arrested.

SECTION THREE: GENERAL PROCEDURES

7:3.01. An officer need not have actual physical possession of an arrest warrant in order to execute it. However, before executing a warrant not in his possession, the officer shall personally determine the location of the warrant and shall ensure that the arrestee sees a copy of the warrant as soon as possible after his arrest.

7:3.02. In executing an arrest warrant, whether or not he has the warrant in his possession, an officer shall announce to the person being arrested that the arrest is made pursuant to an arrest warrant. If the officer has the warrant in his possession, he shall show it to the arrestee. If the officer does not possess the warrant, he shall:

(a) Tell the arrestee the offense charged and where the warrant is, and
(b) Ensure that the arrestee sees a copy of the warrant as soon as possible.

7:3.03. Unless an officer has informed the arrestee of his Miranda rights, the officer shall not interrogate the arrestee.

7:3.04. The arresting officer shall, without unnecessary delay, take the person arrested (or have him taken) before a magistrate of the county where the arrest occurred.

This section sets out general procedures applicable to every arrest under warrant. Rule 7:3.01 incorporates the general rule that an officer need not have actual physical possession of the warrant in order to arrest on its authority. Tex. Code Crim. Pro. Ann. art. 15.26; Bradley v. State, 478 S.W.2d 527 (Tex. Crim. App. 1972); Rutledge v. State, 458 S.W.2d 670 (Tex. Crim. App. 1970). However, article 15.26 does require the officer, upon request, to show the warrant to the arrestee as soon as possible. Rule 7:3.02 eliminates the requirement of a direct request on the assumption that the arrestee can receive a copy of the warrant without placing an undue burden on the officer of the department.

Rules 7:3.03 and 7:3.04 tie into Code of Criminal Procedure article 15.17(a). Article 15.17(a) requires that the arrestee appear before a magistrate. (See Code Crim. Pro. Ann. art. 15.18.) It also obligates the magistrate, not the arresting officer, to inform the arrestee of his Miranda rights. Therefore, without interrogation, the officer need not give the Miranda warnings. Nevertheless, a department may decide to institute a policy of giving such warnings even when no interrogation will occur. Such a policy might minimize challenges to the admissibility of statements the defendant may make unexpectedly or voluntarily.

SECTION FOUR: LOCAL ARREST WARRANTS FOR MINOR TRAFFIC OFFENSES

7:4.01. In executing a locally issued arrest warrant for a minor traffic offense (not including negligent homicide, reckless driving, or drug or alcohol offenses), and in lieu of taking the person into custody, a police officer may telephone the subject of the warrant and request him to present himself voluntarily at the police department within a [reasonable time].

Although a law enforcement agency may wish to expand this practice to other minor offenses, Rule 7:4.01 operates only in cases of minor traffic violations. Although not a substitute for the execution of the warrant, it only applies to the procedure by which the person gets taken into custody. For example, then the person has substantial ties to the jurisdiction, the minimal risk of flight and danger to the community does not require a full-custody arrest by the officer. A voluntary surrender satisfies the order of the court, improves police efficiency, and protects the interest of the community. Of course, if the person fails to show up, he subjects himself to arrest in the regular manner.

SECTION FIVE: ARREST WARRANTS FROM OTHER TEXAS JURISDICTIONS

7:5.01. If an officer has knowledge that another Texas law enforcement agency holds a valid arrest warrant for a particular person, that officer may arrest that person. If an officer seeks to arrest such person, he shall:

(a) Arrest and book the person named in the warrant, in accordance with these rules and department procedures;
(b) Notify the agency holding the warrant that this department executed the warrant and give the location of the arrestee;
(c) Have the arrestee appear before an appropriate magistrate; and
(d) Hold the arrestee as the magistrate prescribes, until releasing the arrestee to the custody or charge of the department holding the warrant.

An officer shall also execute an arrest warrant telegraphed under the authority of an appropriate nonlocal Texas magistrate. (For further reference, see Code Crim. Pro. Ann. arts. 15.06, .07, and .08.)

7:5.02. If the department holding the warrant does not take custody of the arrestee within 10 days after the execution of the warrant, or if that department at any time indicates that it will not take custody of the arrestee, the holding department will release the arrestee.

This section prescribes the procedure for officers executing warrants issued by Texas courts sitting outside the local jurisdiction. In these cases, the officer usually has either received information from another law enforcement agency that an arrest warrant is outstanding against some person or the officer has lawfully detained a person on an unrelated matter and, through a routine record check, discovers that the person is wanted on a warrant. Under Rule 7:5.01, the officer may, after verifying the information received, proceed immediately to take the person into custody. Verification should involve checking with the department holding the warrant by radio or telephone to determine that the information is accurate and current.

Under Rule 7:5.01(c), the arrestee must appear before a local magistrate in order to comply with Texas Code of Criminal Procedure articles 15.16 and 15.17. The department holding the warrant must receive notice of the arrest so that it can cancel the warrant and take custody of the arrestee. However, if that department fails to do so within the 10-day statutory period (Tex. Code Crim. Pro. Ann. art. 15.21), the prisoner must be released (Rule 7:5.02).

As noted in the last sentence of Rule 7:5.01, an officer must execute an arrest warrant forwarded by telegraph if a proper magistrate issued it. The details of this special situation appear in Texas Code of Criminal Procedure article 15.08.

SECTION SIX: OUT-OF-STATE WARRANTS

7:6.01. Whenever any officer has probable cause to believe that a person stands charged of a felony in another state, the officer shall:

(a) Arrest that person, and
(b) Bring the arrestee before a magistrate of the county where he was arrested (to identify the arrestee as the person named in the warrant and to notify the arrestee of the charges against him), and
(c) Notify the department holding the warrant of the arrest.

7:6.02. An officer shall not execute a misdemeanor arrest warrant issued outside Texas.

Although Texas officers cannot arrest under the authority of an out-of-state warrant, they nevertheless may act under the authority of the Uniform Criminal Extradition Act to make an arrest "without a warrant upon reasonable information that the accused stands charged" of a felony in another state. Tex. Code Crim. Pro. Ann. art. 51.13(14). The Uniform Criminal Extradition Act (art. 51.13(7)) provides that the Governor of Texas, at the request of the other state, may sign a fugitive felon's warrant of arrest. An officer may also arrest a fugitive under an arrest warrant issued by a Texas magistrate on complaint made to the magistrate concerning escape from justice or out-of-state offenses. Code of Criminal Procedure articles 51.03, 51.13(13).

In addition, common law subjects fugitives to arrest and detention. Stallings v. Splain, 253 U.S. 339, 341 (1920). In general, an officer may arrest a fugitive from another state as long as the arresting officer has probable cause to believe that the suspect has committed a felony in another state. Thus, the arrest can occur even if there is no arrest

warrant for him in that state and all steps necessary for his rendition have not been taken. (For a general discussion of warrantless arrest procedures, see Chapter Five on Arrest Without a Warrant.)

The common law rule providing for the arrest of persons suspected of crimes committed in other states extends only to crimes considered felonies where they were committed. In the case of a fugitive, officers must necessarily rely on indirect information, usually through official law enforcement channels (such as the National Crime Information Center). Therefore, the courts have upheld arrests based on a broader standard of probable cause for fugitives. 5 Am. Jur. 2d Arrest sec. 47 (1962 & Supp. 1980).

Under Code of Criminal Procedure article 51.13, section 14, an officer can arrest "without a warrant upon reasonable information that the accused stands charged in the courts of a State with a crime punishable by death or imprisonment for a term exceeding one year. . . ." See, e.g., State v. Klein, 25 Wis. 2d 394, 130 N.W.2d 816 (1964), cert. denied, 380 U.S. 951 (1965). On the use of police radio broadcasts, see Merriweather v. State, 501 S.W.2d 887 (Tex. Crim. App. 1973).

SECTION SEVEN: CHANCE ENCOUNTERS

7:7.01. Whenever an officer lawfully stops or otherwise detains and identifies a person, he may concurrently initiate a records check to determine whether any arrest warrant is outstanding against that person. (See Chapter Nine on Stop-and-Frisk.)

7:7.02. To conduct a records check, an officer may detain a person (who he has lawfully stopped) for a reasonable period of time.

(a) For a routine records check by radio, telephone, teletype, or computer terminal, the detention should not exceed more than [30] minutes.
(b) However, detention may exceed [30] minutes (but not more than a total of [60] minutes) if the officer has a reasonable suspicion that a warrant is outstanding but, because of unusual circumstances, the officer does not receive the requested information within that time period.

7:7.03. An officer may prevent a person detained for a warrant check from leaving the officer's presence.

(a) The person may be required to wait in the officer's vehicle, in his own vehicle, or in some other convenient place.
(b) The person may be frisked if the officer reasonably suspects that he may be armed. (See Chapter Nine on Stop-and-Frisk.)

This section would apply, for example, in an on-the-street encounter in which the officer has lawfully stopped the person on some unrelated matter and, through a routine records check, discovers the existence of the warrant. The officer may not stop a person solely to determine if a warrant is outstanding; but where the stop or detention is otherwise lawful, and the officer may require the person to identify himself, the officer may have the records checked to determine whether the person is "wanted." Terry v. Ohio, 392 U.S. 1 (1968). See Chapter Nine on Stop-and-Frisk.

The person has no right to prevent the officer from discovering that he has been charged with a crime. However, the manner of the detention must be reasonable. Under Rule 7:7.02, the officer may only detain the person for a records check for only a fixed and limited time under normal circumstances (e.g., 30 minutes). Current communications technology should make a fixed time of less than one hour adequate to determine if a warrant does exist. However, the officer may extend the detention period in unusual circumstances under Rule 7:7.02(b). Such circumstances might involve, for example, emergency breakdowns in communications which prevent contact with the necessary authorities. Rule 7:7.03 sets out additional guidelines for a reasonable detention to conduct a warrant check. If the officer reasonably suspects that a person is armed or dangerous, he may frisk that person. Terry v. Ohio, 392 U.S. 1 (1968).

SECTION EIGHT: PLANNED EXECUTIONS OF ARREST WARRANTS

7:8.01. Prior to executing an arrest warrant "raid," the officer in charge shall notify his chief of police (or the chief's designee) [and the district attorney's office (or the police legal advisor)].

7:8.02. The time of day for executing the arrest warrant shall be based on the following rules:

- *(a) Execute during daylight, unless circumstances make this dangerous or impractical.*
- *(b) Execute when the person named in the warrant is most likely to be present.*
- *(c) Execute when resistance is least expected and best controlled.*
- *(d) Minimize the inconvenience to other persons who may be on the premises, unless other circumstances make this impractical.*
- *(e) Balance the safety, effectiveness, and convenience of the officer and the occupants.*

7:8.03. An officer may serve the warrant at any place, public or private, where the individual named is reasonably believed to be located.

7:8.04. Officers need not execute the warrant at the first possible opportunity to do so, but may choose the time and place in accordance with Rules 7:8.02 and 7:8.03. However, an officer shall not select the time and place of arrest solely to create the opportunity to conduct a search incident to the arrest, or to embarrass, oppress, or inconvenience the arrestee.

7:8.05. Only peace officers will generally participate in the execution of an arrest warrant. However, when appropriate, the officer in charge may permit a police legal advisor and a member of the district attorney's office to accompany the officers during the execution of the arrest warrant. When necessary to the success of the arrest warrant execution, the officer in charge may permit technical experts (e.g., a locksmith) to participate in such execution.

7:8.06. An officer shall not use force to enter a private premises to execute a misdemeanor arrest warrant.

7:8.07. In general, when seeking to enter a private premises, an officer shall ring the doorbell or knock on the door, announce his identity and purpose, and demand admittance. He shall then wait, for a reasonable time under the circumstances, to be admitted. While executing a felony arrest warrant, however, if an officer reasonably believes that exigent circumstances exist which would unduly jeopardize his safety or the security of the person sought, the officer need not announce his identity and purpose before entering private premises.

(continued)

7:8.08. If an officer must make a forcible entry, the officer shall enter the premises by the least forceful means possible under the circumstances. Although entry may necessarily include breaking a door or window, an officer must strive to inflict as little damage as possible to the premises.

7:8.09. Whenever an officer must forcibly enter private premises to execute a felony arrest warrant, the officer in charge of the operation shall have enough officers present, and take other appropriate measures to protect the safety and security of all persons present. To identify the group as officers, at least one fully uniformed (or otherwise readily identifiable) officer should lead the entry into the premises.

7:8.10. After forcibly entering private premises to execute a felony arrest warrant, officers shall immediately secure the premises by locating, and controlling the movement of, all persons who reasonably appear to present a threat to the safety of the officers. Officers shall also control any object which may be used as a weapon. An officer may frisk any person who the officer reasonably suspects may have a weapon concealed upon his person.

7:8.11. Any detention, warrantless arrest, frisk, search, seizure, or use of force conducted in conjunction with the execution of an arrest warrant shall conform to the rules governing such activities.

7:8.12. An officer shall leave the premises at least as secure as when he entered, for example, by leaving it in the hands of a responsible person or by locking all doors and windows.

This section describes the procedures officers should follow when executing arrest warrants in planned operations, or "raids," in which the department believes that the named person is at a particular place within the jurisdiction. In general, the rules assume that the person may know he is being sought by the police, and might resist or avoid capture if possible. The coordination requirement of Rule 7:8.01 is explained in the commentary accompanying Rule 8:5.01 in Chapter Eight on the Execution of Search Warrants.

Texas Code of Criminal Procedure article 15.23 permits an arrest "on any day or at any time of the day or night." Nevertheless, Rule 7:8.02 establishes a preference for executing an arrest warrant during daylight. An explanation of this preference appears in the commentary accompanying Rule 8:3.02 in Chapter Eight on the Execution of Search Warrants.

Rule 7:8.04 prevents timing an arrest warrant execution as a ruse to conduct a warrantless search. See Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968). While the primary considerations are the successful arrest and safety of all persons involved, when multiple (and equally propitious) opportunities to arrest exist, the selection of time and place should minimize the hardship to the defendant and those associated with him.

Rule 7:8.05 restricts who can participate in an arrest warrant execution. The explanation of this rule appears in the commentary accompanying Rule 8:5.02 in Chapter Eight on the Execution of Search Warrants.

Rules 7:8.06 and 7:8.07 implement, and expand upon, Texas Code of Criminal Procedure article 15.25:

> In case of felony, the officer may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose.

However, as upheld in Rodriguez v. Jones, 473 F.2d 599, 607 (5th Cir.), cert. denied, 412 U.S. 953 (1973), an officer may dispense with the announcements and seek immediate entry if exigent circumstances exist or the subject obviously already knows the officer's purpose. In general, circumstances become "exigent" if the announcement would increase the officer's peril or risk the subject's escape.

Rule 7:8.08 establishes the general policy of using the least amount of force necessary to accomplish the objective. Entering private premises

to execute an arrest warrant can prove extremely hazardous and unpredictable. Therefore, Rule 7:8.09 (along with Rule 7:8.01) mandates adequate planning and preparation. Many such operations have resulted in unnecessary tragedy when persons on the premises mistook plain-clothes officers in the "raiding party" as dangerous criminals and resistance occurred. Therefore, Rule 7:8.09 attempts to avoid this hazard by requiring at least one of the officers in the party to wear a uniform or be otherwise easily identifiable as a police officer.

Under Rule 7:8.10, officers must quickly secure the premises by finding all occupants and frisking those who present an apparent danger to the officers. A further discussion of this procedure appears in the commentary accompanying Rule 8:5.05 in Chapter Eight on the Execution of Search Warrants. Rule 7:8.12 requires the officers to take reasonable steps to secure the premises they have entered. For additional discussion, see the commentary accompanying Rule 8:5.07 in Chapter Eight.

SECTION NINE: DISSEMINATION OF WARRANT INFORMATION

7:9.01. Whenever a magistrate of [the local jurisdiction] issues an arrest warrant, the information shall be entered into Texas Crime Information Center (TCIC) and National Crime Information Center (NCIC), in accordance with established guidelines.

7:9.02. Whenever an officer successfully executes an arrest warrant he shall take appropriate measures to cancel all information regarding the existence of that warrant, in accordance with established guidelines.

Modern police communication systems promote the effectiveness of law enforcement agencies by disseminating information regarding arrest warrants. Thus, state and national computer networks store data regarding "wanted persons" which all law enforcement agencies can receive instantly. However, to achieve effective use and to prevent misuse, these data systems must contain current information. Therefore, each department should adopt and enforce rules regarding the updating of information. Rule 7:9.01 attempts to ensure that information on new warrants achieves proper dissemination throughout the department and enters the interdepartmental information system. This section incorporates the existing procedure of each department.

Rule 7:9.02 should prevent data in the system from becoming "stale." Unless the information regarding the existence of a warrant is deleted from the system when the person is apprehended, he may be improperly picked up a second time. This section makes it the duty of any officer who actually executes the warrant to ensure that he takes all appropriate steps to delete the information.

SECTION TEN: EXECUTION OF LOCAL WARRANTS BY OTHER DEPARTMENTS

7:10.01. Whenever another law enforcement agency within Texas holds a prisoner on a warrant from this department, this department shall either pick up the prisoner within five days or notify the holding department to release him.

7:10.02. Whenever an out-of-state department notifies this department that the out-of-state department has executed an arrest warrant held by this department, and is holding the person arrested, this department shall immediately pursue extradition proceedings.

Rule 7:10.01 implements Texas Code of Criminal Procedure article 15.21. Although article 15.21 provides a 10-day limit, modern communication and transportation facilities permit a 5-day goal. With a 5-day limit, the department holding the prisoner will not be burdened, and the department holding the warrant will have the prisoner in its custody sooner. This also promotes society's interest in affording a prompt hearing to each accused.

Rule 7:10.02 requires the appropriate officer to recommend extradition proceedings when an out-of-state law enforcement agency apprehends a person wanted on a Texas warrant. An extradition proceeding is the proper method to return the prisoner to Texas, as set forth in Texas Code of Criminal Procedure article 51.13.

Chapter Eight

EXECUTION OF SEARCH WARRANTS

CHAPTER EIGHT

EXECUTION OF SEARCH WARRANTS

SECTION ONE: DEFINITIONS

8:1.01. Curtilage - The yard and buildings which relate to domestic activities and surround a residence or dwelling place, generally including garages, sheds, outhouses, driveways, barns, fenced-in areas around the house, and the like. It does not include vehicles, commercial business structures, or open fields surrounding a residence. For apartments or multi-unit dwellings, it also does not include fire escapes, lobbies, or common hallways.

8:1.02. Exigent Circumstances - An emergency or unforeseen occurrence or combination of circumstances which requires an officer to act immediately. For example, exigent circumstances may exist if:

(a) A wanted suspect may escape, or
(b) Bodily injury may occur, or
(c) Evidence will be lost or destroyed, or
(d) Serious damage to property, real or personal, may occur.

8:1.03. Mere Evidence - Property or items (but not contraband or a fruit or instrumentality of a crime) constituting evidence of an offense or tending to show that a particular person committed an offense.

8:1.04. Nexus - Probable cause which, by connecting mere evidence to an offense, permits an officer to seize mere evidence even if the search warrant does not describe it.

8:1.05. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

8:1.06. Reasonable Suspicion - An officer's rational belief, based on credible and articulable information and circumstances, that something may be true (e.g., that a person might be armed or involved in past, present, or future criminal activity). (See Chapter Nine on Stop-and-Frisk.)

(continued)

8:1.07. Search Warrant - A written order, issued by a magistrate (on a showing of probable cause) and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate.

The definition of "curtilage" draws principally on Worth v. State, 111 Tex. Crim. 288, 12 S.W.2d 582 (1928). Although the concept of "curtilage" has ancient origins, it remains in use today. E.g., Cantu v. State, 557 S.W.2d 107 (Tex. Crim. App. 1977). Rule 8:1.02 defines "exigent circumstances" to include only emergencies which require an officer to act immediately and justify the officer's failure to seek routine warrant procedures. In determining whether exigent circumstances exist, an officer should consider all relevant factors such as:

(a) Time and type of premises;

(b) Nature and severity of any offense involved;

(c) Actions and numbers of all persons involved in the activity;

(d) Natural and physical conditions (such as weather and geography) which might interfere with routine search warrant procedures;

(e) Availability to the officer of equipment, tools, manpower, reinforcements, and other resources; and

(f) Information acquired from informants, personal observation, or official channels.

The definitions of "mere evidence" and "nexus" relate to each other. "Mere evidence" describes property which an officer can seize, even though the search warrant does not describe that property, if the officer has a reasonable basis to believe that a "nexus" exists between that property and the particular crime. Chambers v. State, 508 S.W.2d (Tex. Crim. App. 1974). "Mere evidence" falls under subsection (10)

of article 18.02 of the Texas Code of Criminal Procedure. "Mere evidence" would not include contraband or an instrumentality or fruit of a crime.

For example, assume that a search warrant directs an officer to search for and seize, at a particular premises, a particular rifle allegedly used in an armed robbery of a jewelry store. While executing that search warrant, an officer can only search for that rifle. He may seize that rifle when he finds it. However, during his search for that rifle, he finds a hidden cache of jewelry. He may seize that jewelry as "fruit" of the crime (property acquired by theft). He may also seize, as contraband, a switchblade knife he finds. In addition, he may also seize a plaid shirt if he reasonably believes that a nexus exists between that particular shirt and the armed robbery. Thus, if he happened to know that the suspect in that crime wore an identical shirt while committing the robbery, he has the requisite probable cause to seize that shirt even though it is only "mere evidence."

The definition of "probable cause" sets forth the traditional meaning under national and Texas law. E.g., Beck v. Ohio, 379 U.S. 89 (1964). Rule 8:1.06 defines "reasonable suspicion" with commonsense terms. The definition of "search warrant" tracks the statutory language of article 18.01 of the Texas Code of Criminal Procedure.

SECTION TWO: GENERAL DUTIES

8:2.01. Unless permitted under the rules of Chapter Six on Warrantless Search and Seizure, an officer shall never conduct a search or seize property without a search warrant.

8:2.02. An officer shall never alter the information on any search warrant in any manner.

8:2.03. An officer shall presume that any search warrant, which appears in proper form, is valid. To be in proper form and valid on its face, a search warrant must:

(a) Run in the name of "The State of Texas";
(b) Identify the property to be seized and the person, place, or thing to be searched;
(c) Command any peace officer of the proper county to conduct the search immediately; and
(d) Be dated and signed by the magistrate.

8:2.04. An officer shall execute a valid search warrant as provided by law and by these rules.

8:2.05. If the search warrant lacks proper form, the officer shall not execute it but shall return it to the magistrate who issued it. A warrant lacks "proper form" if it appears on its face to be incorrect or if it contains significant errors in identifying the place to be searched or the property to be seized.

8:2.06. Whenever an officer executes a search warrant, he shall bring it with him to the scene and exhibit it to the person, if any, in charge of the premises.

8:2.07. In order to obtain consent to search, or otherwise, an officer shall never falsely represent to any person that a search warrant has been issued or that the officer can obtain a search warrant.

The fourth amendment of the United States Constitution prohibits "unreasonable searches and seizures." The Texas Constitution (art. I, sec. 9) reaffirms this principle. A warrant procedure, based on a showing of probable cause made before a neutral magistrate, protects individual rights. Thus, save a few important exceptions, a peace officer must have a warrant in order to conduct a search. Mancusi v. DeForte, 392 U.S. 364

(1968). Even as to the exceptions, the grounds for the search (if intended to discover evidence of a crime) must meet or surpass the standard of probable cause that a magistrate would apply in issuing a warrant. E.g., Stoddard v. State, 475 S.W.2d 744 (Tex. Crim. App. 1972). Rule 8:2:01, therefore, requires an officer to search either under a warrant or within the limits of the rules on warrantless search, which discuss these exceptions.

Officers should be familiar with the property for which a magistrate may issue a search warrant. Texas Code of Criminal Procedure, article 18.02, reads as follows:

> A search warrant may be issued to search for and seize:
>
> (1) property acquired by theft or in any other manner which makes its acquisition a penal offense;
>
> (2) property specially designed, made, or adapted for or commonly used in the commission of an offense;
>
> (3) arms and munitions kept or prepared for the purpose of insurrection or riot;
>
> (4) weapons prohibited by the Penal Code;
>
> (5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;
>
> (6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;
>
> (7) drugs kept, prepared, or manufactured in violation of the laws of this state;
>
> (8) any property the possession of which is prohibited by law;
>
> (9) implements or instruments used in the commission of a crime; or
>
> (10) property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense.

Rules 8:2.02 and 8:2.03 recognize that a search warrant is a court order directed at a peace officer. Rule 8:2.02 states the requirements of Texas Code of Criminal Procedure article 18.04. An officer has to obey the warrant, if it appears valid on its face. Tex. Code Crim. Pro. Ann. art. 18.06(a). Only the magistrate may correct errors in the warrant; an officer has no authority to alter a warrant in any substantial term. Newburn v. Durham, 10 Tex. Civ. App. 655, 32 S.W. 112 (1895). (For a background discussion, see Search Warrant Execution, a volume in the 1974 Model Rules for Law Enforcement Series of the College of Law of Arizona State University and the Police Foundation.)

The rules for executing search warrants have many similarities to the rules for arrest warrants. They differ significantly, however, regarding personal possession of the warrant at the time of execution. Although Texas law (Tex. Code Crim. Pro. Ann. art. 15.26), as in most states, provides that an officer need not have personal possession of an arrest warrant in order to execute it, no comparable language refers to search warrants. This leads to the presumption that the officer must have possession of the search warrant when he executes it. Rules 8:2.01 and 8:2.06 comply with this presumption as a sound policy. Requiring the officer to have the search warrant in hand while executing it reduces the risk of error in identifying the place or property named in the warrant. Since search warrant executions are rarely accidental or unforeseen, this possession requirement does not unduly burden the officer.

Rule 8:2.07 should prevent the type of situation that occurred in Bumper v. North Carolina, 391 U.S. 543 (1968), where officers misrepresented that they had a search warrant in order to obtain consent to search. The US Supreme Court held that such consent was not voluntarily given.

SECTION THREE: TIME OF SEARCH

8:3.01. A search warrant shall be executed as soon as practical after it is received, but in no event more than three (3) whole days after the magistrate issues it. In calculating the days allowed for execution, the day of issuance and the day of execution are excluded.

8:3.02. The time of day for executing the search warrant shall be based on the following rules:

(a) Execute during daylight, unless circumstances make this dangerous or impractical.
(b) Execute when the property to be seized is most likely to be present.
(c) Execute when resistance is least expected and best controlled.
(d) Minimize the inconvenience to persons who may be on the premises to be searched, unless other circumstances make this impractical.
(e) Balance the safety, effectiveness, and convenience of the officer and the occupants.

A search warrant, unlike an arrest warrant, does not have an indefinite lifespan. For an arrest warrant, once probable cause exists to believe that someone committed an offense, that probable cause rarely dissolves. However, while probable cause may exist to believe that at a certain time a certain thing is at a certain place, there is often no reason to believe that it will remain at that place indefinitely (unless the item cannot be moved). Therefore, the law in most states establishes an automatic expiration period for search warrants.

Thus, Texas Code of Criminal Procedure article 18.07 sets a limit of three (3) days for the execution of a search warrant. The issuing judge may require that it be executed earlier; in any case, officers may not unnecessarily delay the execution. Tex. Code Crim. Pro. Ann. art. 18.06. However, failure to comply with a statutory time limit may not be an

error of constitutional magnitude. A search warrant execution after 72 hours, therefore, may not invalidate the search unless the delay prejudiced the defendant. Smith v. State, 478 S.W.2d 518 (Tex. Crim. App. 1972). Since prejudice is determined "after the fact," officers must adhere to the statutory restrictions. Although Texas Code of Criminal Procedure article 18.06 states that an officer should execute a search warrant "without delay," officers (as with arrest warrants) need not execute a search warrant at the first available opportunity. They may, within reason, choose the moment which will allow them to conduct the search safely and effectively.

The law of many states restricts the execution of search warrants to daylight hours, without special permission from the issuing magistrate. In addition, Rule 41(c)(1) of the Federal Rules of Criminal Procedure states that a search "warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. . . . " Texas, however, has no such requirement. Nevertheless, for safety and convenience, unless special circumstances exist, daylight execution is preferable. See United States ex rel. Bayance v. Myers, 398 F.2d 896 (3d Cir. 1968). Note that the convenience of the department is not an express consideration. An officer should not execute the search warrant when he believes that the property sought is not on the premises. In fact, execution of a search warrant under such circumstances might invalidate the warrant. Rule 8:2.02(b) seeks to avoid this difficulty.

SECTION FOUR: SCOPE OF SEARCH

8:4.01. An officer shall only execute the search warrant and make the search at a place described in the warrant.

(a) An officer may search all buildings or structures, within the curtilage of the described place, where the items sought may be kept.
(b) If a warrant describes the place to be searched as a limited portion of larger premises, the officer may not extend the search to other, unnamed portions.
(c) The search warrant should specify any vehicles to be searched at the premises. If it does not, an officer shall not search vehicles found upon the premises unless the officer has independent probable cause and exigent circumstances exist.

8:4.02. An officer shall only search for items named in the search warrant. An officer shall not search those places or things which could not contain or conceal the items described in the search warrant.

8:4.03. An officer may seize items not named in the search warrant, but discovered during a lawful search, if he found the items in a place reasonably within the scope of the search, and he has probable cause to believe they are:

(a) Contraband,
(b) Fruit of a crime (stolen property),
(c) Evidence of a crime, or
(d) Instrumentalities of a crime.

8:4.04. An officer may search a person found upon the premises:

(a) Incident to an arrest of that person, in accordance with Section Six of this chapter;
(b) If the warrant gives the name and useful description of that person (e.g., usually the owner or person in charge of the premises);
(c) If the warrant specifies, e.g., "any person, or persons unnamed, found on the premises";
(d) If the officer has reasonable suspicion that a particular person is armed and endangers the officer or other persons (in accordance with Rule 8:5.06); or
(e) To prevent the disposal or concealment of any instruments, articles, or things particularly described in the warrant, if the officer has a reasonable suspicion that the person may have such items on his person. In determining whether reasonable suspicion exists officers should consider:

(continued)

(1) The nature and physical quality of the item sought,
(2) The ease with which the item may be disposed of if so concealed,
(3) Whether the officer has located the item on the premises, and
(4) The relationship of the person to the premises (such as owner, resident, visitor) and to those in control of the premises.

A search warrant must identify the place to be searched with enough particularity for the officers to distinguish it from other places in the area. Ex parte Flores, 452 S.W.2d 443 (Tex. Crim. App. 1970). The warrant extends to all parts of the place named, which generally includes all places or buildings within the "curtilage" of the named place. Welch v. State, 154 S.W.2d 248, cert. denied, 315 U.S. 808 (1941). However, a search warrant that specifies the places to be searched with great detail may invalidate a search of a place not so named, even if the searched place lies within the "curtilage." Riojas v. State, 530 S.W.2d 298 (Tex. Crim. App. 1975). Thus, when appropriate, the warrant should include the phrase "including all other structures and places on the premises." In particular, some courts may not consider automobiles as part of the curtilage of a building. Therefore, a search warrant for a general search of a premises should generally specify any vehicles on that premises. Of course, an officer might have independent grounds to search an automobile. See Chapter Six on Warrantless Search and Seizure.

A search warrant for the seizure of certain items only authorizes a search of places which could contain those items. Thus, an officer executing a warrant to seize a stolen sofa would have no authority to look in a cookie

jar, but could look in the garage. On the other hand, a search warrant for narcotics would authorize a search of both the cookie jar and the garage. This principle produced Rule 8:4.02.

Rule 8:4.03 discusses when an officer may seize items not named in the search warrant. Case law is inconsistent on this point. However, under the prevailing view, an officer lawfully executing a search warrant may seize contraband (i.e., property for which possession itself is a crime) discovered incident to the search. Valdez v. State, 472 S.W.2d 754 (Tex. Crim. App. 1971); see Abel v. United States, 362 U.S. 217 (1960). This view also extends to instrumentalities and evidence of a crime. Chimel v. California, 395 U.S. 752 (1969); Warden v. Hayden, 387 U.S. 294 (1967). The principle also applies to property reasonably believed to be stolen. Tex. Code Crim. Pro. Ann. art. 18.16. Moreover, an officer can seize mere evidence not described in the search warrant if a reasonable basis exists to believe that there is a nexus between the evidence and a particular crime. Chambers v. State, 508 S.W.2d 348 (Tex. Crim. App. 1974). Cady v. Dombrowski, 413 U.S. 433 (1973), supports this approach.

Rule 8:4.04 states when an officer may extend the search to occupants. This right is clear where specified in the warrant. Tex. Code Crim. Pro. Ann. art. 18.04. A warrant to search a premises does not automatically give the authority to search persons found upon those premises at the time of the execution. Ybarra v. Illinois, 444 U.S. 85 (1979); State v. Bradbury, 109 N.H. 105, 243 A.2d 302 (1968). An officer, lawfully on the premises, who reasonably suspects that a person may present a danger to the officer, may frisk him for weapons. Terry v. Ohio, 392 U.S. 1 (1968).

An officer may also search someone on the described premises if it reasonably appears that the items named in the warrant are concealed on his person rather than in some physical structure. Particularly in narcotics cases, the narcotics seller often has the contraband with him at all times, rather than deposited in some hiding place. It would be illogical to allow the person to defeat the search warrant by carrying his narcotics in his pocket rather than putting them in a drawer. People v. Pugh, 69 Ill. App. 312, 217 N.E.2d 557 (1966). However, a person's mere presence at the time of the search does not create grounds for searching him. Circumstances must indicate that the items sought are on the person of someone at the premises. State v. Bradbury, 109 N.H. 105, 243 A.2d 302 (1968).

SECTION FIVE: SEARCH PROCEDURE

8:5.01. Prior to executing a search warrant "raid" the officer in charge shall notify his chief of police (or the chief's designee)[and the district attorney's office (or the police legal advisor).]

8:5.02. Only peace officers will generally participate in the execution of a search warrant. However, when appropriate, the officer in charge may permit a police legal advisor and a member of the district attorney's office to accompany the officers during the execution of the search warrant. When necessary to the success of the search warrant execution, the officer in charge may permit technical experts (e.g., a locksmith) to participate in such execution.

8:5.03. The officer in charge shall take appropriate measures to insure the safety and security of fellow officers, the items sought, and any persons at the scene of the execution.

8:5.04. An officer shall enter the premises by the least forceful means possible under the circumstances.

(a) Subject to the exception in Rule 8:5.04(b), when seeking to enter a private premises, an officer shall ring the doorbell or knock on the door, announce his identity and purpose, and demand admittance. He shall then wait, for a reasonable time under the circumstances, to be admitted.

(b) If, in the view of the officer in charge, exigent circumstances exist which unduly jeopardize the safety and security of the officers, the items sought, or persons in the area, an officer shall enter the premises by the most efficient means possible. However, although entry may necessarily include breaking a door or window, an officer must strive to inflict as little damage as possible to the premises.

8:5.05. When necessary, an officer shall first enter the building or other premises and locate and control the movement of all persons who hinder the search or might pose a threat to safety. The officers shall also locate and control all items which might be used as weapons. An officer may frisk any person who the officer reasonably suspects may have a weapon concealed upon his person. The officers should inform all persons not needed at the search scene to vacate the premises for a reasonable period of time.

(continued)

(a) An officer shall use the least amount of force necessary to secure the premises.
(b) An officer shall, as soon as practical, display the search warrant, and explain the reason for the search.
(c) As soon as the officers secure the building, all unneeded officers should leave the area.

8:5.06. After securing the premises, an officer shall search for the items named in the search warrant. When possible, a team of two officers should search a single room or area.

(a) An officer shall diligently attempt to prevent and minimize damage to the premises and property.
(b) An officer shall confine the search to places that could conceal the items sought.
(c) During the course of the search, the officer in charge shall keep a record of the date and time, the areas examined, who examined them, the items seized, and where each seized item was found.
(d) Each officer shall safeguard the admissibility of all seized property by protecting the "chain of evidence": The officer who actually seizes a particular item shall mark that item with his initials and the date and time. That officer shall then turn over all seized items to the single officer in charge of the search. As to all items seized, the officer in charge shall furnish a descriptive receipt to the person from whose possession or control they were taken. (If no such person is present, leave the receipt in a logical and conspicuous place in the premises.) The officer in charge shall complete the "return" to the search warrant by attaching to it an inventory of the items seized. The officer shall also deliver the completed "return" to the magistrate.
(e) The office in charge shall mark all seized items as evidence and deliver them to the [department evidence locker].

8:5.07. An officer shall leave the premises at least as secure as when he entered, for example, by leaving them in the hands of a responsible person or by locking all doors and windows. Unless unavoidable, an officer shall not leave the premises in disorder or disarray caused by the search.

8:5.08. A search warrant authorizes only one search of a premises. Thus, an officer cannot search the premises again under the same warrant once he has executed the warrant and left the premises.

This section prescribes various mechanical and tactical steps to improve and standardize execution procedures. For example, Rule 8:5.01 requires internal coordination and communication. Particularly in larger departments, large-scale search warrant executions, or "raids," occur fairly often. Yet each raid is unpredictable and involves potential danger. The unit which conducts an investigation and obtains the warrant usually makes the "raid." Rule 8:5.01 eliminates the possibility that a unit could plan and execute a raid without informing other supervisory officers of the department. In general, the disastrous risk of other officers interfering in a secret raid outweighs concern for the secrecy of the operation.

Thus, Rule 8:5.01 ensures that command officers, made aware of the pending operation, may take steps to avert internal confusion. The officer in charge should also notify the police legal advisor or the district attorney's office of a search warrant raid so that he may investigate and offer advice on any legal complications which may arise. The district attorney, who will often have to prosecute the case developed by the search warrant, may wish to attend the search warrant execution. Although each police department has its own territorial jurisdiction (sometimes expanded through interlocal assistance agreements), officers often go outside their jurisdiction to execute a search warrant. (Note that "jurisdiction" may not be the same as the political boundaries of a city, town, or village. E.g., Tex. Rev. Civ. Stat. Ann. art. 999 (Vernon Supp. 1963-79).) Nevertheless, whenever practical, communication and coordination between departments is advisable.

Considerations of safety and security require that only essential personnel generally participate in a search warrant execution. (This policy shuns

reliance on Texas Code of Criminal Procedure article 18.08 which permits an officer to "call to his aid any number of citizens in his county" who are "bound to aid in the execution.") Rule 8:5.02 generally prohibits non-police personnel, such as press or media representatives, from accompanying officers. This rule also serves to prevent unfair pretrial publicity. When necessary, or with the chief's authorization, outside persons may accompany the officers. Thus, for example, the district attorney and the police legal advisor would often have a legitimate reason to go along, as would technical experts such as a locksmith. Strict rules cannot govern the tactical aspects of the raid. However, Rule 8:5.05 places the responsibility on the officer in charge of the operation to assure that it is well-planned and carefully executed.

The moment of entering a premises is the most dangerous part of executing a search warrant. At that point, an officer faces the greatest resistance and is least able to control the situation. Even when an officer expects to enter without force, he must be prepared for resistance. Nevertheless, an officer must not "overreact" to the potential for danger or treat every warrant execution as a hostile encounter. The way the police conduct a search may cause an otherwise reasonable search to violate due process of law. As stated in Buckley v. Beaulieu, 104 Me. 56, 71 A. 70, 72 (1908), "officers must not allow their zeal and beliefs to blind them to the rights of owners and occupants of the dwelling house they search."

As in most states, Texas law (Tex. Code Crim. Pro. Ann. art. 18.06(b)) requires officers to announce their purpose before executing a search warrant. However, at common law, where exigent circumstances increase the officer's peril or frustrate the search and seizure, the officer may dispense

with the announcement. Ker v. California, 374 U.S. 23 (1963); Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973). Nevertheless, the mere allegation that the search warrant identifies narcotics or other destructible evidence does not establish grounds for a "no-knock" entry. E.g., People v. Gostelo, 63 Cal. Rptr. 10, 67 Cal. 2d 586, 432 P.2d 706 (1967). An officer who believes that a "no-knock" entry will be necessary should spell out in the affidavit supporting the warrant those circumstances which require an unannounced entry. If the exigent circumstances only arose at the time of execution, the officer's report should explain the factors which required the unannounced entry.

At least one of the first officers into the building should wear a uniform (or other readily identifiable article of clothing) in order to identify the search party as police officers. However, no law establishes this requirement. They should locate and control the movements of any persons who may pose a threat to the safety of the execution process. They should also locate and control any items which might be used as weapons against them. Methods for accomplishing this will vary according to the circumstances, but it may help to gather all persons in one place and to observe them during the search. Since "controlling" a person may be deemed an "arrest," officers must exercise care in such situations. The best procedure involves first eliminating danger to the officers and then simply asking the occupants who have no connection to the search to leave voluntarily for a reasonable time. This will reduce hostilities and possible constitutional violations. See Ybarra v. Illinois, 444 U.S. 85 (1979).

The general procedures of Rule 8:5.06 should also reduce confusion, identify responsibility, maintain the chain of evidence, and eliminate

unnecessary damage. Rule 8:5.06(e) seeks to secure compliance with making a proper "return" in accordance with Texas Code of Criminal Procedure article 18.10. In a large-scale search, or "raid," a police department may find it advisable that the search party not include members of the security party. This should reduce confusion and clarify responsibility by assigning an officer only one task. Keeping the search party small also reduces the likelihood of damaging the chain of evidence.

After executing the search warrant, the officers have a responsibility to secure the premises or to leave the premises in the care of a responsible person. Although a search warrant authorizes the police department to enter and search the premises, it does not allow officers to abandon the building to vandals or to the elements. The police have a duty not to inflict unnecessary damage, including damage which results even indirectly from negligent acts. Therefore, the officers must leave the premises at least as secure as when they entered.

SECTION SIX: ARRESTS DURING SEARCH

8:6.01. In cases of combined warrants commanding both arrest and search at a premises, or where an officer reasonably suspects that an occupant may be named in an outstanding arrest warrant, an officer may require any person on the searched premises to identify himself in order to determine whether the arrest warrant names that person. An officer may also require any person on the premises, who witnessed the search or arrest, to identify himself.

8:6.02. During the search, an officer may inadvertantly find and seize contraband or some other item which gives the officer probable cause to believe that an offense has been committed. This evidence may also provide an officer with probable cause to obtain an arrest warrant for one or more particular persons on the searched premises. Where the officer finds it impractical to obtain a warrant, he should follow the rules of Chapter Five on Arrest Without a Warrant.

8:6.03. An officer may arrest any person who attempts to escape or who forcefully resists or interferes with the lawful execution of a search warrant.

8:6.04. An officer may also arrest anyone on the premises who refuses to identify himself, if the officer has at least a reasonable suspicion that such person has committed an offense.

8:6.05. An officer shall make all arrests in accordance with the applicable rules in Chapter Five on Arrest Without a Warrant and in Chapter Seven on Execution of Arrest Warrants.

Texas Code of Criminal Procedure article 18.03 states that a search warrant may also order someone's arrest. In addition, independent of the search, an arrest warrant may be outstanding against someone, including a person whose property is to be searched.

Therefore, while executing a search warrant, an officer may require identification from any person on the premises who he reasonably suspects is the subject of an outstanding warrant or is involved in criminal activity. The procedure, analogous to a "stop-and-frisk" detention for investigation, requires only reasonable suspicion, not probable cause. An officer may develop a reasonable suspicion about a person based on the nature of the

unlawful activity allegedly occurring on the premises, that person's relationship to those premises, and the likelihood of that person's involvement in the unlawful activity. Texas Penal Code section 38.02 makes it an offense if a person "intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." However, this statute would violate the fourth amendment unless the officer had at least a reasonable suspicion that the person was engaged or had engaged in criminal conduct. Brown v. Texas, 443 U.S. 47 (1979).

A search that yields evidence that illegal activity is occurring on the premises provides an officer with probable cause to arrest persons in control of the premises. With probable cause, an officer can also ordinarily arrest visitors on such premises. Persons who resist or interfere with the execution of the warrant, or who unlawfully fail to identify themselves, may also be arrested. Unless an officer has reasonable suspicion that a person has some involvement in criminal activity, no law requires that person to identify himself. Residents and guests on the premises do not become automatic suspects by the issuance of a search warrant.

Chapter Nine
STOP-AND-FRISK

CONTINUED

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CHAPTER NINE

STOP-AND-FRISK

An officer may initiate a "stop-and-frisk" based on less than probable cause, for the purpose of investigation, crime prevention, and crime detection. Despite the need for police to have "stop-and-frisk" authority, until the landmark case of Terry v. Ohio, 392 U.S. 1 (1968), the courts in most jurisdictions excluded from evidence everything found during a "frisk."

Although a stop-and-frisk does not equal an "arrest-and-search," it still involves a significant state intrusion into a citizen's fundamental right of privacy. Therefore, federal and state courts strictly limit the scope of an officer's authority in this area. The officer must have specific articulable facts to warrant the intrusion of a "stop." Milton v. State, 549 S.W.2d 190 (Tex. Crim. App. 1977). An officer cannot base a stop on an inarticulate hunch, suspicion, or mere good faith. Talbert v. State, 489 S.W.2d 309 (Tex. Crim. App. 1973).

Once an officer has probable cause to arrest, the rules of this chapter cease to apply. However, since probable cause may arise in the course of an investigatory stop-and-frisk (e.g., if the officer finds a concealed weapon) this chapter often ties directly into other chapters. Although the law in this area remains in flux, an officer will improve his chances for staying within legal bounds if he can justify his intrusive actions by citing specific and articulable factors on which he reasonably relied.

[Research Note: For a general discussion of stop-and-frisk issues, see J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer 275-301 (1979). The work of the American Law Institute in A Model Code of Pre-Arraignment Procedure, section 110.2 and Commentary at 262-88 (1975) (hereinafter cited as ALI Model Pre-Arraignment Code), provides a scholarly background to these issues. In addition, the 1974 Model Rules for Law Enforcement Series published by the College of Law of Arizona State University and the Police Foundation includes a volume entitled Stop and Frisk.]

SECTION ONE: DEFINITIONS

9:1.01. Access Area - The area (also known as the "area of immediate control") into which a person might readily reach in order to grab a weapon.

9:1.02. Armed - Carrying a weapon or other object capable of inflicting death or serious bodily injury.

9:1.03. Frisk - Jargon referring to a weapons search of a person generally limited to a patdown of his outer clothing to ensure the safety of the officer and others.

9:1.04. Nonsuspect - A person who an officer has no reasonable suspicion to believe is involved in any criminal activity.

9:1.05. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

9:1.06. Reasonable Suspicion - An officer's rational belief, based on credible and articulable information and circumstances, that something may be true (for example, that an offense may have occurred or that a particular person may have committed an offense).

9:1.07. Stop - A temporary investigative detention, generally including limited field questioning, of a suspect.

9:1.08. Suspect - A person who an officer reasonably suspects of involvement in criminal activity.

A "frisk" (Rule 9:1.03) refers to a limited weapons search of a suspect who the officer reasonably believes is armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). Ordinarily, frisking the suspect's "person" satisfies the protective purpose of the limited weapons search. However, circumstances may require an officer to extend the weapons search to the suspect's "access area" (Rule 9:1.01). For example, to provide for his own safety, he may have to make a limited weapons

search of a suspect's purse or the "access area" beneath a suspect's seat. For a further discussion of the concept of "access area," see Section Four of this chapter and Section Three of Chapter Six on Warrantless Search and Seizure.

Rule 9:1.05 defines "probable cause" in accordance with case law. An extended discussion of this definition appears in Chapter Five on Arrest Without a Warrant. Section Three of this chapter contains a detailed presentation of the concept of "reasonable suspicion" (Rule 9:1.06). A "stop" (Rule 9:1.07), although a "seizure" under the fourth amendment, falls short of being an "arrest" (as defined and discussed in Chapter Five on Arrest Without a Warrant). Although the distinction between a "stop" and an "arrest" can become vague, Section Three of this chapter attempts to clarify the demarcation.

SECTION TWO: INTERVIEWING NONSUSPECTS

9:2.01. Although an officer shall not arbitrarily stop a nonsuspect, an officer may encounter and briefly interview anyone if the circumstances make the interview reasonable. (A nonsuspect has the right to refuse to stop and answer any questions.)

9:2.02. Unless his identity is obvious, an officer shall identify himself when he initiates an interview.

9:2.03. An officer shall not frisk or detain a nonsuspect against his will. However, if the interview or other circumstances provide an officer with reasonable suspicion that an individual is involved in criminal activity, the officer may detain that person as a suspect.

An officer has complete freedom to contact anyone and begin a conversation, provided the officer acts reasonably and can justify the encounter. Such lawful encounters rely upon the voluntary compliance of the citizen. An officer, however, has no automatic or affirmative duty to advise a citizen of his right to decline the interview and move on. An arbitrary interview, absent adequate articulable justifications, subjects subsequent police actions to constitutional attack.

SECTION THREE: STOPS FOR QUESTIONING

9:3.01. An officer may stop and question a person (including a pedestrian or motorist) who he reasonably suspects may be involved in past, present, or future criminal activity. If an officer has lawfully stopped someone, that person commits an offense if he refuses to report or falsely reports his name and residence address.

9:3.02. Unless his identity is obvious, an officer shall identify himself when he stops a person for questioning.

9:3.03. To the extent necessary and reasonable, an officer may use limited, nondeadly force to prevent a suspect from leaving the scene of a lawful stop.

9:3.04. Before an officer stops a person for questioning, he must be able to describe specific suspicious conduct or circumstances to justify that stop. For example, the following factors (generally a combination of one or more of these factors) might contribute towards justifying a stop:

(a) The suspect is making evasive or furtive movements;
(b) The suspect fits a "wanted" notice;
(c) The suspect has a felony record;
(d) The suspect is near the scene of a recently committed crime;
(e) The suspect's actions, clothing, vehicle, or presence appear unusual for the time or the place; and
(f) The officer observes some other factor or has received information (even if anonymous) which links the suspect to criminal activity.

9:3.05. In evaluating a person's suspiciousness, an officer should rely on his training and experience.

9:3.06. An officer must balance the level of his suspicions and the seriousness of the offense against the extent of interference with the stopped suspect.

9:3.07. Subject to Rule 9:3.11, an officer may detain a person he lawfully stopped for a reasonable length of time to:

(a) Verify his identification,
(b) Account for his conduct,
(c) Account for his presence, and
(d) Ascertain whether a crime occurred.

9:3.08. If the questioning remains brief, casual, and relatively neutral and noncoercive, an officer need not inform the suspect of his Miranda rights. However, if the questioning begins to focus on the suspect (e.g.,

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by becoming an accusatory interrogation regarding a specific offense) the officer shall cease the questioning or inform the suspect of his Miranda rights before proceeding.

9:3.09. An officer may inform a lawfully stopped suspect that the officer will consider, in determining whether probable cause exists to arrest that suspect, the suspect's refusal or inability to produce identification or otherwise satisfactorily answer the officer's questions. However, inability to produce identification is not an offense.

9:3.10. Unless he receives authorization from his supervisor, an officer shall release a suspect if the officer cannot develop probable cause to arrest the suspect within a reasonable time [e.g., 30 minutes].

An officer has the right to approach a person to investigate criminal behavior even though he lacks probable cause to arrest. E.g., Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968); United States v. Edwards, 469 F.2d 1362, 1364-65 (5th Cir. 1972). However, under the fourth amendment of the US Constitution, an officer cannot freely and arbitrarily detain, interrogate, and search any individual. The fourth amendment only permits "reasonable" searches (including "frisks") and seizures (including "stops").

Thus, law enforcement (i.e., crime prevention, detection, and investigation) must not overstep constitutional boundaries. Unfortunately, no statute or case law clearly marks these boundaries. This complex and sensitive area of the law remains in flux and packed with unanswered questions. However, existing case law does provide certain direction for making "stop-and-frisk" decisions. Not surprisingly, deciding "reasonableness" requires balancing the "suspicious facts" and the general public interest in law enforcement against the degree of

intrusion into individual personal liberty.

As stated in Rule 9:3.01, in order to stop someone, an officer must reasonably suspect that person of criminal activity. A "stop" stands the best chance of surviving judicial scrutiny if the officer makes a complete record of every factor which, in light of his experience, contributed to his decision. Texas Penal Code section 38.02(a) states:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

For an analogous rule, see ALI Model Pre-Arraignment Code, section 110.2 (1)(b) and Commentary at 262-88. However, to comply with the fourth amendment, an officer can only apply section 38.02 when he has at least a reasonable suspicion that connects the person with criminal conduct. Brown v. Texas, 443 U.S. 47 (1979). The authority to stop a mere witness to an offense (see the title of section 38.02) is questionable. Once an officer lawfully stops someone, the officer may ask him a limited array of questions (Rule 9:3.08). United States v. Salter, 521 F2d 1326 (2d Cir. 1975).

Texas case law on "stops," regrettably, has not paved a consistent path to follow. In large part, however, the problem stems from the inconsistent use of legal terms, rather than from fundamental changes in logic. For example, in Brown v. State, 481 S.W.2d 106, 110 (Tex. Crim. App. 1972), the court states: "Probable cause for an officer to detain a person temporarily for investigative purposes exists where the circumstances reasonably indicate that a particular person either has [committed] or is preparing to commit a crime." The use of the term "probable cause" creates unnecessary confusion. The term "reasonable suspicion"

expresses the same idea but with less confusion. (Bentsen v. State, 576 S.W.2d 374, 375 (Tex. Crim. App. 1978), also appears to confuse "reasonable suspicion" with "probable cause.")

An officer's suspicions need not link a suspect to a particular crime. However, a court may refuse to acknowledge a "high crime" label applied to a large area and used by an officer to justify a broader latitude for "stopping" individuals. E.g., Talbert v. State, 489 S.W.2d 309, 311 (Tex. Crim. App. 1973). The officer must point to specific, articulable, and concrete facts. E.g., Amorella v. State, 554 S.W.2d 700 (Tex. Crim. App. 1977); Faulkner v. State, 549 S.W.2d 1 (Tex. Crim. App. 1976). Thus, in citing "high-crime areas," an officer must refer to a specific location and a particular type of crime. E.g., Wallace v. State, 467 S.W.2d 608 (Tex. Crim. App. 1971).

Rule 9:3.04 presents a partial list of factors which an officer might consider in his decision to stop someone. An officer can justify a stop by showing how the suspicious factors, when analyzed together, were inconsistent with innocent behavior. To demonstrate the reasonableness of a stop, the officer must articulate concrete facts which would have led a prudent person (with the officer's training and experience) to conclude that the stopped person appeared to have a connection with criminal activity. This standard also applies to automobile stops. Delaware v. Prouse, 440 U.S. 648 (1979). In Prouse, the US Supreme Court held that it was unconstitutional to stop a motorist arbitrarily to check his driver's license or vehicle's registration if no traffic violation occurred or other valid reason existed. A systematic alternative (e.g., stopping everyone) could pass constitutional muster.

A person's appearance will often alert an officer that something appears awry. Peculiar or unusual clothing, however, will rarely in itself justify a stop (or a frisk). For example, in Baker v. State, 478 S.W.2d 445 (Tex. Crim. App. 1972), officers stopped and frisked two barefooted, shabbily dressed youths with extremely long hair. The frisk yielded a switchblade knife. The court, however, held (at 449) the evidence inadmissible because "the overall circumstances" did not furnish the officers "with a valid 'stop and frisk' situation."

An officer who sees a person who the officer knows has a record of several arrests for burglary or robbery acting "suspiciously" has probably developed the basis for a "stop." Thus, in Baity v. State, 455 S.W.2d 305 (Tex. Crim. App.), cert. denied, 400 U.S. 918 (1970), an officer observed the defendant, a man he knew had numerous arrests for theft and burglary, with appropriate suspicion. When the officer saw the defendant enter an alley, back out, and then walk away rapidly with his coat pulled tight, the officer acted reasonably when he stopped and interrogated him. The court (at 308) said:

> In the case at bar the experienced officer observed in the downtown business area a series of acts in the early morning hours, each of them perhaps innocent in itself but which when taken together with the officer's previous knowledge of the appellant warranted further investigation. In fact, it would have been poor police work for the officer to have failed to investigate appellant's behavior further. Surely it cannot be argued that a police officer should refrain from making any investigation of suspicious circumstances until such time as he had probable cause for arrest.

The court noted that the officer had served 13 years on the police force. The US Supreme Court had recognized this factor in Terry, by stating

that "in light of [the officer's] experience" he could interpret seemingly innocent behavior and conclude that criminal activity was afoot. This principle produced Rule 9:3.05.

As recognized in Rule 9:3.04(f), an officer's suspicions about an individual often arise from a report by another citizen. In Adams v. Williams, 407 U.S. 143 (1972), the US Supreme Court upheld an officer's stop-and-frisk of a man based on a report of wrongdoing made by an informant the officer knew. However, the citizen who provides the information must give the officer articulable reasons for his suspicions linking a particular person to criminal activity. Thus, in Hinson v. State, 547 S.W.2d 278 (Tex. Crim. App. 1978), the operator of a truck rental business alerted a sheriff of his suspicions about two men to whom he had rented a truck. The court held the sheriff's stop of the two men invalid because the sheriff had insufficient facts on his own and had not received sufficiently specific facts from the rental operator.

Rule 9:3.10 provides guidance on when a "stop" becomes "custodial" and triggers Miranda rights. Miranda applies if questioning becomes accusatory and continues after a temporary detention becomes coercive. E.g., Orozco v. Texas, 394 U.S. 324, 326 (1969). In addition, providing Miranda warnings after making an unlawful investigatory stop (or arrest) does not break the causal chain to permit inadmissible testimony into evidence. Brown v. Illinois, 422 U.S. 590 (1975).

Rule 9:3.10 does not fix a maximum "holding" time [e.g., 30 minutes]. Fixing a time limit has obvious benefits and drawbacks. However, a department may find that a reasonable and workable maximum interval will eliminate most potential for abuse without interfering with an appropriate

investigation. (See the ALI Model Pre-Arraignment Code, sec. 110.2(1) and Commentary at 283, which sets a 20-minute limit.)

SECTION FOUR: FRISKS

9:4.01. An officer may frisk a suspect he lawfully stops only if the officer reasonably suspects that the suspect is armed and dangerous. If appropriate to protect himself or others, an officer may frisk such suspect immediately, without providing an opportunity for the suspect to identify himself or explain his presence.

9:4.02. Before an officer frisks a suspect, he must be able to describe specific factors which produce a reasonable suspicion that the suspect is armed and dangerous. In combination with the factors underlying the stop (Rule 9:3.04), the following factors might contribute towards justifying a frisk:

(a) The suspect attempts to flee from the officer when stopped,
(b) The suspect fails to produce valid identification,
(c) The suspect refuses to explain his actions or presence or offers a false or unbelievable story,
(d) A companion of the suspect is armed,
(e) The suspected crime involved the use of a weapon,
(f) The suspect has a suspicious bulge in his clothing or attempts to conceal an object, and
(g) The officer has received information that the suspect customarily or occasionally carries a weapon.

9:4.03. When practical, before an officer begins a frisk, he should have the suspect remove and set aside any hand-carried or similar items (e.g., packages, purses, parcels, shoulder bags, knapsacks, briefcases). After the frisk, if the officer still reasonably suspects that the suspect is dangerous and that such items could be readily opened and may conceal a weapon, the officer should attempt a limited weapons search (e.g., squeezing flexible items or opening inflexible items) of those items before returning them.

9:4.04. An officer shall end the frisk as soon as he no longer reasonably suspects that the suspect is armed and dangerous.

9:4.05. When appropriate under the circumstances, an officer who has lawfully stopped a suspect may order that suspect to exit his vehicle or otherwise to move a reasonable distance to a safer location (e.g., away from a crowd, out of a dark alley) before frisking him. An officer may make a limited weapons search of the suspect's access area if the officer reasonably suspects that the access area contains a weapon which endangers the officer or others.

9:4.06. While conducting a frisk, if an officer reasonably suspects that an object he feels or otherwise discovers is a weapon, he may

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remove that object for closer examination. (If the removed object is a weapon and the suspect has no exemption which permits him to carry a weapon, the officer shall arrest the suspect, inventory the weapon as evidence, and conduct a full search of the arrestee.) (If the removed object is contraband, or other seizable property, the officer shall arrest the suspect, inventory the seized property, and conduct a full search of the arrestee.)

In Terry v. Ohio, 392 U.S. 1, 27, the US Supreme Court set out limited authority for a protective frisk by law enforcement officers:

> . . . there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Adams v. Williams, 407 U.S. 352 (1972), established three grounds for a valid frisk: (a) the stop must be lawful, (b) the officer must reasonably suspect that the person is armed and dangerous to the officer or to others, and (c) the frisk procedure must relate to the production of weapons. As indicated by the rules within this section, an officer cannot automatically frisk each suspect he stops, even if each stop were lawful.

Thus, an officer must be able to justify a frisk by pointing to articulable facts which would have led a prudent person, with the officer's training and experience, to have a reasonable suspicion that the suspect was armed and dangerous. E.g., Haley v. State, 480 S.W.2d 644 (Tex. Crim. App. 1972). This makes the frisk "reasonable" as required by the US Constitution's fourth amendment. Without such facts, a court may declare the frisk unconstitutional.

For example, in Davis v. State, 576 S.W.2d 378 (Tex. Crim. App. 1978), a store employee called the sheriff after observing the defendant loitering

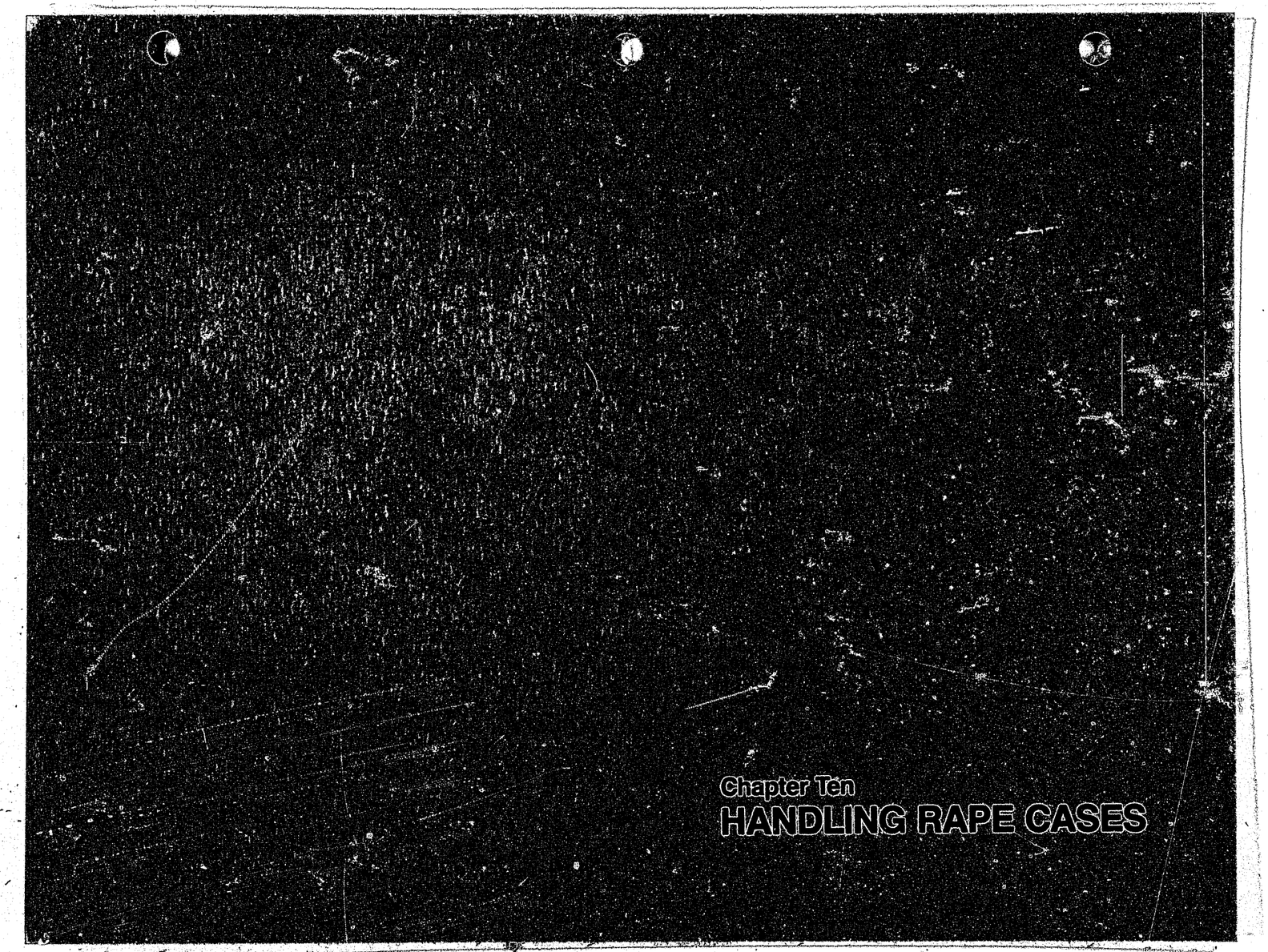
outside the store for most of the morning. The responding deputy observed that the defendant appeared unsteady on his feet and slurred his words. The officer testified that he intended to arrest the defendant for public intoxication. However, he did not do so. Instead, upon noticing a bulge in a pocket of the defendant's tight pants, the officer demanded the defendant to hand over the object causing the bulge. The object was a package of marijuana. Although the court found the stop lawful, it ruled that the officer lacked specific facts to create the reasonable inference that the defendant was armed and dangerous.

Under Rule 9:4.01, an officer may make a justifiable frisk of a suspect without first giving him any opportunity to exculpate himself from the suspicion which led to the stop or the frisk. As a practical necessity, an officer must have this right. For example, as Mr. Justice Harlan observed in his concurring opinion (392 U.S. at 33) in Terry, "the right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence." Similarly, in Adams v. Williams, 407 U.S. 143 (1972), the officer justifiably reached into the suspect's waistband and retrieved the handgun because the officer had a reasonable suspicion that the defendant was armed and dangerous. In fact, a reliable informant had told the officer that the defendant had a gun in his waistband.

The protective weapons search (Rule 9:4.05) of the suspect's access area flows logically from the right to frisk. Particularly in automobile stops, an officer remains highly vulnerable to an attack with a weapon concealed within the suspect's "area of immediate control." Thus, an officer may conduct this limited weapons search to protect himself and others.

In an automobile, for example, a suspect may have a weapon hidden under the seat, beneath the floor mat or some papers, tucked in the sun visor, or in an accessible glove box. E.g., Adams v. Williams, 407 U.S. 143 (1972) (machete under suspect's car seat); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978) (revolver in holster under suspect's car seat). Moreover, it may be necessary for the officer to have the suspect leave the access area in order to conduct the protective search (e.g., have the driver exit his vehicle to check for a weapon under the driver's seat). The officer, however, has no right to seek out non-dangerous contraband or other seizable property or to extend his search outside the access area (e.g., in the trunk). In addition, if the officer had no reason to frisk the stopped driver, he may not then search the access area after the suspect has exited. Government of the Canal Zone v. Bender, 573 F.2d 1329 (5th Cir. 1978).

As noted in Rule 9:4.06, in a properly confined frisk for weapons, an officer may seize any contraband and other seizable property (i.e., fruits and instrumentalities of a crime and other evidence of an offense) he discovers. Evidence found in that manner is admissible. E.g., Adams v. Williams (heroin); Peters v. New York, 392 U.S. 40 (1968) (burglar's tools).


Chapter Ten
HANDLING RAPE CASES

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The Federal Bureau of Investigation reported that 67,131 forcible rapes occurred in the United States during 1978, an increase of approximately 20 percent since 1974. During 1978 alone, 31 out of every 100,000 females were reported rape victims. FBI Uniform Crime Reports: Crime in the United States, 1978, at 14-15. Moreover, these figures do not reflect the widely acknowledged high percentage of rapes that are not reported to the police. Although no one knows the exact percentage of unreported rapes, it probably remains uncomfortably high, conservatively estimated at nearly 50 percent. US Department of Justice, Sourcebook of Criminal Justice Statistics (1977).

Although many factors may explain why victims fail to report that they have been raped, the treatment victims receive from the police always ranks uncomfortably high among the factors cited. Some victims do not contact the police because they fear that the investigative, medical, and prosecutorial procedures will be as psychologically traumatic as the crime itself. Indeed, police have frequently been accused of being indifferent, callous, and even accusatory and voyeuristic in their dealings with rape victims.

In response to such criticism, many police departments have instituted procedures which attempt to insure that the rape victim receives sympathetic and understanding treatment. Such treatment not only benefits the victim but also helps the investigation of the case because the

attitude of the police officer can influence the victim's willingness to cooperate in the investigation and prosecution. In addition, growing public awareness of sympathetic and professional treatment of rape victims by the police should encourage more women to report the offense and generally increase public confidence and respect for the police.

These rules establish departmental procedures for handling rape cases. They outline how to conduct a thorough preliminary investigation while helping the victim both physically and emotionally. This chapter focuses primarily on the officer's relationship with the rape victim. Consequently, it does not cover the technical aspects of the investigation, such as the collection of evidence.

A large proportion of these rules have applicability to a broad range of interaction between police officers and the public. For example, although these rules directly relate to "rape" (i.e., under Texas law, a male who engages in nonconsensual intercourse with a female (Tex. Penal Code Ann. sec. 21.02)), "aggravated rape" (Tex. Penal Code Ann. sec. 21.03), and "rape of a child" (Tex. Penal Code Ann. sec. 21.09), they would also have considerable relevance when dealing with the victims of other types of crimes, such as "sexual abuse" (Tex. Penal Code Ann. sec. 21.04), "aggravated sexual abuse" (Tex. Penal Code Ann. sec. 21.05), "sexual abuse of a child" (Tex. Penal Code Ann. sec. 21.10), and "indecency with a child" (Tex. Penal Code Ann. sec. 21.11). In particular, police interaction with victims of "homosexual rape," classified as "deviate sexual intercourse" (Tex. Penal Code Ann. sec. 21.01(1)) in the crime of "sexual abuse" or "aggravated sexual abuse," might be improved by adapting and applying the rules of this chapter to that situation.

SECTION ONE: GENERAL PROCEDURES

10:1.01. The officer should attempt to gain the victim's confidence and establish a relationship of trust with her and her family.

10:1.02. The officer should let the victim know that he has concern for helping her as well as in arresting and prosecuting the offender.

10:1.03. The officer should treat the victim with compassion, consideration, understanding, and patience, although such sympathy should not prevent him from collecting evidence and asking necessary questions.

10:1.04. When talking to the victim, the officer should use language appropriate to her age, intelligence, and education.

10:1.05. The officer should use inoffensive terms when referring to various parts of the body (e.g., if appropriate, use medical terms such as penis, vagina, etc.).

10:1.06. The officer should never unnecessarily ask the victim to relate details of the offense.

10:1.07. The officer should not ask any embarrassing or personal questions which are irrelevant to the investigation.

10:1.08. An officer should not appear judgmental or express to the victim any personal opinion as to why or whether a rape or other offense has been committed.

10:1.09. Although an officer should administer appropriate first aid, he shall never undertake a medical (e.g., pelvic) examination of a rape victim.

The officer's understanding of the victim's emotional condition is highly important to the successful handling of a rape case. At all times he must remember the psychological effects of rape on its victims. It is essential that he view rape as both an emotional and physical assault on the victim. Rape frequently leaves emotional scars which can lead to marital problems, mental illness, and even suicide.

A rape is a brutal violation of a person's body because it deprives

the victim of both physical and emotional privacy and autonomy. See, e.g., Bard & Ellison, Crisis Intervention and Investigation of Forcible Rape, Police Chief, May 1974, at 68. From the outset, the officer must express his concern for the victim's well-being. He must gain her confidence and let her know that he is there for her benefit and protection. Though he should remain calm and professional at all times, he can demonstrate tolerance, compassion, sympathy, and patience while performing his official duties. Charlé, Sex Crime Units, Police Mag., Mar. 1980, at 52-61. Establishing good rapport with the victim's family can be just as important as developing a good relationship with the victim. Family support is often extremely crucial to the rape victim's recovery.

The officer should never cause the victim to feel guilty because she has been raped. In no way should he appear to judge her or her actions. He must not appear embarrassed or extremely casual. He should acknowledge the victim's personal dignity by being considerate and respectful. He should not reveal his own sexual attitudes, either overtly or subtly.

In accordance with Rules 10:1.04 and 10:1.05, an officer should avoid unnecessary reliance on slang or colloquialisms, particularly when alluding to matters directly related to the offense. The officer, taking his cues from the victim, should discuss the incident by using the most appropriate inoffensive terms to suit the circumstances. Use of routine medical terms will often minimize embarrassment and enhance the professional atmosphere of the investigation. The officer may ask questions of a personal nature only if they relate to the purpose of the

investigation. For a discussion of the importance of the officer's interaction with the victim, see Merchant, Police Assistance to Rape Victims, Police Chief, June 1980, at 39-40, 77.

Similarly, officers should never make a rape victim unnecessarily relate the details of the offense. Each time a victim recounts the details of the rape, she mentally relives the incident. If not properly handled, a detailed recounting can amount to a psychological rape. By gathering complete information at the proper times, officers can avoid putting her through the ordeal of repeated questioning. (In order to reduce the need for repetition, at least one department tape-records the victim's account of the incident.)

SECTION TWO: INITIAL POLICE CONTACT WITH THE RAPE VICTIM

10:2.01. After explaining the importance of preserving evidence, the officer shall advise the victim not to bathe, shower, douche, or take any measures which might destroy evidence.

10:2.02. The first officer to respond to a rape complaint is responsible for the preliminary investigation and immediate notification of [the proper investigative unit].

10:2.03. If the victim requires immediate medical attention, the officer should follow departmental procedures regarding the administration of first aid and transportation to a hospital.

10:2.04. Only one officer should conduct the preliminary questioning of the victim. In order to minimize embarrassment to the victim and the chance for conflicting accounts of the victim's statements, the questioning should take place in private (away from all other officers, witnesses, relatives, and onlookers). In the best interests of the investigation, the officer may make an exception and permit the presence of a person whom the victim specifically requests.

10:2.05. If an investigator is readily available, the initial officer should not question the victim in detail about the incident, but should briefly interview her in order to:

(a) Determine the type of crime that has occurred,
(b) Obtain a description of the offender and broadcast a pick-up, if appropriate, and
(c) Obtain basic information for beginning an investigation (i.e., name, address, age, occupation, etc.).

However, if the responding officer will conduct the investigation, he may obtain a detailed account of the incident from the victim in accordance with Section Three of this chapter.

The sequence of events in the way a particular police department proceeds with a rape case varies markedly among the different departments and depends, in large part, on the size of the department. This chapter attempts to provide flexible rules but cannot establish universally applicable procedures. For example, since each department will have its

own approach for investigating a rape case, this chapter always uses the more general term "officer," even in situations where many larger departments would generally deploy an "investigator," a "detective," or some other type of specialist.

The first officer to arrive at the scene of a rape has an important, if sometimes limited, role in the investigation. The way he deals with the victim can greatly influence the victim's emotional recovery and determine whether she will cooperate in the investigation and prosecution of the case. Consequently, he must demonstrate that he is there to help her. The victim's physical condition should have primary importance to the officer. If she does not require immediate medical attention, she should be interviewed by only one officer for the immediate purpose of obtaining the information listed in Rule 10:2.05.

The victim's privacy and emotional comfort should take precedence. Thus, the officer should separate the victim from everyone, unless the victim requests someone's presence. Even if the victim makes such a request, the officer should only permit the presence of another person if doing so will benefit the investigation (e.g., where the victim is a small child who appears afraid to be alone with the officer). The victim may have trouble telling a stranger what has happened to her; having others listening may only add to her difficulty. Moreover, legal problems may arise where more than one person witnesses the same interview. At this time, the victim need not relate the details of the rape (and the officer should not ask her to do so) if another investigating officer will soon be assigned to the case. This procedure will vary depending on the particular department's procedures. Therefore, the officer may require

only enough information to determine what type of crime has been committed and to broadcast a pick-up.

However, if the first responding officer will also function as the investigating officer on the case, he may obtain a detailed and more complete account of the incident. Thus, this officer would be functioning under the rules of the following section. Regardless of the particular departmental procedures, the officers will follow the underlying policy of shielding the victim from needlessly repetitious and detailed recountings of the rape.

SECTION THREE: INITIAL INTERVIEW

10:3.01. An officer will be assigned to investigate a rape case as soon as possible after the initial complaint. The same officer will, where possible, remain with the case from assignment until the close of the investigation.

10:3.02. Where practical, and subject to personnel availability, an officer should ask the victim if she would prefer to speak with a female officer. Whenever possible, and particularly where the victim specifically and spontaneously requests to speak to a female officer, the officer should attempt to accommodate the victim's request.

10:3.03. [In situations where the investigating officer differs from the responding officer.] Prior to interviewing the victim, the officer shall obtain the basic investigative information from the officer who conducted the preliminary investigation pursuant to Rule 10:2.05.

10:3.04. The officer should concentrate on calming the victim and trying to minimize her emotional strain and psychological trauma.

10:3.05. The officer should conduct a brief interview with the victim in private, unless the victim's age or other circumstances indicate the need for the presence of someone else. The officer should:

(a) Allow the victim to tell her story in her own words and without interruption.
(b) Avoid asking questions that encourage merely a "yes or no" answer.

10:3.06. The officer should expect the victim to omit embarrassing details about the crime. If such omission occurs, he should explain the need to discuss certain information in order to satisfy the legal aspects of the crime and to assist the investigation.

10:3.07. The officer should ensure that the victim is never left alone. Except during the actual medical examination, she should always be accompanied by the officer, a friend, a relative, or other person of her choice.

10:3.08. The officer should inform the victim how to contact available local organizations which offer assistance to rape victims.

Ideally, as soon as possible after the initial complaint, the case should be assigned to an officer, preferably one trained and experienced

in handling sex crimes. This same officer should remain with the case throughout the investigation in order to gain the victim's confidence and to establish a close working relationship with her. Oftentimes, however, the officer who initially responded to the call will also have the primary (and, perhaps, exclusive) duty to conduct the investigation. Moreover, a department often finds it impossible to keep the same officer working on any given case. The goal of continuity, particularly in regard to direct communications with the victim, should not be disregarded.

In most instances, an officer or investigator will be a male, since the number of female officers is still relatively small. If, however, the victim asks to speak to a female officer, she should be provided with one if one is available. Some departments assign a male and a female officer to each case, thus giving the victim an immediate choice of interviewer.

While many rape victims can discuss the details of the crime more easily with a woman than with a man, there may be some advantages in having an understanding and sensitive male officer handle the case. At a time when the victim may resent and possibly detest men, a supportive male officer can help her overcome this aversion. (Bard & Ellison, at 74.)

Where an investigating officer assumes control of a case, in accordance with Rule 10:3.03, the investigating officer should obtain as much information as he can from the officer who took the preliminary report pursuant to Rule 10:2.05. Doing so will eliminate asking the victim repetitious questions. The officer's interview with the victim represents another important part of the investigation. Since the

victim should have a medical examination as soon as possible, the first interview may necessarily be brief. Generally, the officer should conduct an in-depth, follow-up interview only after the victim has been medically examined and treated and has met her personal needs such as washing and changing clothes. (See Section Five on the Follow-up Interview.)

In the officer's first interview with the victim, he must gain her confidence and lay the foundation for mutual cooperation and respect by demonstrating his interest in helping and protecting her. In addition, he must obtain the information required to determine if and how the crime occurred and the direction in which the investigation should proceed. Of course, the way in which a rape victim responds to the interview varies, depending in part on the physical condition and individual psychological makeup of the particular victim. The following discussion of various types of responses by victims derives from Interviewing the Rape Victim, IACP Training Key #210 (1974) and Rape Intervention Resource Manual (P. Mills ed. 1977).

The verbal styles of the victims can range from quiet and guarded to talkative and unrestrained. Some victims find it extremely difficult to talk about the rape, perhaps because of the personal and traumatic nature of the subject or because they become uncommunicative while under pressure. Others find relief in discussing the details of the rape. Often a victim will alternately exhibit each pattern during the course of the interview.

The two verbal patterns most frequently displayed by rape victims during an interview reflect general emotional states commonly associated with the psychological effects of rape. The victim may respond to the

crime in an expressive manner; that is, she verbally and physically exhibits fear, anger, and anxiety. Or, the victim may respond in a controlled behavior pattern. In this pattern the victim hides her feelings and outwardly appears to be calm, composed, or subdued. Thus, a particular rape victim will physically show her feelings: crying, shaking, screaming, restlessness, and tenseness may all accompany discussion of the crime, especially the more painful details. Some women may react by smiling or laughing, often to avoid their true feelings. Comments such as "Really, nothing is wrong with me" combined with laughter often serve as a substitute for the distressing memory of the attack.

Rape victims who appear composed and able to discuss the rape calmly are usually controlling their true feelings. Presenting a strong controlled appearance during personal crises may be the way they cope with stress. In some cases, however, the victim's state of calmness reflects physical exhaustion rather than a conscious effort to remain composed. Victims frequently have not slept since the previous night because most rapes occur after dark.

Victims also often remain silent. The officer should realize that silence does not mean that the victim is hiding facts. Rather, it often merely means that she is having a difficult time in starting to talk about the incident. Rape victims also frequently express shock that the incident occurred. Statements such as "I can't believe it happened," "It doesn't seem real," or "I just want to forget it" are common responses to the trauma of rape.

Although general emotional reactions to rape vary among individuals, the one common psychological denominator seems to be fear. The victim

often feared for her life during the rape. In most cases, the emotional reaction to this fear has not dissipated by the time of the interview.

Regardless of the victim's emotional reaction to the crime, the interview itself creates additional anxiety. In many cases, the victim has no familiarity with police procedures; perhaps she has never before talked with a police officer. Nevertheless, the "stranger" conducting the interview will ask her to discuss the details of probably the most traumatic experience of her life. This produces a conflict within the victim: she <u>knows</u> that to aid the investigation she must discuss the details of the rape, but she <u>feels</u> apprehensive about describing the experience.

The officer must be patient and avoid appearing aggressive or forceful. Initially, as stated in Rule 10:3.04, he should allow the victim to tell her story in her own words without interruption. However, the officer should anticipate a certain amount of hesitance or omission of embarrassing or unpleasant details from her description of the offense (Rule 10:3.05). While the officer should encourage her to talk about what happened, he may want to obtain this information at a later interview, particularly if the victim appears emotionally upset. The victim may also find it helpful for the officer to talk to the victim's family in order to explain what has happened and its significance to her. He should stress that neither the family nor the victim deserves blame for what has happened. This attitude may help the family to relate to her with compassion, understanding, and support. (Bard & Ellison, at 74.)

In many jurisdictions, several organizations provide assistance to

the rape victim. Officers who handle rape cases must become familiar with these groups, when available, and the services they provide. City or county social service agencies often offer counseling services or at least counseling referral. Public health agencies can provide needed medical services. In addition, women's groups have formed throughout the nation for the purpose of helping rape victims. Such groups now exist in many communities throughout Texas (e.g., the Rape Crisis Center in Austin). Counseling may also be available by telephone, such as through the use of a toll-free number. Many of the women involved in organizing these groups are themselves rape victims. Exactly what type of services these groups offer varies from city to city, but many provide counseling or counseling referral, legal and medical service, and general assistance and comfort to rape victims. Several police departments throughout Texas have excellent working relationships with such organizations.

For a general discussion, see Landau, Volunteers in Rape Prevention, Police Chief, Mar. 1980, at 32.

SECTION FOUR: MEDICAL EXAMINATION

10:4.01. The officer should ask the victim to undergo a physical examination after explaining to her that:

(a) Prosecution is unlikely without the examination, and
(b) The examination often yields important evidence, and
(c) She may require medical treatment for possible pregnancy, disease, or injury. Thus the victim should receive a medical examination even when she believes that a medical examination is unnecessary or when the circumstances surrounding the rape indicate that an examination would yield no evidence.

10:4.02. A physician (preferably a gynecologist) experienced in handling rape cases should examine the victim.

10:4.03. The officer should stress the importance of having the initial examination performed at [a medical facility where the department has arranged for the examination of rape victims]. (Although the police department will pay for the examination if performed at such facility, the victim must pay if she chooses to be examined by the doctor of her choice.)

10:4.04. The officer should accompany the victim to and from the medical examination. A friend or a relative may also accompany the victim to the hospital.

10:4.05. If possible, the victim should wait for the examination in a private room. The officer or a friend or relative of the victim should remain with her while she waits.

10:4.06. Before the examination, the officer should advise the victim of the general nature of the examination she will undergo. He should impress upon her the need, in order to obtain the necessary evidence, for complete cooperation with the examining physician.

10:4.07. Neither the officer nor any friends or relatives of the victim should be present during the examination.

10:4.08. Prior to the examination and out of the victim's presence, the officer should inform the examining physician of the details of the offense. The officer should tactfully inquire as to the examining physician's experience in handling rape cases. If the physician is inexperienced in handling rape cases, the officer should inform him of the type of examination which should be conducted and of the need to obtain all possible evidence which corroborates the offense. He should also explain how to complete the proper medical form.

If the officer cannot transport the victim to the medical examination, he should help arrange for an appropriate alternative method of transportation. The victim must undergo a medical examination as soon as possible. As a general rule, motile sperm can be found in the vagina from one to eight hours after coitus. Non-motile sperm may last up to 14 hours although, in exceptional cases, they have been found from 18 to 24 hours after intercourse.

Even if a medical examination will not serve any investigative purpose (e.g., if the victim did not report the rape until past the time when physical evidence of the offense could be obtained), the victim's health and comfort require that she receive prompt medical attention. Thus, the victim should be examined and treated for possible injuries, venereal disease, or pregnancy. Since the victim must not douche or bathe prior to the examination, she is likely to be uncomfortable during this time.

Many police departments have arranged for a local hospital or medical facility, usually the city or county hospital, to handle rape examinations. If no such facilities exist in the area, similar arrangements can be made with an individual doctor. Ideally, the arrangements should ensure that the rape victims are examined by gynecologists (usually resident doctors at the hospital) experienced in handling rape cases. Assigning all rape cases to the same doctor(s) is preferred because it results in better reports for evidentiary purposes, greater sympathy for and understanding of the victim's condition, more thorough and sophisticated examinations, greater cooperation with the police, and greater

willingness of the doctor to testify in court. (The doctor's use of a self-contained "rape evidence kit" facilitates thoroughness and the proper collection and preservation of evidence.)

Although the victim may be examined by the doctor of her choice, the officer should explain the importance of the examination and gently try to persuade her to go to the facility where these arrangements have been made. Under no circumstances should she be coerced or intimidated into going there or into having an examination if she does not want one. Since a victim may be reluctant to incur the expense of an examination, it is wise to advise her that Texas law provides that the law enforcement agency will pay the costs of the examination if it is done at the approved facility. (Tex. Rev. Civ. Stat. Ann. art. 4447(m) (Vernon 1976).) However, the agency has no responsibility for the costs of treating the victim's injuries.

If possible, the victim should wait for the examination in a private room, accompanied only by the officer and perhaps a friend or relative. Many hospitals have designated a special room for this purpose. Prior to the examination, the officer should privately inform the doctor of the details of the offense so that the doctor will obtain all possible corroborative evidence. If the doctor has insufficient experience in examining rape victims, the officer should also explain the kind of examination that is required and the type of evidence needed. Fisher, Introduction of a Modified Evidence Collection Kit, Police Chief, May 1980, at 34.

SECTION FIVE: FOLLOW-UP INTERVIEW

10:5.01. When appropriate, the officer should arrange for a follow-up interview with the victim. As soon after the incident as practical, he should take a formal statement from her and reduce it to writing. The officer should not unnecessarily repeat questions. The officer will then file the case.

10:5.02. If the victim is emotionally distraught, the officer should delay the interview until she is calm and has regained her composure.

10:5.03. The interview should not take place in a police interrogation room. The interview should take place in a comfortable setting with privacy and freedom from distraction.

10:5.04. In order to minimize embarrassment to the victim and the chance for conflicting accounts of the victim's statements, only the officer and the victim [and optionally a person requested by the victim (such as a policewoman or appropriate third party) who does not inhibit the investigation] should be present at the interview. The officer, when appropriate, should explain the need for privacy (e.g., the risk of impeachment and other evidentiary problems).

10:5.05. The officer should make every effort to obtain all necessary information at or before this interview. Unless necessary for the investigation of the case, the officer should not conduct a further interview with the victim.

10:5.06. The officer should remain sympathetic, but should emphasize that he may sometimes take an inquisitorial and even adversarial position in order to obtain vital information and not because he doubts the truth of her statements. The officer should tactfully explain to the victim that even if portions of the interview seem embarrassing or insulting, they are necessary because:

(a) The information may help uncover the identity and the method of operation of the offender.
(b) The information will help determine whether sufficient evidence exists to merit prosecution.
(c) The information may enhance the chances of successfully prosecuting a rape suspect.
(d) Defense counsel may subject the victim to similarly thorough questioning if the case reaches court.

10:5.07. Initially, the officer should allow the victim to talk about the incident in her own words without interruption.

(continued)

10:5.08. After the victim has given her account of the incident, the officer should question her about relevant details. These questions should uncover any important details about the offense which she has failed to mention (e.g., the time of the offense, details about the offender's method of operation, words spoken by the offender, whether the offender had a weapon, whether the offender had any accomplices, etc.).

10:5.09. The officer should tactfully inquire into the victim's role in the incident and the type of resistance, if any, that she offered. These questions should include at least the following areas:

(a) The length and extent, if any, of her acquaintance with the offender.
(b) The duration and type of any previous personal relationship, including any prior sexual relations, with the offender. (Do not ask questions concerning the victim's sexual activities with any person other than the offender.)
(c) Her state of mind during the attack.
(d) The details of her resistance, if any.

10:5.10. The officer should present his questions in a manner that encourages conversation rather than implies interrogation.

10:5.11. If the victim's explanation differs from the original facts she reported, the officer should not accuse her of lying but should attempt to eliminate the discrepancies by asking for further explanation and detail, as necessary.

10:5.12. If the victim indicates that she does not wish to prosecute, the officer should nevertheless explain the importance of prosecution. If the victim refuses to prosecute, the officer may nevertheless continue the investigation in order to:

(a) Identify the offender and
(b) Obtain information that may help solve or prevent other offenses.

10:5.13. If the victim has any bruises or other externally visible signs of assault, the officer should have them photographed. However, if the victim must remove any clothing for the photograph, the picture shall only be taken in private and by a female officer or a female police employee.

10:5.14. The officer should explain to the victim the need for her continued cooperation. He should advise her of the possibility of future interviews, identification procedures, and court appearances and should encourage her to call whenever she has any information or problems.

Another crucial stage in a rape investigation is the follow-up interview with the victim, at which time the investigator must obtain the often embarrassing details of the offense. As noted, depending on a particular department's procedures, this sequence of events may vary. For example, if the original responding officer will also conduct the investigation, the interview sequence may be compressed. Thus, that officer need not split the interview by waiting until the day after the medical examination. This in-depth interview should be conducted as soon as practical, although often after the medical examination, taking into account the victim's physical and emotional condition. The day after the offense may be the best time to have the interview because it gives the victim a chance to calm down and regain her composure.

The setting of the interview is particularly important. The victim must feel as comfortable and relaxed as possible under the circumstances. In fact, it would be advisable to ask her where she would feel most at ease. An interview conducted in a police interrogation room may make the victim feel that she is being investigated rather than helped. A crowded office or squad room is even worse since, once again, privacy is essential. Only the officer and the victim should generally be at the interview. However, the officer should permit the presence of a third party (such as a trained female officer, social worker, or nurse) if that will ease the victim's anxiety and embarrassment and if she requests the presence of another person. Generally, however, it is less difficult for her to tell the intimate details of her story without others listening or interrupting. A private interview also eliminates the opportunity for a defense counsel to use the testimony of a third person to confuse or

impeach the testimony of the victim or the officer.

Obtaining, at this interview, all the information necessary to file the case and conduct the investigation will spare the victim the ordeal of repeated questioning. It may, however, be difficult to overcome the victim's reluctance to talk. Understandably, her psychological defenses and embarrassment frequently interfere with her ability and willingness to remember and relate all the details of the offense, particularly if some perverse form of sexual abuse occurred. She may omit, change, or be unable to recall certain facts. The officer must, therefore, create an atmosphere that encourages her to tell him all the pertinent information. However, he must avoid suggestions which might lead a victim to tell him what she thinks he wants to hear rather than what she actually remembers.

A large percentage of rapists have known or seen their victim prior to the attack. Therefore, the officer should ask the victim if, and how long, she has been acquainted with her attacker. The officer must also inquire into the nature of their relationship, including any prior sexual activities. Only if appropriate under the circumstances, the officer may ask the victim whether she has: filed any rape complaints in the past, a criminal record, or a history of mental illness. In general, the officer should have exhausted alternative investigative methods in attempting to disclose such information before he makes direct inquiry. Furthermore, the officer should ask these questions with the utmost tact, and only after explaining why he needs this information.

Questions about the victim's resistance to the attack should also

be handled with great care. An inappropriate question, or an appropriate question asked the wrong way, may unintentionally cause the victim to feel guilty or responsible for what has happened to her. It may prove helpful for the officer to explain (not just recite) the legal elements of rape and, in particular, the statutory definition of "without the female's consent." (Tex. Penal Code Ann. sec. 21.02 (Vernon Supp. 1980).)

The officer should never accuse the victim of lying if discrepancies exist in her story or if it varies from her original report. Since these differences may have resulted from any number of things, such as an excited emotional state or embarrassment, the victim should have a full opportunity to explain them. If, however, factors strongly indicate that the victim is making a false report, the officer may remind her of the seriousness of a rape charge and of the penalty for the crime. (Tex. Penal Code Ann. secs. 21.02(c) and .03(b).) She may also be informed of the penalty for making a false report. (Tex. Penal Code Ann. sec. 37.08.)

Contrary to common assumptions, false accusations of rape are not numerous. Nationally, the police "unfound" an average of approximately 15 percent of all reported rapes; in some places the rate is much lower. In New York City, for instance, only 5 percent are unfounded. This compares favorably with unfounded cases for other crimes. (National League of Cities and United States Conference of Mayors, Rape (1974) at 8.) Furthermore, these figures do not distinguish between those cases which cannot be successfully prosecuted and those in which the victim confessed to lying.

A rape victim may refuse to prosecute for numerous reasons, among them: reluctance to testify in court, a desire to attempt to forget the crime, threats by the offender, and pressure from family or friends. If the victim does not want to prosecute, the officer should explain the importance of doing so. However, if she persists in her refusal, he should inform her that no prosecution will be brought against her wishes, but that her cooperation is nevertheless needed to help identify the offender and prevent him from committing future rapes.

Since the various police and court procedures involved in prosecuting a case (e.g., lineup, preliminary hearing) bewilder many rape victims, the officer should acquaint the victim with these procedures so that she knows exactly what to expect at each stage. For example, in the District of Columbia, the police department found it helpful to give each rape victim a booklet which explains these procedures and provides other useful information.

SECTION SIX: SUBSEQUENT INVESTIGATION

10:6.01. From time to time during the investigation, the officer should inform the victim of the progress of the case.

10:6.02. Ordinarily, the officer should not either require or request the victim to take a polygraph test.

10:6.03. The officer may only "close" (defined to include "unfound," "clear," and all other possible reasons not to proceed with a case) a rape complaint if the prosecutor agrees that a rape conviction clearly could not be obtained.

Rape victims often complain of difficulty in finding out the status of the investigation and prosecution of their cases. The victim should not have to call the police department repeatedly to learn what has happened with her case. As an essential part of the mutual cooperation that is needed for a successful prosecution, the officer should keep the victim informed of the progress of the investigation.

The practice of requiring rape victims to take lie detector tests stems from the mistaken belief that women make many false accusations of rape. As noted, the overwhelming majority of reported rapes are not "unfounded," and the number of false rape complaints compares favorably with the number of false reports of other crimes. No rational basis exists for the assumption that a woman will make a false rape report more readily than anyone else will make a false report of another crime.

Asking a rape victim to take a polygraph test indicates to her that she is suspected at a time when she needs sympathy and understanding. It will be extremely difficult, if not impossible, for the officer to gain

her confidence and cooperation if he indicates that he does not believe her by asking her to take a lie detector test. The polygraph can never replace good investigative techniques. In rape cases as in other offenses, a good detective can usually determine which complaints are false without resorting to its use. (Some departments have found that the use of hypnosis may aid the investigation and also be more supportive than the polygraph.)

Any investigation of the victim's sexual conduct or reputation for chastity will often embarrass the victim and destroy her rapport with the officer. Moreover, statutory limitations (Tex. Penal Code Ann. sec. 21.13) restrict the admissibility of such evidence at trial. Consequently, an officer should exercise great care in undertaking any such investigation. He may consult with the prosecutor in order to assess the need for such evidence. Most courts have not permitted the admission of such evidence even where the defendant has raised the issue of consent. E.g., Wilson v. State, 548 S.W.2d 51 (Tex. Crim. App. 1977); Young v. State, 547 S.W.2d 23 (Tex. Crim. App. 1977). If the officer must proceed to inquire into these matters, he should always first ask the victim herself. A collateral investigation should be undertaken only when necessary.

In order to allay certain fears of the victim, the officer should explain the statutory protections which strictly limit the admissibility of evidence concerning the victim's sexual conduct and reputation. The officer should also advise the victim that all such discussions will be heard by the judge in a private (in camera) hearing. Although evidence

of prior intercourse with the defendant may be admissible as bearing on the issue of consent, a court will rarely admit general evidence of unchastity.

The decision to "close" a rape case should rest on the likelihood of obtaining a conviction. Even though the officer and prosecutor believe that a rape has occurred, they may be forced to "close" the case if they believe that the evidence is not strong enough to win a conviction. The officer and the prosecutor should consider, combine, and balance varying weights of the following factors:

(a) Evidence that the victim was intoxicated;

(b) Victim's delay in reporting the assault;

(c) Lack of physical or other corroborative evidence supporting the allegation;

(d) Victim's ability to identify the offender (particularly where no corroboration exists);

(e) Victim's ability to testify and/or communicate (e.g., resulting from her early age, emotional instability, or mental illness);

(f) Victim's refusal to submit to a medical examination;

(g) Recent sexual relationship between the victim and the offender;

(h) Victim's reputation for unchastity;

(i) Victim's failure to cooperate with the police investigation; and

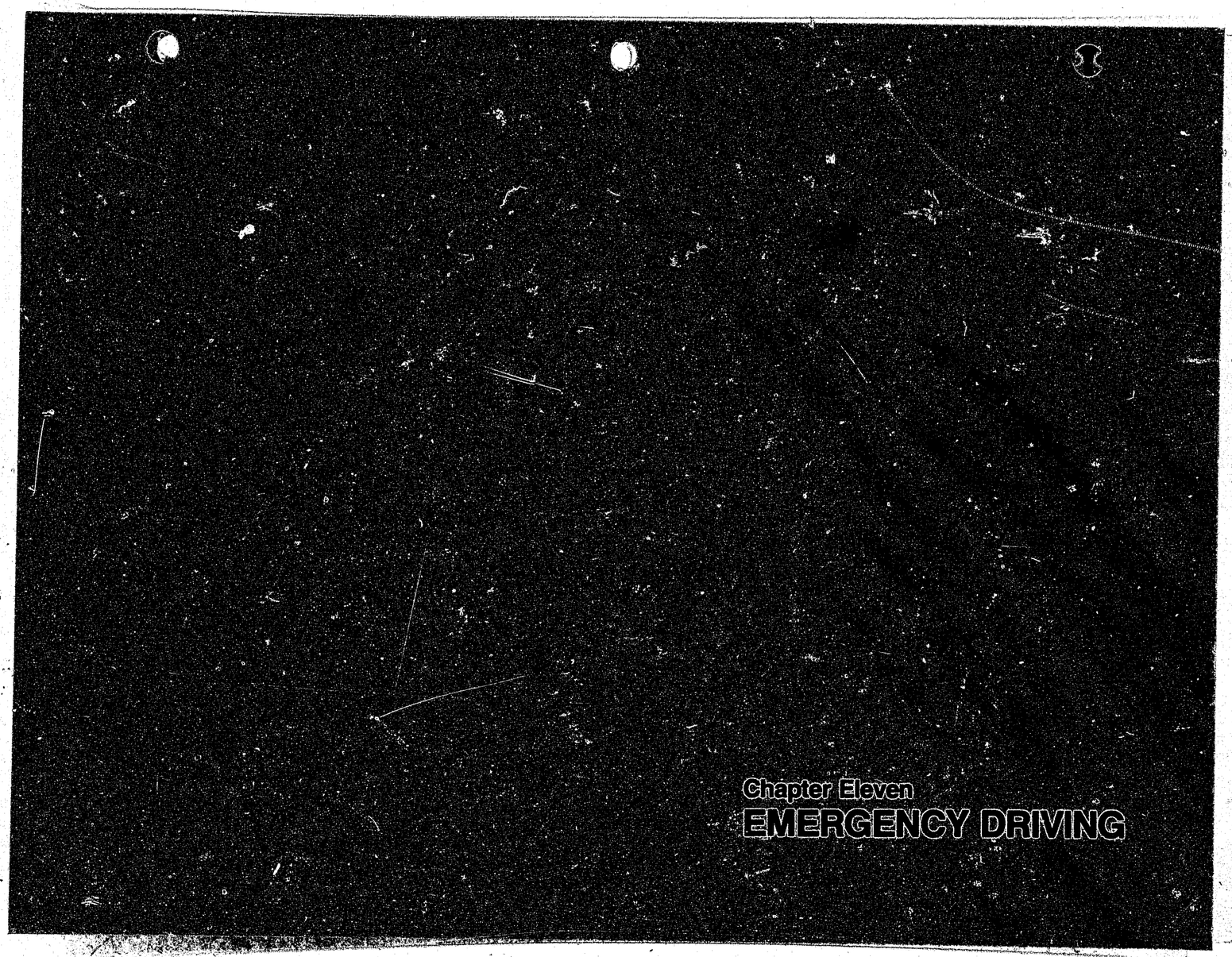
(j) Victim's past history of filing unsubstantiated rape complaints.

When a rape case is closed, the officer should always inform the victim of the reasons for not pursuing prosecution. He should emphasize that the

decision not to pursue prosecution resulted from the unlikelihood of obtaining a convicion and in order to spare her the ordeal of a fruitless prosecution. If the evidence will support a charge other than rape, the prosecutor will often pursue the alternate charge.

In Texas, the testimony of the victim need not ordinarily be corroborated in order to support a rape conviction. (No corroboration needed if offense reported to any person within six months of occurrence. Tex. Code Crim. Pro. Ann. art. 38.07.) However, corroborative evidence has a definite effect on the willingness of a jury to convict an accused rapist. The corroborative factors which may affect the verdict include: scientific evidence of penetration, evidence of semen or blood on the victim or the accused, the victim's physical and emotional condition following the attack, the condition of her clothes, and the promptness with which she reported the assault.

Texas law has historically required close scrutiny of a rape conviction resting on the uncorroborated testimony of a victim who fails to make a prompt report. Although delay may effect the weight given the victim's testimony, it never makes her testimony inadmissible. Lacy v. State, 412 S.W.2d 56 (Tex. Crim. App. 1967). There is, however, a three-year statute of limitation on all sexual offenses. Tex. Code Crim. Pro. Ann. art. 12.01(4).



Chapter Eleven
EMERGENCY DRIVING

CHAPTER ELEVEN

EMERGENCY DRIVING

This chapter, which provides rules for operating emergency vehicles, should be read in conjunction with Chapter Three on the Use of Force.

SECTION ONE: DEFINITIONS

11:1.01. Overtake - Pursuit of a motorist, who does not yet realize that he is being pursued, in order to:

(a) Position the police vehicle so that audible and/or visual signals can effectively be communicated to the motorist; and/or
(b) Position the police vehicle so that the officer may more effectively observe the motorist, his vehicle, his passengers, and/or his load.

11:1.02. Evader - A driver who continues to drive his vehicle and fails to pull to the right and stop when he knows or should know of the audible and/or visual signals to do so directed to him by an officer, but who does not attempt to escape by driving recklessly and/or at an excessive speed.

11:1.03. High-Speed Pursuit (Vehicular Hot Pursuit) - Police vehicular pursuit of another vehicle at speeds which exceed the legal speed for nonemergency vehicles.

11:1.04. Reckless Evader - A driver who, in order to escape or avoid apprehension by a police officer, drives his vehicle recklessly and/or at speeds which are so extreme under the conditions prevailing that his involvement in a collision is probable should he continue.

11:1.05. Roadblock - Any method, restriction, or obstruction used to prevent free passage of motor vehicles on a highway, in order to effect the apprehension of an actual or suspected violator in a motor vehicle.

11:1.06. Primary Pursuing Unit - The police unit which initiates a pursuit or any unit which assumes control of the pursuit.

11:1.07. Probable Cause - That total set of apparent facts and circumstances based on reasonably trustworthy information which would warrant a prudent person (in the position of and with the knowledge of the particular peace officer) to believe something, for example, that a particular person has committed some offense against the law.

SECTION TWO: GENERAL PROVISIONS

11:2.01. An officer may be held liable for the consequences of his reckless disregard for the safety of others. An officer's duty to avoid damage or injury to innocent third parties takes precedence over pursuit or emergency response. No officer shall engage in negligent or reckless actions, even in pursuit of actual or suspected violators or in response to emergencies, which may damage or injure innocent persons.

11:2.02. Officers shall balance the need for pursuit and apprehension against the probability and severity of damage or injury. The officer shall consider the seriousness of the offense which the evader or reckless evader committed (See Chapter Three on the Use of Force).

The uniqueness of each "emergency" makes it difficult to establish specific rules. However, each officer must balance the potential benefits against the potential risks of personal injury and property damage for each instance of emergency driving. As a key factor in this balance, the officer must consider the magnitude of the offense committed by the evader. Pursuit of an escaped murder suspect may warrant more high-speed pursuit than pursuing a shoplifter who has fled the store. For a discussion of rules based on this balancing principle, see Scafe & Round, High-Speed Pursuits, Police Chief, Dec. 1979, at 36; Chapin, The High Speed Chase, Police Mag., Nov. 1978, at 36.

The rights of compensation for persons suffering injury or damage because of the negligent or reckless acts of pursuing officers remain in force despite the seriousness of the criminal acts of the pursued offenders. An officer may suffer personal liability for damages caused by his negligent or reckless actions during pursuit or other emergency driving. Governmental units may also be liable for certain damages caused by actions of their officers.

Section 3 of the Texas Tort Claims Act (Tex. Rev. Civ. Stat. Ann. art. 6252--19 (Vernon Supp. 1980)) makes each governmental unit employing a peace officer liable in damages for the civil wrongs he commits, but limits this liability to $100,000 per person ($300,000 for any single occurrence) for bodily injury or death and $10,000 for any single occurrence for damage to property. However, section 14 (subsections 8 and 9) of the Tort Claims Act specifically excepts the governmental unit from liability in:

> (8) Any claim arising out of the action of an officer, agent or employee while responding to emergency calls or reacting to emergency situations when such action is in compliance with the laws and ordinances applicable to emergency action.
>
> (9) Any claim based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection or rebellion or arising out of the failure to provide, or the method of providing, police or fire protection.

Recently the Texas Supreme Court ruled in State v. Terrell, 588 S.W.2d 784 (1979), that, under the Tort Claims Act:

> . . . the State of Texas is subject to liability for injuries arising out of the negligence, if any, of [DPS] Officer White in operating his vehicle, provided such negligence occurred while Officer White was acting within the scope of his employment and not in an emergency. [At 789, emphasis added.]

The Supreme Court agreed (at 788) with the Austin Court of Civil Appeals that "the State was not immune under the emergency provision [section 14(8)] because Officer White had failed to utilize his siren or red light as required by article 6701d, sections 24 and 124."

In addition to the liability of the governmental unit, Texas law (Tex. Rev. Civ. Stat. Ann. art. 6252--19b, sec. 2(a) (Vernon Supp. 1980))

now permits any political subdivision of the state to pay actual damages, court costs, and attorney's fees adjudged against an employee,

> . . . if damages are based on an act or omission by the employee in the course and scope of his or her employment for such political subdivision and if the damages arise out of a cause of action for negligence, except a wilful or wrongful act or omission or an act or omission constituting gross negligence or for official misconduct.

The same monetary limits apply as do for the liability of the political subdivision itself. This same article also permits the local government to provide counsel to represent the defendant, if it so desires.

Any punitive damages awarded are the exclusive responsibility of the officer as an individual since the statutes exclude this type of compensation. In light of the limitations on the type and amount of money that the governmental unit may be liable for, officers may find themselves held personally liable for part or all of the damages awarded against them and the governmental unit. In Texas, the issue of whether a police officer may commandeer (take or use without the owner's permission) a person's property, including a motor vehicle, remains unsettled as does the issue of liability that could arise from such action.

SECTION THREE: WARNING EQUIPMENT AND TRAFFIC REGULATIONS

11:3.01. An officer operating a police vehicle shall not disregard stop signs or signals, exceed maximum speed limits, or disregard regulations governing the specified direction of traffic or turning, unless he continuously sounds a siren (and continuously displays an emergency light system if his vehicle has such equipment) as a warning to others.

11:3.02. An officer must drive with due regard for the safety of all persons and shall never operate any vehicle in reckless disregard for the safety of life and property.

(continued)

The Uniform Act Regulating Traffic on Highways (Tex. Rev. Civ. Stat. Ann. art. 6701d) permits an officer operating his police vehicle (automatically included within the definition of an "authorized emergency vehicle" under sec. 2(d) of the Uniform Act) on an emergency call to deviate from certain of the general traffic regulations of the Uniform Act. Section 24 of the Act states that:

> (a) Unless specifically made applicable, the provisions of this chapter except those contained in Article V of this Act and Articles 802b, 802c and 802e, Penal Code of Texas, 1925, as amended shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work.
>
> (b) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> (c) The driver of an authorized emergency vehicle may:
>
> 1. Park or stand, irrespective of the provisions of this chapter;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing direction of movement or turning in specified directions.

(d) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of audible and visual signals meeting the requirements of Section 124 of this Act, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(f) The provisions of this Act applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this State or any county, city, town, district, or any other political subdivision of the State, subject to such specific exceptions as are set forth in this Act with reference to authorized emergency vehicles.

Despite these exemptions, the Uniform Act itself and court decisions involving negligent operation of police vehicles still require that safety be the officer's primary consideration. E.g., Eubanks v. Wood, 304 S.W.2d 567 (Tex. Civ. App.--Eastland 1957, writ ref'd n.r.e.). For example, the Act requires that before proceeding through a red signal or stop sign the officer must slow down as may be necessary for safe operation. In addition, the Act permits prima facie and maximum speed limits, but never "safe speeds," to be exceeded. Section 24(e) of the Act best expresses the legislative policy never unnecessarily to endanger life or property.

The specified exemptions granted to authorized emergency vehicles under section 24(d) of the Act apply only for police vehicles using their emergency signals. The type of emergency warning devices permitted a police vehicle is controlled by section 124 of the Uniform Act. That section states:

(a) Every authorized emergency vehicle may, in addition to any other equipment and distinctive markings required by this Act, be equipped with a siren, exhaust whistle or bell capable of giving an audible signal.

(b) Every school bus and every authorized emergency vehicle shall, in addition to any other equipment and distinctive markings required by this Act, be equipped with signal lamps mounted as high and as widely spaced laterally as practicable, which shall be capable of displaying to the front two alternately flashing red lights located at the same level and to the rear two alternately flashing red lights located at the same level, and these lights shall have sufficient intensity to be visible at 500 feet in normal sunlight. A church bus . . . .

(c) A police vehicle when used as an authorized emergency vehicle may but need not be equipped with alternately flashing red lights specified herein.

(d) The alternately flashing lighting described in Subsections (b) and (c) of this section shall not be used on any vehicle other than a school bus, a church bus, or an authorized emergency vehicle.

Of utmost importance, even with the use of emergency warning devices, the Act prohibits unsafe or reckless driving by officers. Each officer must always drive with proper control and without negligence. Thus, each officer must operate his vehicle in a manner and at a rate of speed which, with the use of ordinary care by third parties, will avoid any type of collision or accident which should reasonably have been foreseen. Again, if the emergency driving would unreasonably endanger the safety of innocent third parties, it is prohibited under all circumstances.

When an authorized emergency vehicle approaches with its emergency warning devices in operation, the Uniform Act requires that other traffic yield the right-of-way. Officers should note that the emergency vehicle is not given the right-of-way or the right to take it. The emergency vehicle is only entitled to receive the right-of-way after it is yielded by others who knew, or should have known as reasonable and prudent drivers, of the approach of the emergency vehicle. This approach minimizes unnecessary risks to innocent third parties.

11:3.03. An officer engaged in overtaking shall not exceed the apparent or maximum speed limit by more than [___] miles per hour (MPH) unless such a rate would unreasonably extend the pursuit, which makes a higher speed necessary.

11:3.04. An officer engaged in responding to a call for emergency service may not exceed the speed limit by more than [___] MPH, unless a life-threatening situation exists and traffic conditions permit a higher speed without causing an unreasonable risk.

Rules 11:3.03 and 11:3.04 attempt to minimize the possibility of collisions during routine pursuits and emergency responses. Routine pursuits rarely require extraordinarily swift apprehension or dangerous positioning of the police vehicle. In deciding whether to exceed the speed limitation, an officer should consider at least the following: the type of roadway and highway presently involved and what may be ahead, the density and speed of other traffic at present and what can be expected ahead, the possibility of losing contact with a pursued vehicle, the relative danger of collision by either a pursued vehicle or the police vehicle, and the seriousness of the criminal matters involved or suspected.

SECTION FOUR: BLOCKADES AND BARRIERS

11:4.01. An officer may construct a blockade or barrier to divert traffic or to stop a reckless evader. In either event, an officer must deploy a reasonably effective advance warning system in order to alert motorists (including the reckless evader) of an approaching roadblock. Such deployment shall occur no later than at the time the roadblock or barrier becomes operative.

11:4.02. Only if Chapter Three on the Use of Force authorizes the use of deadly force, and only after all other reasonable means of apprehension have been exhausted, an officer may attempt to apprehend a reckless evader or violator (who is fleeing in a vehicle) by resort to the use of blockades or barriers.

11:4.03. Prior to constructing a blockade or barrier to stop a reckless evader, an officer must receive permission and specific instructions on the type and placement of the blockade or barrier to be used from his chief of police or [designated supervisor].

11:4.04. Only when Chapter Three on the Use of Force authorizes the use of deadly force, may an officer attempt to apprehend a reckless evader by ramming his vehicle into the fleeing car or by using one or more police cars to contain the reckless evader and bring him to a halt.

11:4.05. An officer shall only use his firearm in accordance with Chapter Three on the Use of Force. An officer positioned at a roadblock may have firearms ready for use.

11:4.06. At no time shall an officer or other person position himself behind the blockade or barrier in a possible direct line of the oncoming reckless evader.

The rules on the use of force provide the foundation for the rules on the use of roadblocks and other dangerous techniques for apprehending evaders and violators. Although these rules cannot cover all possible situations or describe the variety of techniques with which officers may attempt to apprehend such motorists, these rules emphasize the following key policies:

(a) Rarely, if ever, will an officer be justified in using a procedure or technique that creates any reasonably foreseeable risk to the safety of innocent third parties. In all cases, an officer must take every reasonable precaution to ensure that innocent third parties will not suffer any personal injury or significant property damage by the officer's attempt to apprehend an evader. An officer must even provide sufficient advance warning to a felonious or reckless evader to permit him to avoid injury by surrendering or stopping his evasive driving.

(b) Even in an effort to apprehend a reckless evader through the use of blockades or barriers, an officer may only resort to techniques or procedures that have been authorized by a supervisor.

The "ramming" referred to in Rule 11:4.04 includes any intentional striking or collision of the suspect's car by any portion of the police vehicle, not just use of the front end of the police vehicle. Therefore, "ramming" includes application of the moving police vehicle's brakes so that the front of the closely following evader's vehicle will collide with the rear of the police vehicle. These types of intentional impacts between two moving vehicles present the level of risk of personal injury which requires consideration as the use of "deadly force."

"Containment" and "ramming" may also result in forcing a reckless evader's vehicle off the road. This includes situations where the officer places his vehicle alongside the violater's vehicle under the circumstances which force the evader to choose between colliding with the police vehicle or

running off the road or into some obstacle. Such situations would include: where the number of traffic lanes decrease, on approaches to stopped or parked vehicles in the path of the violator's vehicle, and where a roadway shoulder (being used by the violator) ends. Thus, this rule extends beyond situations in which an officer directs his car laterally (or parallel) towards the evader's vehicle.

The use of a police vehicle to ram or contain a reckless evader must still comply with the rules of Chapter Three on the Use of Force. This limitation recognizes that:

(a) Even a reckless evader usually does not directly threaten a police officer, he merely wants to flee from the officer;

(b) Once set in motion, an officer cannot control the result of these procedures; and

(c) These procedures create a high risk of injury to the police officer and to innocent third parties, as well as to the police vehicles.

Thus, although a police department may wish to have its officers consider their vehicles as another weapon in their peace-keeping arsenal, such consideration must reflect and safeguard against these added risks.

SECTION FIVE: HIGH-SPEED PURSUIT POLICY

11:5.01. An officer shall not engage in high-speed pursuit whenever it reasonably appears that the potential harm to persons or property arising from such pursuit outweighs the potential harm threatened by the escaping offender. In the absence of an outweighing danger to persons or property, a peace officer shall not engage in high-speed pursuit whenever it reasonably appears that apprehension of the escaping offender by other means is likely. In determining whether to engage in pursuit, an officer may consider all relevant factors including:

(a) Nature of the offense committed by the offender,
(b) Method of the offender's escape,
(c) Extent to which the offender may be identified,
(d) Knowledge of the offender's possible destination or direction of movement,
(e) Present ability of other officers to apprehend the offender,
(f) Knowledge of previous activities of the offender,
(g) Likelihood that the offender may use weapons or forcibly resist apprehension, and
(h) Potential for physical harm to persons or property resulting from high-speed pursuit of the offender.

(continued)

High-speed pursuit should not be undertaken lightly. Even when an officer has received specific training in high-speed pursuit, such action on his part can significantly increase the danger to himself and innocent third parties through accident or equipment failure. Rule 11:5.01 prohibits high-speed pursuit of an offender when it appears not reasonably necessary to the eventual apprehension of the offender, or when the potential harm arising from pursuit outweighs the potential harm threatened by the escaping offender. An officer may not engage in high-speed pursuit when he knows, or based upon his experience should know, that the apprehension of the offender by means other than such pursuit is likely, and that no outweighing harm will likely result.

11:5.02. An officer shall not engage in high-speed pursuit to arrest someone for any misdemeanor except:

(a) A breach of the peace which just occurred in the presence of that officer and will likely reoccur, or
(b) A violation of the state highway and vehicle laws.

(continued)

This rule makes clear that high-speed pursuit is not authorized for misdemeanor offenses not classified as breaches of the peace or traffic violations.

11:5.03. An officer engaged in high-speed pursuit need not maintain a constant view of the escaping offender, but the pursuit must be constant and continuous and without unreasonable or extraneous delays. If the officer engages in activities unrelated to the pursuit, which remove him from the pursuit, he may not renew the pursuit.

(continued)

This rule further relates the scope of a high-speed pursuit with the definition of "fresh pursuit" (see Chapter Five on Arrest Without a Warrant). It emphasizes that constant view is not necessary but that the act of pursuit must be continuous and uninterrupted.

11:5.04. An officer shall notify his supervisor [or dispatcher] upon engaging in any high-speed pursuit, unless to do so would unreasonably delay the initiation of such pursuit.

11:5.05. When an officer engaged in high-speed pursuit finds that the offender will flee beyond the boundary of the officer's local jurisdiction or onto a government reservation, he shall notify his supervisor [or dispatcher] and request him to notify officers of the jurisdiction into which the pursuit will lead.

(continued)

Rules 11:5.04 and 11:5.05 place controls upon the initiation and extent of high-speed pursuit by requiring the officer to notify his supervisor or dispatcher when he begins a pursuit, and again when he finds that he will be required to leave his local jurisdiction. The supervisor or dispatcher can then take whatever steps he deems necessary. The notification may be dispensed within certain cases under Rule 11:5.04 but is mandatory under Rule 11:5.05 when the pursuit will extend beyond the officer's jurisdiction. The rule requires notification because pursuit outside the officer's local jurisdiction raises many issues other than the legality of the pursuit which may require action by the supervisor. Each law enforcement agency will handle pursuit onto government reservations according to procedures negotiated with the particular installation.

11:5.06. A peace officer in high-speed pursuit may enter the states of Arkansas, Louisiana, New Mexico, or Oklahoma, continue in pursuit, and arrest a person only on the following grounds:

(a) The person committed a felony in Texas in the presence of the officer, or
(b) The officer knows or has probable cause to believe that a felony has been committed in the state of Texas and knows or has probable cause to believe that such person committed it.

A state cannot confer upon itself the power to arrest within another state. McLean v. Mississippi, 96 F.2d 741 (5th Cir. 1938). The law of the jurisdiction where the arrest occurred determines the legality of that arrest. Miller v. United States, 357 U.S. 301 (1958). Although each of the states adjoining Texas has different statutes and case law regarding arrest authority and procedures within their borders, these states all have "fresh pursuit" statutes based upon the Uniform Act on the Fresh

Pursuit of Criminals Across State Lines. These statutes (except for Louisiana's) are, in essence, identical. See Arkansas Code of Criminal Procedure sections 43-511 to -517; New Mexico Code of Criminal Procedure sections 31-2-1 to -2-7; Oklahoma Code of Criminal Procedure sections 221 to 228.

This rule prescribes the same criteria for officers engaging in "close pursuit" into Louisiana. See Louisiana Code of Criminal Procedure articles 231 and 232. However, "close pursuit" as required by Louisiana (and as defined in Chapter Five on Arrest Without a Warrant) is more limited than "fresh pursuit."

SECTION SIX: HIGH-SPEED PURSUIT PROCEDURE

11:6.01. When not coordinated by a dispatcher or supervisor, the officer in the primary pursuing unit of a high-speed pursuit shall direct the pursuit by both his unit and others.

11:6.02. The officer in the primary pursuing unit of a high-speed pursuit may request all units and the base station to observe radio silence whenever necessary to the proper conduct of the pursuit. The base station operator will immediately repeat that request to all units on the frequency used by the primary pursuing unit. Thereafter, until termination of the high-speed pursuit, only messages involving that high-speed pursuit or emergency radio traffic shall be transmitted.

11:6.03. Only the primary pursuing unit shall engage in high-speed pursuit, unless a supervisor or dispatcher authorizes additional units to engage in the pursuit.

11:6.04. Intercepting units shall never intersect the path of an oncoming high-speed vehicle. No assisting unit shall move toward the route of a high-speed pursuit without notifying the pursuing officer or the dispatcher of that movement.

11:6.05. Where the primary pursuing unit is a motorcycle unit, that unit shall abandon a high-speed pursuit when a four-wheeled unit has joined the pursuit and can follow the violator.

11:6.06. When an air unit establishes visual contact with the violator's vehicle, the ground units shall be notified of that contact. After such notification, the air unit shall direct the movement of the primary pursuing unit and all other ground units.

11:6.07. Upon encountering heavy traffic or densely populated areas, each ground unit should abandon its high-speed pursuit of a reckless evader when all of the following factors exist:

(a) The reckless evader's current violation, the incident which prompted the pursuit, involved only a traffic offense; and
(b) The reckless evader has not committed any felony during the pursuit; and
(c) The officer has no reason to believe that the reckless evader is attempting to escape from apprehension for any felony; and
(d) The officer has reason to believe that the evader will discontinue his reckless and high-speed vehicle operation if the pursuit is abandoned.

11:6.08. Except when directed otherwise by a supervising officer, the primary pursuing unit of a high-speed pursuit may at any time abandon

(continued)

that pursuit in the interest of safety; that unit and/or the base station shall immediately communicate that decision to all other units involved. Upon receiving such communication, all units shall abandon that high-speed pursuit.

These rules should provide for:

(a) Coordination among pursuing units engaged in high-speed pursuit in order to make the intended apprehension efficiently, and

(b) The utmost possible safety for the pursuing units and to the public.

In light of this intention and the relative simplicity and explicitness of most of the rules within this section, no detailed commentary appears necessary. Note that, although an officer in the primary pursuing unit conducts a high-speed pursuit, only a supervisor should direct an apprehension attempt through the use of any type of roadblock. This difference in approach reflects the policy that a roadblock should only be used as a last resort. In either case, the officer should be aware of the guidelines in Chapter Three on the Use of Force.

SECTION SEVEN: EMERGENCY CALL RESPONSE

11:7.01. An officer shall use emergency warning equipment in responding to calls for service only when specifically authorized to do so by the officer or dispatcher assigning him to the call.

11:7.02. Any officer acting as a radio dispatcher or in any other way assigning a police officer in a vehicle to respond to a call for service shall, in addition to providing all other pertinent information, designate the response code which the assigned officer must use.

11:7.03. Responses shall be designated as follows:

(a) Non-Emergency Calls - Officer must respond to the call without using emergency equipment or procedures.
(b) Emergency Calls - Officer must respond to the call immediately by proceeding directly to the call location as quickly as reasonably possible while utilizing emergency warning equipment and obeying traffic regulations as required in Section Three of this chapter.

11:7.04. Emergency Calls may only be designated, but are not required, for the following categories:

(a) Officer in trouble;
(b) Felony in progress;
(c) Assault, involving weapon, in progress;
(d) Accident, fire, or other calls which may jeopardize human life; and
(e) [Others as the department may provide.]

11:7.05. A field supervisory officer may override the provisions of this section and order an officer to use a different response call designation than here indicated, if he deems it necessary under the circumstances.

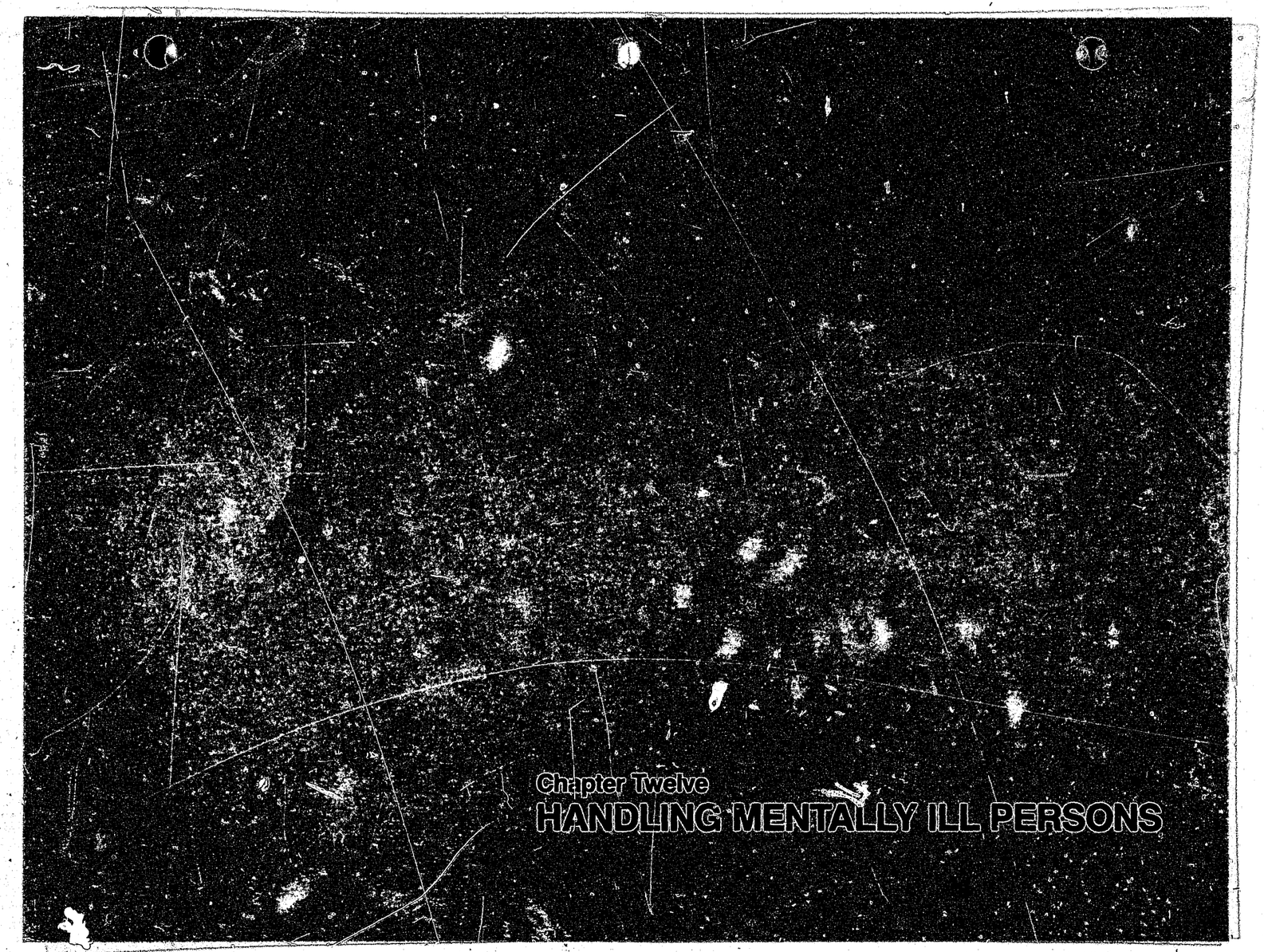
11:7.06. A responding officer who changes the response call designation shall immediately notify the radio dispatcher or field supervisory officer. The responding officer shall state his reasons for changing the response designation.

This section addresses situations in which an officer is responding to a call for emergency services. Normally, such situations involve one

or two officers in a police vehicle who receive a message over the vehicle's radio that a matter of extreme urgency has occurred. The matter may involve a serious crime, a fellow officer in some danger, or a potential threat to human life. Police officers, quite naturally, may become overanxious in responding to such critical situations. The rules within this section attempt to place rational limitations and controls on the circumstances in which officers use emergency warning equipment and driving methods. In this manner, such extraordinary and inherently dangerous measures will be undertaken only in completely warranted situations and when the police dispatching officer can control the movements of all vehicles which become involved.

These rules assume that the danger to public safety from a speeding police vehicle might outweigh the threat from the situation to which the officer is responding. The dispatcher, who received such information from the source of the call, should more likely know the nature and seriousness of the situation and be better able to make a considered judgment as to how critical the situation is and thus what response designation is warranted. At the same time, the dispatcher may have a better idea of the relative location of the call scene and the responding vehicle. He has a better opportunity to prevent two speeding police vehicles from colliding at an intersection while responding to a call by designating only one of them to respond to an emergency call.

The details of Rule 11:7.04 can vary as the police chief sees fit. The list provides only the most obvious categories. When necessary, in response to any unusually critical situation not listed, the dispatcher's supervisor or the line supervisor on the street can override the general rule.


Chapter Twelve
HANDLING MENTALLY ILL PERSONS

CHAPTER TWELVE

HANDLING MENTALLY ILL PERSONS

Of the many perplexing problems facing the police officer, one of the most tragic and sensitive involves dealing with mentally ill persons. Mental illness may force a person to live in a world that he cannot comprehend and in which he cannot function normally. Fortunately, such cases are rare. Nevertheless, particularly in light of the trend towards community de-institutionalization of mentally ill persons, police officers must often deal with such persons. Even when no violation of the criminal law has occurred, citizens who display extremely abnormal or irrational social behavior provide a constant source of concern for the officer.

An officer may encounter behavior which ranges from aimless and harmless wandering on public streets to instances of extremely violent behavior which threatens human life. In addition, the behavior of a mentally ill person may swiftly and unexpectedly escalate from minor and nonviolent actions into conditions which endanger the physical safety of the mentally ill person, innocent citizens, and the police officer. This chapter focuses on procedures for dealing with citizens who, because of their mental illness, may injure themselves, may injure others or the property of others, or may be injured by others. [The Texas Psychiatric Society, a district branch (1801 North Lamar Blvd., Austin, Texas 78701; telephone (512) 477-6704) of the American Psychiatric Association, has expressed a willingness to provide guidance to local law enforcement agencies in their handling of mentally ill persons.]

SECTION ONE: DEFINITIONS

12:1.01. Emergency Admission - A statutorily prescribed process (Tex. Rev. Civ. Stat. Ann. art. 5547--27 through --30) by which a health or peace officer, who has probable cause to believe that a person is mentally ill and is therefore likely to injure himself or others if not immediately restrained, may obtain a warrant from any magistrate and take such person into custody and immediately transport such person to the nearest appropriate hospital for temporary detention.

12:1.02. Mental Hospital - A hospital operated for the primary purpose of providing in-patient care and treatment for the mentally ill.

12:1.03. Mentally Ill Person - A person who displays symptoms of substantially impaired mental health and who is in danger of causing injury to himself or to the person or property of others or is in danger of being injured by others.

12:1.04. Mental Patient - A person admitted or committed to any mental hospital or a person under observation, care, or treatment in a mental hospital.

12:1.05. Voluntary Hospitalization or Voluntary Admission - A procedure in which the head of a mental hospital may admit as a voluntary patient any person for whom a proper application is filed, if he determines upon the basis of preliminary examination that the person has symptoms of mental illness and will benefit from hospitalization.

These definitions do not attempt to duplicate technical medical or clinical meanings. Rather, the definitions should serve as a functional complement to the language and spirit of the Texas Mental Health Code (Tex. Rev. Civ. Stat. Ann. art. 5547--1 et seq.) while providing a clear and concise working vocabulary for use by law enforcement officers.

Rule 12:1.01 summarizes the "emergency admission procedure," a type of involuntary hospitalization, which an officer has statutory authority to use. This procedure, which directly calls for immediate police action, underscores the requirement of an imminent risk of personal injury. The full statutory language of that article, as it relates to peace officers, appears in the commentary to Section Three of this chapter.

The definition of "mental hospital" (Rule 12:1.02) repeats language from the Mental Health Code definition (Tex. Rev. Civ. Stat. Ann. art. 5547--4(g) (Vernon Supp. 1980)). Likewise, the definition of "mental patient" was also taken directly from the Mental Health Code (art. 5547--4(j) (Vernon Supp. 1980)).

In defining "mentally ill person," Rule 12:1.03 draws on the statutory language (art. 5547--4(k)) but focuses on the practical standards which law enforcement officers need. Article 5547--4(k) of the Mental Health Code defines a "mentally ill person" as someone "whose mental health is substantially impaired," which "includes a person who is suffering from the mental conditions referred to in Article 1, Section 15a of the Constitution of the State of Texas." In turn, the constitution refers to "insanity" and "persons of unsound mind." In light of the limited scope and purpose of police intervention, Rule 12:1.03 limits the definition of a "mentally ill person" to someone who, as a result of his mental illness, represents an immediate and likely danger to the person and property of others or to himself (including self-inflicted injuries and abuse by others).

These rules assume that an officer has no professional medical or psychological training. Therefore, an officer should not be forced into determining whether a person's abnormal behavior results from mental illness, drug use, or some other medical problem. Thus, by referring to "symptoms of substantially impaired mental health," Rule 12:1.03 allows an officer to take action based on the available, even if limited, current information he has. Although the Mental Health Code (art. 5547--5) excludes epilepsy, senility, alcoholism, and mental deficiency

from its definition of mental illness, an officer cannot bear the responsibility for determining the root cause of a particular person's problems.

For example, an officer who encounters an elderly person who is currently suffering from a serious mental impairment (such as extreme loss of memory or highly irrational or confused behavior) rarely has the time or training to evaluate the physiological or psychological source of that person's present condition. Therefore, if the officer has probable cause to believe that such a person may harm himself or others, or be harmed by others, the officer should take action in accordance with this chapter. Nevertheless, an officer should have the training to realize that abnormal or irrational behavior may result from a medical cause, such as epilepsy or an insulin reaction from diabetes. Therefore, to the extent practical, an officer should take this possibility into account, for example, by considering and reporting such claims if made by the arrested person or his friends and relatives. In addition, an epileptic, a diabetic, or other person with a medical condition, will frequently carry some appropriate identification or documentation (such as a bracelet or a card carried in a purse or wallet).

SECTION TWO: GUIDELINES

12:2.01. An officer shall only arrest a person who has violated the law. An officer has no authority to arrest a person solely on the basis of his mental condition because neither insanity nor any other form of mental illness violates any criminal statute.

12:2.02. Although the law limits the degree to which an officer can intervene in situations involving a mentally ill person, the officer should respond and take lawful action in an attempt to:

- *(a) Protect the public from harm caused by a mentally ill person,*
- *(b) Protect the mentally ill person from harm which he or others may cause,*
- *(c) Provide a stabilizing force in any conflicts which may arise from the actions of the mentally ill person, and*
- *(d) Aid in acquiring proper medical attention for the mentally ill person.*

12:2.03. Incidents involving a mentally ill person require tactful, patient, and understanding responses. To the extent reasonably possible, an officer should:

- *(a) Attempt to learn as much as possible about the individual and the situation, by talking with the mentally ill person, his family, his friends, and witnesses.*
- *(b) Regardless of the circumstances (e.g., verbal abuse directed at the officer), respond in an objective, unexcited, nonabusive, unthreatening manner in order to calm and control the subject.*
- *(c) Not deceive the mentally ill person. (Deception often thwarts the chance for trust and endangers the subject's potential for recovery. Trust enhances the opportunity for controlling the situation.)*

Frequently, without warning and with little indication of the true nature of the problem, a police officer encounters a mentally ill person either in the course of patrolling or when dispatched to a location by radio. When an officer must intervene, his actions should meet the objectives of protecting a mentally ill person from harming himself, or the person or property of others, while responding in a manner consistent with the medical status of the mentally ill person

involved. The Mental Health Code (Tex. Rev. Civ. Stat. Ann. art. 5547--1 et seq.) states its purpose (art. 5547--2) as follows:

> It is the purpose of this Code to provide humane care and treatment for the mentally ill and to facilitate their hospitalization, enabling them to obtain needed care, treatment and rehabilitation with the least possible trouble, expense and embarrassment to themselves and their families and to eliminate so far as possible the traumatic effect on the patient's mental health of public trial and criminal-like procedures, and at the same time to protect the rights and liberty of everyone. In providing care and treatment for the mentally ill, the State acts to protect the community from harm and to serve the public interest by removing the social and economic burden of the mentally ill on society and the burden and disturbing effect of the mentally ill person on the family, and by care and treatment in a mental hospital to restore him to a useful life and place in society. . . .

The rules within this section attempt to state general principles which fulfill this legislative purpose and can guide a law enforcement agency in handling mentally ill persons.

The rules within this section establish a basic foundation on which an officer should base his responses when he encounters a mentally ill person. The police officer on the scene must be aware that his initial contact with a mentally ill person will have a strong influence on that person's immediate conduct and, perhaps, on that person's ultimate prognosis as well. Rule 12:2.03 stresses the need for tact, patience, and understanding and lists several suggestions to guide police behavior.

The rules of this chapter clarify a police officer's authority in dealing with mentally ill persons based on the underlying philosophy that police intervention resulting in involuntary custody is desirable only when necessary to prevent a mentally ill person from being harmed,

or from harming other persons or their property. As a general rule, as long as the situation remains nonviolent, the mentally ill person will be far better off if placed in the custody of a responsible sponsor (such as a relative or friend) and afforded medical assistance in a gradual and voluntary manner. Although this chapter expresses concern for the physical and psychological well-being of the mentally ill person, it also alerts the officer to the constant potential for disruptive and even violent acts. Thus, the officer must protect the general public as well as himself. Of course, an officer always has the authority to arrest any person who violates the criminal law, particularly where personal injury or extensive property damage occurs.

Rule 12:2.02 directs the officer to respond to calls involving mentally ill persons in order to stabilize a conflict and to minimize future injury and damage. An officer's role may be very limited, particularly in strictly civil matters. An officer who confronts a mentally ill person must often decide, for example, whether to take custodial control of the individual, to place the individual in the care of some responsible sponsor, or simply to allow the individual to continue on his own. For a discussion of these issues, see Texas Law Enforcement Handbook 91-93 (1976 rev. ed.).

SECTION THREE: PROCEDURES

12:3.01. Whenever possible, if it appears likely that a situation involving a mentally ill person will require immediate police intervention in order to prevent personal injury or extensive property damage, two officers should be dispatched initially. A lone officer who encounters such a situation should, whenever possible, request a back-up officer.

12:3.02. If an officer must control and restrain a mentally ill person, he shall use the least amount of force necessary in accordance with the rules in Chapter Three on the Use of Force.

12:3.03. If the officer has reason to believe that a person may be a mental patient who has left institutional care without authorization, the officer should investigate and notify the institution and let the institution arrange for the patient's return.

12:3.04. An officer should handle a mentally ill person who needs attention in the following manner:

- *(a) Attempt to locate responsible relatives or friends who will attend to the needs of the mentally ill person.*
- *(b) If asked for advice, the officer may provide information about the availability of voluntary hospitalization.*
- *(c) If the mentally ill person has no friends or relatives who will take responsibility for him and he will not apply for voluntary hospitalization, the officer should refer the matter to the proper health authorities or to a magistrate.*

12:3.05. When a mentally ill person's behavior requires confinement in order to prevent him from harming himself, harming another person, or committing a crime, the officer shall:

- *(a) Obtain a warrant of commitment in accordance with Rule 12:3.08;*
- *(b) Take the mentally ill person into custody and immediately transport him to the nearest mental hospital;*
- *(c) Present the warrant to the hospital authorities, make an application for emergency admission, and turn the person over to hospital authorities.*

12:3.06. If an officer has no time to obtain a commitment warrant and must act immediately in order to prevent personal injury or extensive property damage, the officer shall:

- *(a) Arrest the mentally disturbed person for any criminal conduct which he committed, including disorderly conduct and threats;*

(continued)

- *(b) Immediately present the matter to a magistrate and seek an emergency commitment warrant, then proceed in accordance with Rule 12:3.05; and*
- *(c) If the mentally ill person is committed, the officer should notify the prosecutor of that commitment.*

12:3.07. When seeking a warrant of commitment, an officer shall by affidavit or in person before the magistrate, indicate those specific facts and circumstances which would lead a reasonable person to believe that the subject suffers from mental illness and requires observation and treatment in a mental hospital for his own protection or the protection of others.

This section attempts to provide an officer with flexible alternatives, within the statutory limits of the Mental Health Code, for handling situations involving mentally ill persons. Rule 12:3.01 suggests that, if possible, a lone officer should not attempt to intervene in a potentially violent situation involving a mentally ill person without first attempting to receive back-up assistance. Rule 12:3.02 restates the general principle regarding the limited use of force. Rule 12:3.03 establishes the procedure for responding to suspected mental patients who have left institutional care without authorization.

The police have no authority to detain a person solely on the basis of mental illness. Mental illness becomes an official matter of police concern only upon finding an immediate threat of injury to the mentally ill person or others. Police are often called, however, to assist in matters concerning the mentally ill where no immediate danger to anyone exists. It will not satisfy community expectations, or the officer's general duty to the public, to avoid these matters on the grounds that the police lack statutory authority. In order to handle

the law enforcement problem of handling mentally ill persons without chaos, a department must develop an appropriate plan. For example, a department must train its officers where and how to refer a mentally ill person who has not violated any law but who needs help and has no responsible friends or relatives available and willing to care for him. A department's planning should also cover night and weekend emergencies.

Rule 12:3.04 outlines certain measures which an officer can take without invoking the Emergency Admission Procedure. An officer must exercise these measures, which are fundamentally advisory, with caution. Although an officer should inform the mentally ill person and other interested parties of the availability of voluntary hospitalization, the officer must take care to ensure that no one interprets his remarks regarding voluntary hospitalization as being coercive or threatening. Hospitalization achieved through coercion, although nominally "voluntary," may result in civil liability to the officer.

Should the situation demand that the mentally ill person be detained, Rules 12:3.05 through 12:3.07 establish alternative procedures for use by an officer. Rules 12:3.05 and 12:3.07 comply with the Emergency Admission Procedure set forth in article 5547--27(a) of the Mental Health Code:

> Any health or peace officer, who has reason to believe and does believe upon the representation of a credible person, in writing, or upon the basis of the conduct of a person or the circumstances under which he is found that the person is mentally ill and because of his mental illness is likely to cause injury to himself or others if not immediately restrained, may upon obtaining a warrant from any magistrate, take such person into custody, and immediately transport him to the nearest hospital or other facility deemed suitable by the county health officer, except in no case shall a jail or similar detention facility be deemed suitable unless

> such jail or detention facility is specifically equipped and staffed to provide psychiatric care and treatment, and make application for his admission, pursuant to the warrant of the magistrate. Such person admitted upon such warrant may be detained in custody for a period not to exceed twenty-four (24) hours, unless a further written order is obtained from the County Court or Probate Court of such county, ordering further detention. Provided, however, that should the person be taken into custody after 12:00 o'clock noon on Friday, or on a Saturday or Sunday, or a legal holiday, then the twenty-four-hour period allowed for obtaining the court order permitting further detention shall begin at 9:00 o'clock a.m. on the first succeeding business day.

Thus, a mentally ill person may be detained only upon the joint occurrence of two conditions: (1) a finding by the police officer that because of mental illness the person will likely cause injury to himself or others unless immediately restrained and (2) issuance of a warrant by a magistrate.

The rules of this chapter attempt to make maximum use of responsible relatives and friends of the mentally ill person, as well as of the process of voluntary hospitalization, in order to minimize the need for invoking the Emergency Admission Procedure. As indicated by the language set forth above, the complex and cumbersome nature of securing an "emergency admission," leads to a pragmatic preference for first exhausting the voluntary and more expeditious measures detailed in this chapter. However, in the relatively limited circumstances where an "emergency admission" should occur, an officer has full authority to pursue that procedure, particularly where a magistrate is readily available and the time taken in obtaining a warrant will not result in injury to the mentally ill person or to others, such as when two officers have responded and one can remain with the subject while the other obtains the warrant.

As soon as the magistrate issues the commitment warrant (see Appendix),

an officer should immediately transport the mentally ill person to the appropriate institution. As to the method of transportation, the Mental Health Code (Tex. Rev. Civ. Stat. Ann. art. 5547--64) requires that:

> (b) Every female patient shall be accompanied by a female attendant unless accompanied by her father, husband or adult brother or son during conveyance to the mental hospital.
> (c) The patient shall not be transported in a marked police or sheriff's car or accompanied by officers in uniform if other means are available.

In turn, the rules prefer to have an officer resort to the "emergency admission" procedure rather than invoking the criminal process against the mentally ill person. Rule 12:3.06, which does involve the criminal process, necessarily contradicts the underlying policy of this chapter. Nevertheless, a mentally ill person's police custody and involvement in the criminal process should be kept as brief as possible. An officer should arrest the mentally ill person, however, where such person has violated the criminal law and the officer cannot feasibly obtain a commitment warrant but must take immediate action. In many cases, the prosecutor's office will dismiss the criminal charge once a commitment warrant is issued. This type of dismissal involves prosecutorial discretion and does not taint the validity of the original arrest.

Appendix

COMMITMENT WARRANT

THE STATE OF TEXAS

TO ANY PEACE OFFICER OF THE STATE OF TEXAS, GREETING:

You are hereby commanded to Arrest:

_____

and immediately transport _____ to _____ Hospital in Austin, Texas, and make application for _____ admission therein for emergency observation and treatment, pursuant to the provisions of Section 27 of the Texas Mental Health Code.

HEREIN FAIL NOT but of this writ make due return, showing how you have executed the same,

Witness my official signature, this _____ day of _____, A.D. 19_____.

_____
Judge
Municipal Court
City of Austin
Travis County, Texas

Bond $_____

File No._____

THE STATE OF TEXAS

VS

WARRANT OF ARREST

Issued the _____ day of _____

_____, A.D. 19____

_____

Judge
MUNICIPAL COURT
City of Austin
Travis County, Texas

SHERIFF'S OR CONSTABLE'S RETURN

Came to hand the _____ day of _____ A.D. 19____, at _____ o'clock _____ M.

_____ and executed on the _____ day of _____ A.D.

19____, at _____ o'clock _____ M., by arresting the within named _____

_____ in Travis County, Texas, and taking his bond, placing him in jail at

_____.

I actually and necessarily traveled _____ miles in the service of this writ, in addition to any other mileage that I may have traveled in the service of other process in this cause in the same trip.

FEES—Mileage . . . . . $_____

Making arrest . . . . . $_____

Taking bond . . . . . $_____

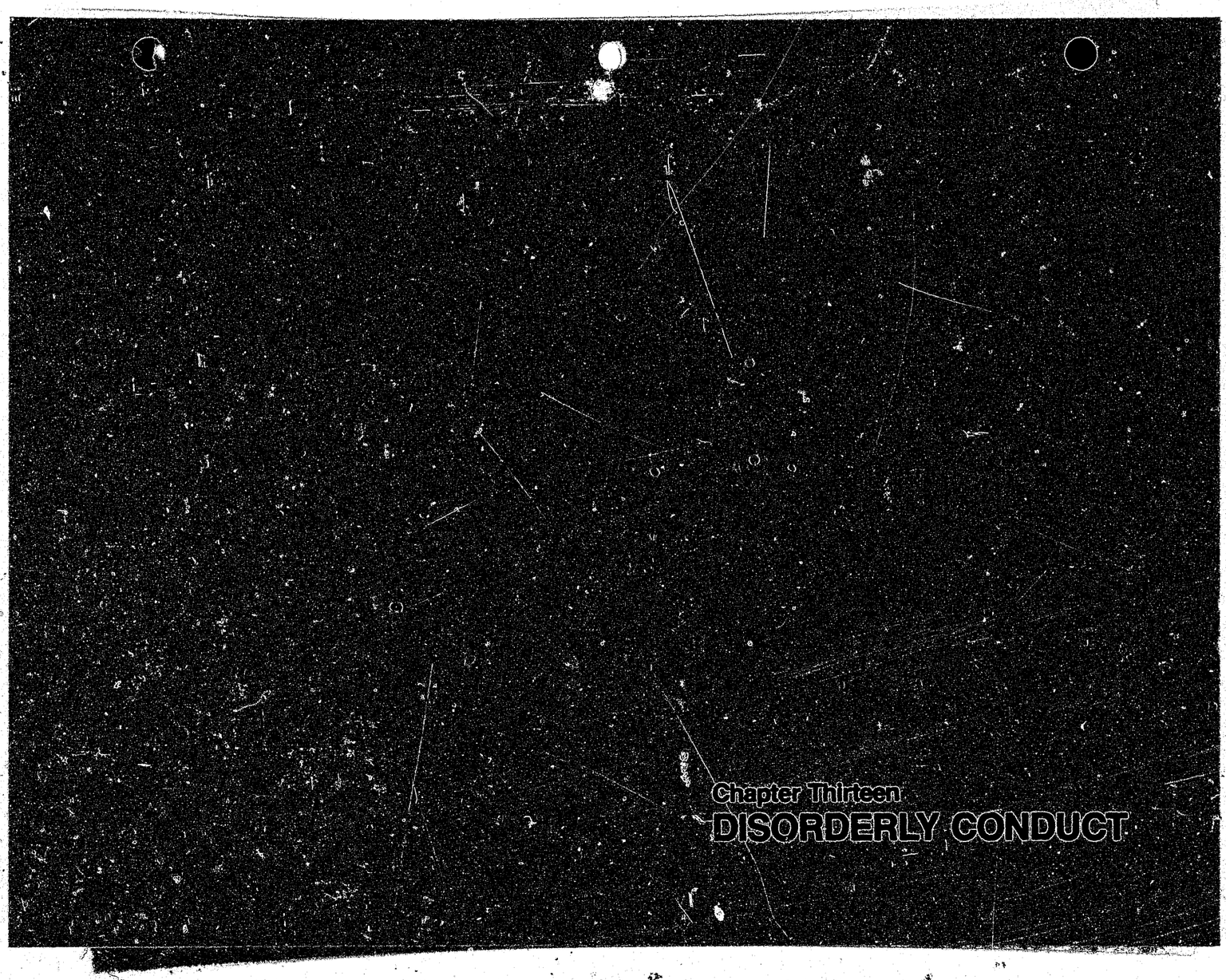
Commitment . . . . . $_____

Release . . . . . $_____

Total . . . . . $_____

_____
Sheriff, Constable Travis County, Texas

BY_____
DEPUTY



Chapter Thirteen
DISORDERLY CONDUCT

CHAPTER THIRTEEN

DISORDERLY CONDUCT

Historically, the police function of maintaining order developed from roots significantly different from those which grew into the function of crime detection. E.g., Force, Decriminalization of Breach of the Peace Statutes, 46 Tulane L. Rev. 367, 394 (1972). Disorderly conduct statutes and ordinances generally proscribe long lists of comparatively minor crimes which in some way either disturb or threaten to disturb the public peace. The officer's primary role in this area should be to stop or prevent such disturbances and to ensure that those which have already occurred do not reoccur. These rules do not attempt to predict every circumstance or combination of circumstances which may confront an officer. They should, however, provide the officer with general guidelines to consider and apply when determining what action, if any, he should take.

Although the police and the public both accept and expect selective enforcement of disorderly conduct statutes, police officers have traditionally received little or no guidance in how to exercise their broad discretion in dealing with instances of disorderly conduct. See, e.g., J. Q. Wilson, Varieties of Police Behavior 6, 21-22, 130-32, 140-51 (1968). Unlike more serious offenders, disorderly persons are not always arrested. An officer's discretion, moreover, is not limited to determining whether an arrest is warranted. He has a wide range of alternatives from which he may choose. Unless an officer arrests the offender, the officer's actions will rarely be reviewed. Even if the officer makes an arrest, his actions usually do not receive judicial scrutiny since the offender may forego

trial and pay a fine to obtain his release.

These rules attempt to fill a portion of this void by providing officers with guidelines for handling disorderly conduct cases. However, the rules apply only to individual instances of disorderly conduct and not to disorderly crowds or riots. Likewise, the rules do not apply when the officer has probable cause to arrest the offender for an offense more serious than disorderly conduct. These rules attempt to channel, not to eliminate, police discretion in order to promote uniform application of the law in accord with departmental directives. Ideally, these rules will reduce the incidence of inappropriate responses without unduly restricting the officer in the performance of his daily duties.

FIRST AMENDMENT ISSUES

Acts which seem to violate disorderly conduct statutes may be protected under the first amendment. An objective and impartial understanding of the facts should enable an officer, if he does intervene, to elect the type of intervention which complies with this chapter.

The basic guarantee of the first amendment is the freedom to advocate ideas. Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y. State, 360 U.S. 684 (1959); West v. State, 489 S.W.2d 597, 600 (Tex. Crim. App. 1972). Most cases regarding the freedom of expression have arisen in the context of public debate and political discourse. However, in Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977), the US Supreme Court observed that

> . . . our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a non-exhaustive list of labels--is not entitled to full First Amendment protection.

Thus, freedom of speech extends beyond political expression or comment on public affairs; it encompasses, at a minimum, the liberty to discuss publicly all matters of public concern without prior restraint or fear of subsequent punishment. Time Inc. v. Hill, 385 U.S. 374 (1967); Thornhill v. Alabama, 310 U.S. 88 (1940); International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979). The US Supreme Court has emphasized that first amendment rights embrace all communicative types of action, not just speech. Brown v. Louisiana, 383 U.S. 131, 142 (1966). In order to call attention to his opinion, however, a person may not just deliberately engage

in illegal conduct. A person's intent to express an idea through his conduct does not necessarily provide constitutional protection for his activities. When a single course of action combines "speech" and "nonspeech" elements, it falls within the scope of the first amendment only if the activity is sufficiently imbued with elements of communication. E.g., Aryan v. Mackey, 462 F. Supp. 90, 92 (N.D. Tex. 1978). In making this determination, both the nature of the activity and the environment in which it occurs must be considered.

When confronted with illegal conduct that contains a significant component of expression, courts have resolved the conflict by balancing first amendment rights against the societal interests infringed by the communicative actions. Only a sufficiently important governmental interest in regulating the nonspeech element can justify even incidental limitations on first amendment freedoms. The US Supreme Court has used a variety of descriptive terms to characterize the quality of this countervailing governmental interest: e.g., compelling, substantial, subordinating, paramount, cogent, and strong. Though somewhat imprecise, these terms emphasize that a government regulation has sufficient justification only: if it falls within the constitutional power of the government; if it furthers an important governmental interest; if the governmental interest does not relate to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than necessary to further that interest. Buckley v. Valeo, 424 U.S. 1, 19 (1976); United States v. O'Brien, 391 U.S. 367, 376-77 (1968); Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

The police have a duty to protect a person engaged in first amendment activity, even if his speech or conduct annoys others or creates a minor disturbance. The first amendment even protects vulgar and coarse language, as long as that language occurs in a "communicative" context. Cohen v. California, 403 U.S. 15 (1971); see FCC v. Pacifica Foundation, 438 U.S. 726, 747 (1978). First amendment communication frequently annoys or upsets listeners or viewers, but such annoyance provides absolutely no grounds for interference with a person's exercise of his rights. Cox v. Louisiana, 379 U.S. 536, 551 (1965). In Cox, the US Supreme Court affirmed a speaker's right to espouse unpopular views, even if greeted by a hostile reaction from the crowd which he is addressing. When the possibility of violence becomes imminent, however, the state can validly intervene and curtail first amendment expression. The state has a valid interest in maintaining order and in preventing injury to the speaker as well as to any third parties. Grayned v. City of Rockford, 408 U.S. 104 (1972); Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Thus, the state has ample justification for intervening against persons who evoke violently hostile reactions from their audience. The US Constitution does not bar the enactment of laws regulating conduct connected with speech, press, assembly, and petition, as long as such laws aim carefully and narrowly at the forbidden conduct. International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809, 828 (5th Cir. 1979); Beck v. State, 583 S.W.2d 338, 343 (Tex. Crim. App. 1979).

The Supreme Court also recognized in Cox (at 554-55) that the state can even curtail the exercise of vital first amendment rights if they

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interfere with public safety or convenience. See Grayned v. City of Rockford at 111-12; International Soc'y for Krishna Consciousness v. State Fair of Texas, 461 F. Supp. 719, 722 (N.D. Tex. 1978). Such interference must be more than speculative. It must be present and actual. For example, a person who obstructs a sidewalk and causes passersby to have to walk in a busy street needlessly endangers the safety of third parties. See Colten v. Kentucky, 407 U.S. 104, 109; Feiner v. New York at 320.

Thus, when a person's disorderly conduct unreasonably interferes with the public order, officers should act to restore order and to assure safety and convenience, even if the person is exercising his first amendment rights. The crucial question in determining reasonableness is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. In making this difficult determination, the courts have given great weight to the presence of first amendment communication. E.g., Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Where society's interests greatly outweigh an individual's interests, the individual loses his first amendment protection and becomes subject to intervention. Colten v. Kentucky 407 U.S. 104, 111 (1972); Aryan v. Mackey, 462 F. Supp. 90, 93 (N.D. Tex. 1978).

Courts have also recognized that although the government may prohibit the intrusion of certain views and ideas into the privacy of the home, it cannot totally ban them from public dialogue. Outside the home "we are often captives" subject to objectionable speech. Rowan v. U.S. Post Office Dept., 397 U.S. 728, 738 (1970). Whether an act unreasonably invades a person's privacy interests depends on two key factors: the nature of the

act and the nature of the public interest. By this standard, first amendment speech, even if it offends passersby, is highly protected. The mere presumed presence of unwilling listeners or viewers does not justify the curtailment of all speech capable of giving offense. The state can curtail offensive expression only if the listener's substantial privacy interest suffers invasion in an essentially intolerable manner. Cohen v. California, 403 U.S. 15, 21 (1971). A person's privacy interests vary, depending on the circumstances and place. Thus, a person has a strong and substantial expectation of privacy in his own home, but has little legitimate expectation of privacy while riding the bus or shopping in a store. Even when a person has only a slight expectation of privacy, another's disorderly acts can be proscribed if they have no social value. Thus, obscene and lewd acts are unreasonable whenever they violate an unwilling viewer's interest in privacy.

The US Supreme Court has repeatedly stressed that streets, sidewalks, parks, and other similar places have such a strong historical association with the exercise of first amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely. E.g., Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). However, some public places are so clearly committed to other purposes that their use for the airing of grievances becomes anomalous. When municipal or state property is open to the public, the exercise of first amendment rights may be regulated in order to prevent interference with the ordinary use of the property. Certainly, some conduct which would be proper on the street or in the park has no place in a courtroom or statehouse.

See, e.g., International Soc'y for Krishna Consciousness v. State Fair of Texas, 461 F.Supp. 719, 721 (N.D. Tex. 1978).

Not every incidental interference with a public function will remove the cloak of privilege from first amendment communication or will require police intervention. Only unnecessary and significant disruptions require intervention. However, even a minor disturbance might significantly disrupt a particularly sensitive public function. Thus, the amount of interference which requires police intervention will vary depending on the nature of the affected public function. For example, a school classroom needs quiet and order whereas noise would not interfere with municipal trash collection operations. See Grayned v. City of Rockford, 408 U.S. 104, 116-19; Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); Aryan v. Mackey, 462 F. Supp. 90, 93 (N.D. Tex. 1978).

SECTION ONE: DEFINITIONS

13:1.01. Disorderly Conduct - Acts proscribed under the Texas Penal Code Annotated and analogous municipal ordinances as: Disorderly Conduct (section 42.01), Public Lewdness (section 21.07), Indecent Exposure (section 21.08), Obstructing Highway or Other Passageway (section 42.03), Disrupting a Meeting or Procession (section 42.05), Public Intoxication (section 42.08), Hindering Proceedings by Disorderly Conduct (section 38.13). (The Appendix sets forth the statutory language of the cited offenses.)

13:1.02. First Amendment Activities - The lawful exercise by one or more persons of the constitutional right (without prior restraint or fear of arbitrary subsequent punishment) to assemble, to speak, or to engage in communicative behavior which expresses a point of view. Although first amendment activities usually involve political, social, economic, or religious ideas, issues, or opinions, they are not limited to those topics.

The definition of "disorderly conduct" includes those acts classified as such under Texas Penal Code section 42.01 as well as related offenses under the Penal Code and similar municipal ordinances. Although the Penal Code does not label all of the itemized offenses as "disorderly conduct," the listed offenses should nevertheless be considered together because they each proscribe a relatively minor offense which interferes with the public's interest in preventing violence and protecting the safety and constitutional rights of individual citizens and the community.

Disorderly conduct laws frequently proscribe conduct which may encompass first amendment expression. For example, Texas Penal Code sections 42.01(a)(1) and (a)(2) each prohibit certain speech or conduct which "tends to incite an immediate breach of the peace." The US Supreme Court (as previously discussed in this chapter) has held that a state may restrict first amendment

activities if the threat to public safety and order (such as a "breach of the peace") outweighs the first amendment interests. However, only a limited definition of "breach of the peace" would meet such a test. Thus, although Woods v. State, 152 Tex. Crim. 338, 213 S.W.2d 685, 687 (1948), broadly defines "breach of the peace" to include offenses which cause "consternation, and alarm and disturb the peace and quiet of the community," it offers poor direction in situations involving first amendment activities. These statutes, nevertheless, are not impermissibly vague or facially overbroad. Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

A narrow judicial definition of "breach of the peace" could preserve the constitutionality of that statutory language. Thus, the Practice Commentary to Texas Penal Code section 42.01 (Vernon 1974) notes that "[m]uch of the language" of subsections (a)(1) and (2) comes from Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and prohibits "fighting words." The Practice Commentary in fact, states that "[t]he fighting words or acts requirement makes the remaining language of these two subdivisions [(a)(1) and (a)(2)] largely immaterial." The Practice Commentary also criticizes the use of the words "abusive, indecent, profane, or vulgar" as imprecise and redundant.

Penal Code section 42.01 (a)(4) may raise more serious constitutional questions because it lacks the "fighting words" requirement (i.e., "tends to incite an immediate breach of the peace"). The authors of the Practice Commentary believe that this subsection "is probably unconstitutional, at least on its face," unless the statutory phrase "obviously offensive manner" is equated with the "fighting words" requirement. As it stands, the statute suffers from vagueness and overbreadth which restricts constitutionally protected conduct by preventing a person of common understanding from knowing

exactly what conduct is prohibited. (The presence of the "provocation defense" set forth in subsection (b) would not mitigate the constitutional problems.) Chaplinsky involved a statute which proscribed calling a person "any offensive or derisive or annoying" words. The US Supreme Court upheld the validity of the statute because the New Hampshire state courts had construed the statute to apply only to words which "have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." The state court (quoted in 315 U.S. at 573) also said:

> The word "offensive" is not to be defined in terms of what a particular addressee thinks . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.

Using the term "unreasonable" in sections 42.01(a)(3) and (a)(5) should not, on its face, create any constitutional problem. For example, in Cameron v. Johnson, 390 U.S. 611 (1968), the US Supreme Court dismissed an attack on a statute which used the term "unreasonably" as a standard. Whether section 42.05 will withstand constitutional scrutiny also depends on an interpretation which does not unreasonably infringe on first amendment rights or curtail innocent activities. See Buckley v. Valeo, 424 U.S. 1 (1976); Grayned v. City of Rockford, 408 U.S. 104 (1972); Beck v. State, 583 S.W.2d 338 (Tex. Crim. App. 1979).

SECTION TWO: GENERAL POLICIES AND PROCEDURES

13:2.01. Officers should be primarily concerned with the maintenance of public order rather than the punishment of offensive conduct. Officers should take a preventive rather than punitive approach to the enforcement of disorderly conduct statutes.

13:2.02. An officer shall not intervene in a disorderly conduct situation except as provided in this chapter.

13:2.03. This chapter applies only to disorderly conduct committed by individuals, not to the handling of riots as defined in Texas Penal Code section 42.02.

13:2.04. This chapter applies only when the individual's illegal behavior amounts to no more than disorderly conduct, as defined by these rules. This chapter does not apply where an officer has probable cause to arrest the offender for a more serious offense.

13:2.05. When intervening in disorderly conduct situations, each officer shall use the least intrusive method of intervention which will reestablish order.

13.2.06. An officer shall not intervene to stop an individual from exercising his first amendment rights simply because the officer or anyone else finds the individual's ideas unpopular, unpleasant, annoying, irritating, or insulting.

13:2.07. An officer must remain impartial and deal tactfully with disorderly individuals by:

(a) Avoiding brusqueness,
(b) Establishing his authority in a firm but unbiased manner, and
(c) Directing his approach and effort to reducing tension.

13:2.08. Possible methods of intervention, starting with the least degree of intrusiveness, include:

(a) Mediating;
(b) Informing the person(s) of appropriate social, medical, or legal counseling;
(c) Contacting friends or relatives of the disorderly person;
(d) Giving a warning;
(e) Informing about peace bond or complaint procedures;

(continued)

(f) Giving an order;
(g) With the consent of the disorderly person, taking him home or to an appropriate treatment center; and
(h) Using physical restraint and arrest.

An officer should initially resort to methods (a) through (e), when they will enable the officer to accomplish his purpose, rather than to methods (f) through (h).

13:2.09. In determining the type of intervention to use, the officer should examine the circumstances of a particular incident, the purpose of the intervention, and the speed with which the officer must act.

Even without first amendment considerations, enforcement of disorderly conduct statutes should rest on a balancing of interests. The law must weigh an individual's interest in engaging in certain conduct against the interests of the general public or of the affected group. Before intervening, an officer must analyze the situation and determine whether the interference involves more than a petty or common irritation, annoyance, or inconvenience.

Rule 13:2.01 emphasizes the key goals of police intervention, regardless of the particular type of disorderly conduct. Thus, for example, the police must immediately intervene to prevent violence but may have more options in responding to less urgent offenses, even if they each are Class A misdemeanors. This range of response finds support in Rule 13:2.08. This rule should persuade an officer to exercise restraint in the variety of actions he may take. Rule 13:2.05 stresses that an officer can maintain order and resolve most situations involving disorderly conduct through limited intervention. In all instances, once the police achieve order, continued intervention is no longer required.

Rule 13:2.07 recognizes that the appearance of police neutrality is crucial in dealing with disorderly conduct, especially in situations involving two or more disputants or first amendment rights. An officer must never let his opinion of the actor's views influence his handling of a situation. Most disorderly conduct involves people who are angry (e.g., fights, abusive language), unreasonable (e.g., intoxicated persons), or aroused by political or social differences of opinion (e.g., first amendment communication). Such persons, although legally bound to respect police intervention, may act irrationally because of their physical condition or aroused state. An officer must, therefore, be prepared for angry, abusive, or even disruptive reactions from such persons. Even if taunted or provoked by disorderly persons, the officer should continue to act calmly and professionally, since this attitude will often defuse a volatile situation and help restore order. In his concurring opinion in Lewis v. New Orleans, 408 U.S. 913 (1972), Justice Powell observed that a police officer, because of his training and experience, is expected to exercise a greater degree of restraint than the ordinary citizen. After regaining order, an officer should not arrest someone solely because of his angry or abusive reaction to police intervention.

Rule 13:2.08 lists possible methods of intervention in disorderly conduct situations. It emphasizes the need for flexibility. As the key to successful intervention, the officer must objectively analyze the situation and then apply the least intrusive method of intervention which is likely to maintain or restore public order.

An officer would not apply all of the methods of intervention listed in Rule 13:2.08 to every disorderly conduct situation. For example, some of the methods (such as (b), (c), or (g)) may be particularly appropriate in situations involving intoxicated persons. Other methods clearly would not apply in certain situations (for instance, mediation could not help where the disorderly conduct only involves one person). When confronted with disorderly conduct, the officer should determine the relevant alternatives. He should then apply the least intrusive of these which still will accomplish the goal of maintaining order. Frequently, the presence of the police officers will cool tempers, particularly in situations involving arguments. After the police arrive, disorderly individuals often cease their offensive conduct. If this result satisfies everyone, police intervention should end.

Rule 13:2.08(a) recognizes the usefulness of settling disputes through mediation. If the disorderly incident involves a disagreement whether someone was unreasonably noisy or offensive, police officers may try to mediate the dispute as objective observers. Allowing disputants to talk to officers individually will encourage them to cool their tempers and respect the officer's neutral appraisal of the situation. Perhaps an objective view may reveal to the parties that the offending conduct resulted from a misunderstanding rather than intentional interference.

Officers, however, cannot function as social workers or lawyers by seeking to resolve the underlying causes of serious disputes. Police officers have neither the time nor the particular expertise needed to undertake such action. Officers should be apprised of the availability of local social agencies and of the services they provide. If so informed, they can

direct the disputants to a particular agency for additional counseling (Rule 13:2.08(b)). Referral to the appropriate social, medical, or legal agency is particularly appropriate when the offensive conduct has an identifiable cause. In a wide range of situations, a warning may remedy a disorderly situation (Rule 13:2.08(d)). A warning informs the disorderly person of the consequences if his behavior continues and urges him to discontinue it.

When an officer believes that lesser alternatives have not succeeded, or that one of the disputants needs continuing protection from another, he may mention the availability of peace bond or formal complaint procedures (Rule 13:2.08(e)). Informing persons of legal remedies reduces police intervention while allowing aggrieved parties an opportunity to press for justice. Moreover, requiring a person to initiate legal action himself will often placate a momentarily angered person who has no serious interest in prosecution. In many instances, an order (Rule 13:2.08(f)) will be the last method of intervention an officer attempts to use before resorting to arrest. All orders should be reasonable, but emphatic. Failure to obey a reasonable order given by an officer may constitute an offense under Texas Penal Code section 42.03(a)(2).

At times, physical restraint and arrest (Rule 13:2.08(h)) may be the only feasible method of stopping disorderly conduct. In fact, in certain situations (usually involving ongoing violence) an officer must arrest someone before he can try any of the less intrusive means of intervention. If an officer must use force, he should exercise restraint because excessive use of force may cause disorderly persons to turn their violence against the police. (See Chapter Three on the Use of Force.) The Penal

Code gives an officer the authority to release an individual arrested under section 42.08 if the officer "believes imprisonment is unnecessary for the protection of the individual or others." Thus, contacting friends or relatives of the disorderly person (Rule 13:2.08(c)) may be especially useful for handling an intoxicated individual who may inadvertently injure himself or others.

Rule 13:2.09 suggests factors for the officer to consider in deciding whether, and how, he should intervene. For example, regarding nonviolent lewd or offensive behavior, an officer should usually avoid making an arrest unless the conduct highly offended third persons. (See Chapter Two on Misdemeanor Field Release by Citation.) On the other hand, offenses which involve ongoing violence or endanger public safety demand swift and forceful action, since the state has a duty to protect its citizens from bodily harm. Cox v. Louisiana, 379 U.S. 536, 554 (1965). This duty authorizes the police to stop an imminent threat of violence or an interference with public safety. The Penal Code (sections 42.01(a)(1), (2), (4), and 42.03) forbids certain acts which create such dangers. In these situations, the officer should use any method of intervention, including arrest. These rules, therefore, do not require an officer to exhaust every lesser alternative before relying on arrest. However, whenever time allows (e.g., when it appears that no one will be physically harmed within a few minutes), he should consider less intrusive means, such as a request, a warning, or an order.

Although nonviolent, certain disorderly conduct "outrageously shocks" the community. An "outrageously shocking" act involves an outrageous, flagrant, and intentional violation of the law and the rights of third persons. Such behavior would, under the circumstances, evoke intense

revulsion or abhorrence from a representative sampling of persons of ordinary sensibilities within the community. This type of behavior, by its nature antithetical to a system of public order, mandates immediate police intervention. In such instances, the state's interests overwhelmingly outweigh the offender's rights. Therefore, immediate arrest serves both to stop the offensive conduct and to deter the offender and others from engaging in such conduct in the future. Officers must realize the strictness of this standard. They must not invoke this label to circumvent the guidelines of this chapter.

Appendix

DISORDERLY CONDUCT STATUTES

MISCELLANEOUS PROVISIONS
OF TEXAS PENAL CODE ANNOTATED

§ 21.07. Public Lewdness

(a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his act:

(1) an act of sexual intercourse;

(2) an act of deviate sexual intercourse;

(3) an act of sexual contact;

(4) an act involving contact between the person's mouth or genitals and the anus or genitals of an animal or fowl.

(b) An offense under this section is a Class A misdemeanor.

§ 21.08. Indecent Exposure

(a) A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act.

(b) An offense under this section is a Class C misdemeanor.

§ 38.13. Hindering Proceedings by Disorderly Conduct

(a) A person commits an offense if he intentionally hinders an official proceeding by noise or violent or tumultuous behavior or disturbance.

(b) A person commits an offense if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance and continues after explicit official request to desist.

(c) An offense under this section is a Class A misdemeanor.

Section 42.01. Disorderly Conduct

(a) A person commits an offense if he intentionally or knowingly:

(1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

(2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace;

(3) creates, by chemical means, a noxious and unreasonable odor in a public place;

(4) abuses or threatens a person in a public place in an obviously offensive manner;

(5) makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy;

(6) fights with another in a public place;

(7) enters on the property of another and for a lewd or unlawful purpose looks into a dwelling on the property through any window or other opening in the dwelling;

(8) discharges a firearm in a public place other than a public road;

(9) displays a firearm or other deadly weapon in a public place in a manner calculated to alarm;

(10) discharges a firearm on or across a public road; or

(11) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act.

(b) It is a defense to prosecution under Subsection (a)(4) of this section that the actor had significant provocation for his abusive or threatening conduct.

(c) For purposes of this section, an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence.

(d) An offense under this section is a Class C misdemeanor unless committed under Subsection (a)(8) or (a)(9) of this section, in which event it is a Class B misdemeanor; and further provide that a person who violates Subsection (a)(10) is guilty of a misdemeanor and on a first conviction is punishable by a fine of not less than $25 nor more than $200, on a second conviction is punishable by a fine of not less than $200 nor more than $500, and on a third or subsequent conviction is punishable by a fine of $500.

§ 42.03. Obstructing Highway or Other Passageway

(a) A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly:

(1) obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, regardless of the means of creating the obstruction and whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(2) disobeys a reasonable request or order to move issued by a person the actor knows to be or is informed is a peace officer, a fireman, or a person with authority to control the use of the premises:

(A) to prevent obstruction of a highway or any of those areas mentioned in Subdivision (1) of this subsection; or

(B) to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

(c) An offense under this section is a Class B misdemeanor.

§ 42.04. Defense When Conduct Consists of Speech or Other Expression

(a) If conduct that would otherwise violate Section 42.01(a)(5) (Unreasonable Noise) or 42.03 (Obstructing Passageway) of this code consists of speech or other communication, of gathering with others to hear or observe such speech or communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally harmed the interests of others which those sections seek to protect.

(b) The order required by this section may be given by a peace officer, a fireman, a person with authority to control the use of the premises, or any person directly affected by the violation.

(c) It is a defense to prosecution under Section 42.01(a)(5) or 42.03 of this code:

(1) that in circumstances in which this section requires an order no order was given;

(2) that an order, if given, was manifestly unreasonable in scope; or

(3) that an order, if given, was promptly obeyed.

§ 42.05. Disrupting Meeting or Procession

(a) A person commits an offense if, with intent to prevent or disrupt a lawful meeting, procession, or gathering, he obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance.

(b) An offense under this section is a Class B misdemeanor.

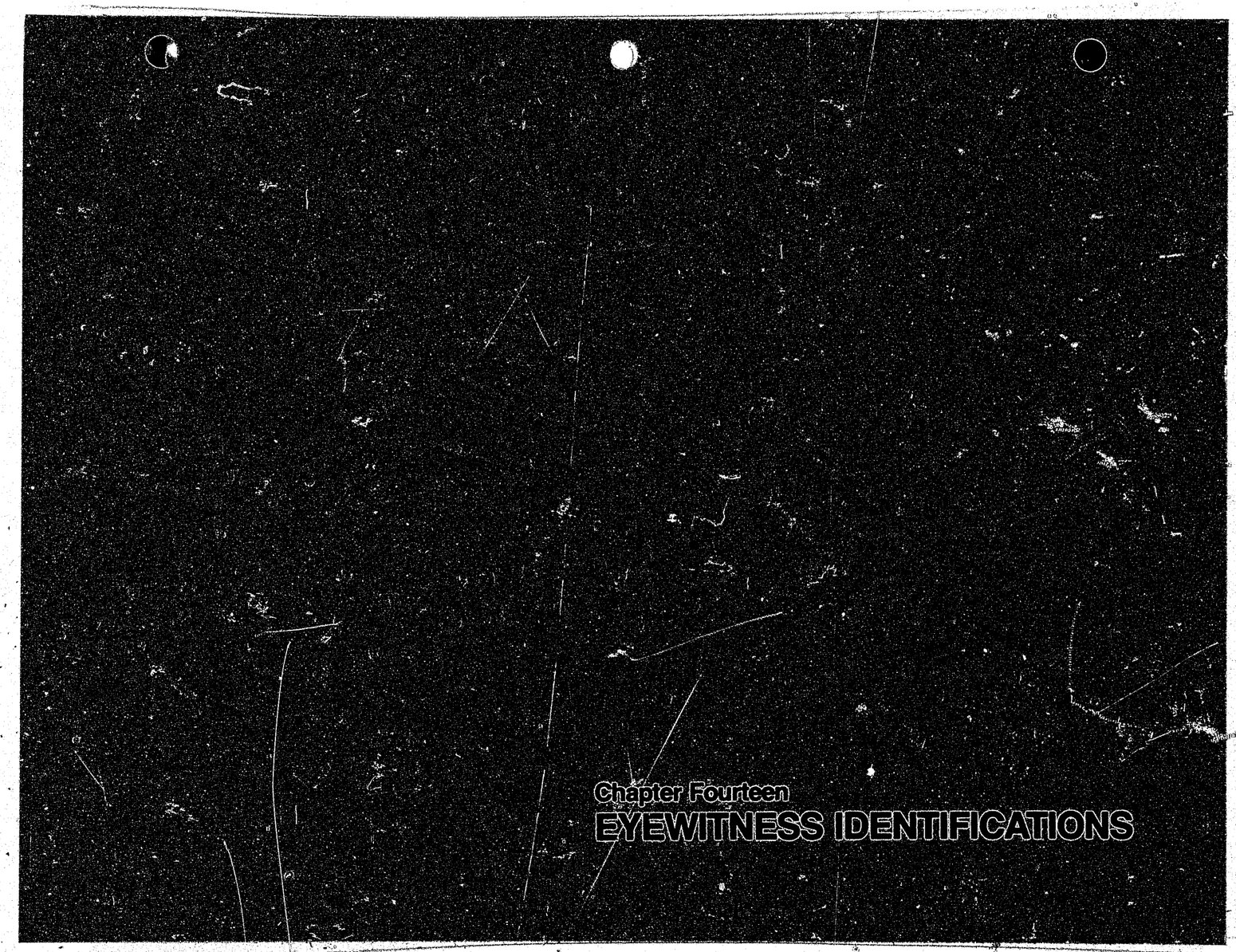
§ 42.08. Public Intoxication

(a) An individual commits an offense if he appears in a public place under the influence of alcohol or any other substance, to the degree that he may endanger himself or another.

(b) A peace officer or magistrate may release from custody an individual arrested under this section if he believes imprisonment is unnecessary for the protection of the individual or others.

(c) It is a defense to prosecution under this section that the alcohol or other substance was administered for therapeutic purposes by a licensed physician.

(d) An offense under this section is a Class C misdemeanor.



Chapter Fourteen

EYEWITNESS IDENTIFICATIONS

CHAPTER FOURTEEN

EYEWITNESS IDENTIFICATIONS

Eyewitness identification procedures include lineups, field identifications, photo displays, and informal identifications. This chapter attempts to establish reliable and fair rules regarding the identification of suspects by witnesses. These rules build on case law and commonsense practices to create a consistent system for impartially conducting eyewitness identifications. For a thorough analysis of current law and the legal and practical problems in this area, see N. Sobel, Eye-Witness Identification (1972 & Supp. 1980).

In 1967, concerned with the dangers of improper eyewitness identifications, the United States Supreme Court established procedural safeguards and sanctions in the landmark trilogy of United States v. Wade (388 U.S. 218), Gilbert v. California (388 U.S. 263), and Stovall v. Denno (388 U.S. 293). Although the Court mandated certain constitutional and procedural safeguards to minimize the possibility of mistaken identification, it nevertheless left many questions unanswered, only some of which have since been dealt with in later decisions. In Wade, the Supreme Court also opened the door for police departments to develop rules for eyewitness identification. While the Court recognized that a postindictment lineup is a "critical stage in the prosecution" which entitles the defendant to assistance of counsel, it also noted (at 239) that

> [l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." [Footnote omitted.]

The courts examine the overall fairness and reliability of eyewitness identifications. In Stovall, the Supreme Court reaffirmed a defendant's right to challenge any identification procedure on due process grounds. The Court announced (at 301-02) that evidence of a pretrial confrontation could be excluded if the totality of the surrounding circumstances indicated that "the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." Courts determine the necessity of a suggestive procedure by considering both why the police selected that procedure and how they implemented it. Simmons v. United States, 390 U.S. 377, 384-86 (1968).

In Neil v. Biggers, 409 U.S. 188 (1972), the US Supreme Court focused on the accuracy and reliability of a suggestive identification procedure. Biggers involved a station house showup seven months after the crime. Although concerned with the length of this delay, the Court's decision hinged (at 199) on "whether under 'the totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." The Court suggested (at 199-200) an evaluation of the likelihood of misidentification based on the following five factors:

(a) The opportunity the witness had to view the criminal at the time of the crime,

(b) The witness' degree of attention,

(c) The accuracy of the witness' prior description of the suspect,

(d) The level of certainty the witness demonstrated at the confrontation, and

(e) The length of time between the crime and the confrontation.

Using this framework, the Court held the identification evidence admissible.

In Manson v. Brathwaite, 432 U.S. 98 (1977), the US Supreme Court suggested that courts, in deciding the admissibility of identification information, should also (at 114) consider "the corrupting effect of the suggestive identification itself." Thus, the Court took the additional step of analyzing this corrupting effect and balancing it against the five reliability indicators of Neil v. Biggers. In Manson, the questionable evidence resulted from an undercover officer's identification of a drug crime suspect in a single photograph left in his office by a fellow officer. Although agreeing (at 116) that "identifications arising from single-photograph displays may be viewed in general with suspicion," the Court concluded (at 116) that the officer made the identification under "no coercive pressure" and "in circumstances allowing care and reflection." The Court also concluded (at 114) that "reliability is the linchpin in determining the admissibility of identification testimony."

Since certain eyewitness identification procedures are more suggestive than others, an officer must determine the appropriate procedure for each case. However, to avoid suggestiveness he must also know how to conduct that procedure. In deciding whether to exclude evidence of a pretrial confrontation, courts will analyze the "fairness and impartiality" of the "totality of the circumstances" as a factor in determining suggestiveness and the likelihood of misidentification. In balancing the "corrupting effect" of a suggestive identification, most courts will consider (1) the choice of procedure, (2) whether the defendant had a right to counsel and if the police honored that right, (3) whether the police violated the

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defendant's fifth amendment rights during the identification procedures, and (4) how the conduct of the police affected the witnesses. For a concise discussion of pretrial identification procedures, see J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer 303-20 (1979).

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SECTION ONE: DEFINITIONS

14:1.01. Complaint - The affidavit made before a magistrate or a district or county attorney which charges a particular person with the commission of an offense. The filing of a "complaint" triggers a suspect's right to counsel at eyewitness identification procedures. For the purposes of this chapter, the term "complaint" includes a grand jury indictment.

14:1.02. Lineup - An identification procedure in which a suspect is placed in a live group-setting and presented to an eyewitness.

14:1.03. Field Identification - A corporeal identification procedure (also known as "confrontation," "showup," and "one-on-one") in which the suspect is presented singly to the witness.

14:1.04. Photo Identification Display - An identification procedure (also known as "photo display," "photo lineup," and "photo array") in which a group of photographs, preferably in color, are displayed together before the witness.

14:1.05. Informal Identification - A procedure in which an officer takes a witness to observe a suspect who is at liberty, and who is usually unaware that he is being observed.

14:1.06. Witness - A victim or an eyewitness to a crime.

14:1.07. Filler - Any person, other than a suspect in a particular criminal investigation, who participates in a lineup which relates to that investigation.

In Texas, the filing of a "complaint" (Rule 14:1.01) initiates an "adversary judicial criminal proceeding" against a particular person. Texas Code of Criminal Procedure, article 15.04, defines "complaint" and forms the basis for the definition used in Rule 14:1.01. The complaint turns a "suspect" into a "defendant." Thus, with the filing of a complaint, the right to counsel at identification procedures first attaches. The definition of "adversary judicial criminal proceeding" derives from Kirby v. Illinois, 406 U.S. 682 (1972). In Kirby, the US Supreme Court

stated (at 689) that a defendant's right to counsel attaches to lineups and showups held "at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information or arraignment." In Texas the filing of a complaint equals the filing of a "formal charge." The Court, in Kirby, reasoned (at 689-90) as follows:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. [Footnote and citations omitted.]

Thus, a suspect, even if arrested, has no right to counsel at identification procedures until a complaint has been filed against him. As noted in the definition, the term "complaint" includes a grand jury indictment, which may occur without a preceding complaint.

SECTION TWO: GENERAL RULES

14:2.01. Conduct all eyewitness identification procedures in a fair and impartial manner in order to avoid suggestiveness and influence on any witness. An officer shall not say or do anything that might suggest to a witness the guilt or innocence of a suspect.

14:2.02. An eyewitness identification is unnecessary when:

(a) The witness could not identify the offender because he never saw him when the offense occurred; or
(b) The witness knew the identity of the suspect before the offense occurred, or learned the suspect's identity after the offense and without police assistance; or
(c) The suspect is arrested while committing the crime.

14:2.03. When there are two or more witnesses, each witness shall view the suspect or his likeness (i.e., photo or composite drawing or sketch) and make his identification separate from the other witnesses. Instruct witnesses not to converse or otherwise communicate with any other witness about the identification until all of the witnesses have completed their respective identifications.

14:2.04. A complete record of the identification procedure must be made. The time, location, and identity of all those present, including the fillers being viewed, must be noted. The record must also include any remarks made by any witnesses, officers, suspects, or lawyers. Whenever possible, photographs and tape or stenographic recordings shall be made.

Section Two applies to all eyewitness identification procedures. Rule 14:2.01 requires the police to conduct such procedures fairly and impartially. In United States v. Wade, 388 U.S. 218, 228 (1967), the US Supreme Court expressed concern about the risk of injustice caused by suggestiveness during witness identifications:

> . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . .

Suggestiveness in identifications arises from two sources. First, the identification procedure may itself be suggestive (e.g., placing a white suspect in a lineup with six black people, using an array of 12 photographs in which the suspect's picture appears eight times). Rules 14:3.15 and 14:5.05, for example, set forth specific procedures to avoid such suggestiveness. The second potential source of suggestiveness stems from the conduct of the police or prosecutor as it affects the viewer. Police procedures may, intentionally or not, produce an identification which reflects police suggestion rather than true choice. An officer should never inform any witness that a suspect has admitted guilt, that the police have recovered property similar to what was stolen, that the police have seized weapons like those used in the offense, or that the officer believes the suspect is guilty. Likewise, an officer must always guard against in any way indicating to any witness that a particular person is a suspect or is in a lineup or other group to be viewed by the witness. Such suggestiveness may result in an irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979).

Rule 14:2.02 lists circumstances which make an eyewitness identification unnecessary. A suspect has no right to a pretrial identification procedure. United States v. McGhee, 488 F.2d 781 (5th Cir. 1974). Rule 14:2.02(b) applies when the witness already knows the identity of the suspect and acquired this knowledge without any police assistance. This would occur, for instance, if the witness and offender were relatives or co-workers, or if the witness recognized the offender's picture in the newspaper. It would not be sufficient, however, if the witness had merely

seen the offender prior to or after the offense. The witness must either know his name or be able to point him out in order to obviate the identification procedure. The primary purpose of maintaining a complete record of all identification procedures (Rule 14:2.04) is to enable the police or a defendant to reconstruct at trial the relative fairness of such pretrial procedures.

Rule 14:2.03 states general principles to observe when two or more witnesses are available to make an identification. While combined viewings do not necessarily violate due process, they become a key factor on which courts focus when examining identification procedures. E.g., United States v. Bridgefourth, 538 F.2d 1251 (6th Cir. 1976); Rudd v. Florida, 477 F.2d 805 (5th Cir. 1973). Separate viewings avoid the influence of "mutual reinforcement" by the presence or reactions of other witnesses.

SECTION THREE: LINEUPS

14:3.01. Use only a lineup following the arrest of a suspect, unless:

(a) A field identification in accordance with Section Four is appropriate; or
(b) No witness will attend a lineup due to illness, refusal to cooperate with police, or inconvenience caused by having the suspect in custody far from the witness (see Section Four on Field Identification and Section Five on Photo Identification Displays); or
(c) The suspect looks so unusual that other persons with similar physical characteristics cannot practically be found for a lineup; or
(d) The suspect refuses to participate in a lineup, despite Rule 14:3.11.

14:3.02. A lineup should be held as soon as practical after the suspect appears before a magistrate. A lineup may be held before the suspect appears before a magistrate when special circumstances indicate that delay of the lineup will seriously hamper an ongoing investigation.

14:3.03. An officer may request a suspect, once in custody, to participate as a filler in lineups relating to crimes for which he has not been arrested. A person, whether or not in custody, has no right to counsel when he appears in a lineup as a filler.

14:3.04. A suspect has the right to have a lawyer present at a lineup which occurs after a complaint has been filed against him. After a complaint has been filed, a suspect shall be advised that:

(a) The results of the lineup can and will be used against him;
(b) He has the right to have an attorney present to observe the lineup procedure;
(c) If he cannot afford a lawyer, he has the right to receive one free of charge; and
(d) The lineup will be delayed for a reasonable amount of time in order to allow the lawyer to appear.

Use Appendix A of this chapter as the form for a suspect's "Waiver of Right to Attorney at Lineup."

14:3.05. When a suspect who has a right to counsel at a lineup desires to have counsel present, the following procedures shall be followed:

(continued)

(a) If the suspect already has a lawyer, allow him to notify the lawyer.
(b) Allow a suspect who has no lawyer, but wishes to retain one, a reasonable amount of time to do so.
(c) If the suspect is indigent, the officer conducting the lineup shall contact the court to provide a free lawyer for him.

14:3.06. After being advised of his right to counsel, if an accused wishes to waive this right, request him to read (or read to him) and sign the appropriate waiver form. If the accused refuses to waive or fails to comprehend waiver of the presence of counsel and refuses to employ an attorney or to have one appointed for him, the investigating officer shall inform the court and request an attorney in the accused's behalf.

14:3.07. Even if a suspect may have no right to appointed counsel at a lineup (because a complaint has not been filed against him), advise the suspect that he may have the assistance of retained counsel at the lineup. Delay the lineup a reasonable time to allow the attorney to appear.

14:3.08. If, despite notification, the suspect's attorney fails to appear at the scheduled lineup, delay the lineup for a reasonably short period of time. If the attorney still does not appear, the officer in charge may:

(a) Delay the lineup until a later date; or
(b) Notify the court which will appoint a substitute attorney to represent the suspect at the lineup; or
(c) Hold the lineup without the attorney, if the other alternatives are impractical.

An officer who conducts a lineup without the suspect's attorney shall make a record of (1) all efforts to obtain substitute counsel, (2) how long he delayed the lineup, and (3) the circumstances which made further delay impractical. (See Rule 14:3.17.)

14:3.09. A reasonable time prior to the lineup, inform the prosecutor's office of the date, time, and place of the lineup.

14:3.10. Before placing the suspect in the lineup, the officer conducting the lineup shall inform the suspect that:

(a) He will be placed in a lineup along with other persons who look like he does; and
(b) During the lineup, for identification purposes only, he may be required to wear certain clothing, say certain words, or do certain things.

(continued)

14:3.11. If a suspect refuses to participate in a lineup, request a court order compelling the suspect to participate. If, despite a court order, a suspect continues to refuse:

- *(a) Advise him that he has no right to refuse and that he may be found in contempt of court, and*
- *(b) Make a record of the precise words of his refusal.*

If a suspect continues to refuse to participate, do not force him to take part in the lineup without a court order.

14:3.12. Prior to beginning the lineup, the officer in charge shall explain the lineup procedures and the responsibilities of all parties to all attending witnesses, police officers, and attorneys.

14:3.13. The officer conducting the lineup shall:

- *(a) Extend all professional courtesies to all attorneys present.*
- *(b) Prior to the lineup, tell the attorney for the suspect the date, time, place, and nature of the offense involving his client.*
- *(c) Not give the names or addresses of witnesses who will view the lineup to the attorney for the suspect.*
- *(d) Instruct the attorney(s) to direct all comments and inquiries to him outside the presence of the witnesses.*
- *(e) Before the witnesses view the lineup, permit the attorney(s) to make suggestions regarding the arrangement and composition of the lineup.*
- *(f) If two or more suspects appear in one lineup, permit each attorney to move his own client, but only once and at the discretion of the officer in charge.*
- *(g) Note on the record the objections or lack of objections by the attorney(s) to the lineup arrangement or procedures.*
- *(h) Eject attorneys who obstruct the lineup.*
- *(i) If a suspect's attorney leaves the lineup or is ejected, delay the lineup until a substitute attorney is appointed. (See Rule 14:3.08.) If a substitute attorney cannot be obtained despite a concerted effort, the lineup may continue without an attorney for the suspect. (However, a complete record shall be made of the circumstances. See Rule 14:3.08.)*

(continued)

14:3.14. Prior to viewing the lineup, instruct each witness as follows:

- *(a) Neither the witness' identity nor his address will be revealed to the suspect or his counsel.*
- *(b) Instruct witness not to talk to anyone (except to the officer, when necessary) while in the lineup room. Witnesses must write all comments, such as the number of an identified suspect.*
- *(c) The lineup should exonerate the innocent as well as identify the accused.*
- *(d) Witnesses must look at the lineup carefully and must record any doubts or uncertainties about any identification they make.*
- *(e) A witness may request the officer to require all the participants in the lineup to speak certain words, make certain gestures, or assume particular poses.*
- *(f) Witnesses do not have to talk to defense counsel, but may do so after the lineup.*

(Appropriate special measures shall be taken to assist witnesses who do not speak, see, hear, or read and write English.)

14:3.15. In order to assure fairness to the suspect, observe the following procedures:

- *(a) If practical, the lineup should consist of at least six participants (including the suspect).*
- *(b) All lineup participants shall be of the same sex and race. They must also have similar physical characteristics, such as age, skin color, hair color, height, weight, and hairstyle.*
- *(c) Allow the suspect to choose his initial position in the lineup and to change his position before each subsequent viewing.*
- *(d) Instruct the participants in the lineup to conduct themselves in a way which does not identify the suspect.*

14:3.16. Allow the witness sufficient time to view the lineup. An officer may ask the witness, while still viewing the lineup, to identify the lineup participants. The officer may also decide to conclude the lineup and then take the witness to a separate room and interview him alone to determine whether he is able to identify any of the persons in the lineup. (The witness may refer to any notes he may have made while in the lineup room.) An officer may give a witness a "Witness Lineup Identification Form" (Appendix B to this chapter).

14:3.17. Make a record of all lineup procedures. The record shall include at least the following:

(continued)

(a) A large photograph or videotape (preferably in color) of the lineup, as originally set. If the line changed in any way, take another picture as the lineup appeared to each witness.
(b) A stenographic or tape recording of all words spoken during the lineup, including:

(1) All instructions to the witness prior to viewing the lineup,
(2) Any objections or remarks made by defense counsel,
(3) Any notes made by the witness, and
(4) Any identification made by the witness.

(c) Whether defense counsel was present.
(d) The amount of time it took the witness to make an identification.

Courts prefer the use of lineups to the use of field identifications and photo identification displays because of the greater fairness generally provided by lineup procedures. United States v. Wade, 388 U.S. 218 (1967); Allen v. Estelle, 568 F.2d 1108 (5th Cir. 1978). For instance, lineups present the suspect in three dimensions and as he currently looks. Photos, on the other hand, show the suspect the way he looked when his picture was taken. A field identification, although it also presents the suspect "in the flesh," is somewhat inherently suggestive because the witness has no choice to identify anyone other than the suspect.

Following the arrest of a suspect, a lineup should be the only eyewitness identification procedure used, without the presence of one or more of the circumstances enumerated in Rule 14:3.01. Alternative procedures should be used, under the circumstances enumerated in Rule 14:3.01(c), only after making reasonable efforts to compensate for a suspect's unusual

physical characteristics. If necessary, persons in the lineup may wear wigs, stand on hidden blocks, or otherwise disguise themselves in order to look like the suspect.

Since an officer has to justify his use of another procedure when a lineup is available, he should make a record of those circumstances which make a lineup impractical. Rule 14:3.02 recognizes the need to hold eyewitness identification procedures while the witness' recollection of the offender is still fresh. Nevertheless, the rule requires delaying the lineup until the suspect has appeared before the magistrate, has been advised of his rights, and has been appointed counsel, if necessary. In most cases, this delay should be relatively brief, since articles 14.06 and 15.17 of the Texas Code of Criminal Procedure require that an arrested suspect be brought before a magistrate "without unnecessary delay." Although holding a lineup after the suspect's appearance before the magistrate will trigger his right to counsel at the lineup (Rule 14.3.04), the advantages of having counsel present outweigh the administrative, logistical, and budgetary difficulties involved.

The special circumstances which would permit holding a lineup prior to prompt appearance before a magistrate will vary from case to case (Rule 14:3.02). For example, such action might be justified if the suspect would have to be released if the witness does not identify him. If, however, enough evidence exists to hold the suspect even if the witness failed to identify him, the lineup should be delayed. The availability of a magistrate is another prime consideration in determining when to hold a lineup since delay may jeopardize an ongoing investigation. In general, however, courts do not exclude reliable evidence obtained by the police during an authorized

delay in taking an accused before a magistrate.

The fact that a magistrate is likely to release the suspect on bond or personal recognizance while awaiting trial does not justify holding a lineup prior to presentment. Rather, an officer should have the magistrate issue an order requiring the suspect to appear in a lineup and forbidding him from altering his appearance before then. There is seldom any reason to hold a pre-presentment lineup for persons arrested on charges over which municipal courts have jurisdiction. Although the suspect may be released on cash bond or personal recognizance before appearing before a magistrate, such cases rarely require any lineup.

Rules 14:3.03 and 14:3.04 recognize that the police have the right to compel a person they have in custody to participate as filler in a lineup which relates to a specific offense other than the one for which the police arrested him. Moreover, even if he has been formally charged with a particular offense or otherwise acquired a right to counsel, this right does not extend to his appearance in any lineup which does not relate to that particular offense. United States v. Tyler, 592 F.2d 261, 263 (5th Cir. 1979); United States v. Anderson, 490 F.2d 785, 788 (D.C. Cir. 1974). However, without a court order, the police probably cannot compel someone who has not been arrested to participate in any lineup; such compulsion would greatly intrude on a person's liberty.

Thus, even though a suspect has been formally charged with an offense, he has no right to counsel at a lineup relating to another offense for which he has not been formally charged. Rule 14:3.04 states the law regarding the right to counsel at pretrial identification procedures. In Kirby v.

Illinois, 406 U.S. 682 (1972), the Supreme Court (in a 5-4 decision) declined to extend the right to counsel at identification procedures held prior to the initiation of formal prosecution. In several cases, Texas courts have also held that a suspect has no right to counsel at a lineup until the state files formal charges against him. E.g., Wyatt v. State, 566 S.W.2d 597, 600 (Tex. Crim. App. 1978); Lane v. State, 506 S.W.2d 212 (Tex. Crim. App. 1974). In Texas, formal charges are generally lodged against a suspect with the filing of a complaint. In Texas, a lineup held prior to formal charges remains "investigatory in nature and not accusatory." Wyatt v. State at 600. A magistrate issues an arrest warrant only after a complaint has been filed. Thus, the right to counsel attaches with the issuance of an arrest warrant. Dickson v. State, 492 S.W.2d 267, 271 (Tex. Crim. App. 1973).

The law prohibits the police from evading the counsel requirement by deferring formal proceedings. United States v. Sikes, 463 F.2d 540, 542 (5th Cir. 1972). In fact, the police have little if anything to gain and possibly much to lose by excluding counsel from a lineup. All identification procedures, regardless of the suspect's right to counsel, must comply with due process standards which forbid any lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. Manson v. Brathwaite, 432 U.S. 98 (1977); Allen v. Estelle, 568 F.2d 1108 (5th Cir. 1978). In summary, except in unusual circumstances, Rule 14:3.02 would prevent the police from holding a lineup before the suspect is formally charged.

The right to counsel and the requisite warnings have no meaning unless the suspect can obtain a lawyer. Rules 14:3.04 and 14:3.05 explicitly

obligate the police to ensure that the suspect has the opportunity to have counsel present at the lineup. In addition, courts have long recognized that an accused may waive his right to counsel at a lineup. However, a suspect must make any such waiver knowingly and intelligently. The suspect should be told, consequently, not only that he has a right to counsel, but also that if he cannot afford counsel, he will have one appointed for him without charge. A suspect must voluntarily waive his right to counsel. Thus, officers should not exert either direct or indirect pressure to encourage the suspect to waive his right to counsel. Texas courts have found effective waivers in cases even where the defendant made no express oral or written waiver. Nevertheless, Rule 14:4.05 adopts a more stringent procedure in order to remove any doubt whether the suspect made a knowing and intelligent waiver. Perryman v. State, 470 S.W.2d 703 (Tex. Crim. App. 1971); Miller v. State, 468 S.W.2d 818 (Tex. Crim. App. 1971).

Rule 14:3.08 prevents a defense attorney from using his failure to attend a lineup as a delaying tactic. After allowing a suspect's lawyer a reasonable time to appear, the officer in charge may arrange for substitute counsel to represent the suspect at the lineup. United States v. Wade, 388 U.S. 218, 237 & n.27 (1967); Chapman v. State, 489 S.W.2d 584 (Tex. Crim. App. 1973). If counsel for other suspects in the lineup are present, the officer in charge should request one of them to substitute for the absent attorney. However, he should not ask an attorney to serve as substitute counsel for a codefendant of his own client. As a second alternative when counsel fails to appear, the officer in charge may postpone the lineup until a later date. Only if both substitution and delay are impractical, may the lineup be held without counsel. Thus, for instance, if substitute counsel

were unavailable, and delay would greatly inconvenience the witness or cause great difficulty in assembling a sufficient number of similar looking participants, the lineup could proceed without the suspect's counsel.

Though not required, a prosecutor should attend all lineups to prevent unfairness or suggestiveness which might taint the proceedings. He might also save the police from making needless changes in the lineup composition and procedures. However, his role (as is the role of defense counsel) is only advisory. The officer in charge should make all final decisions.

Rule 14:3.10 encourages cooperation on the part of the suspect by informing him of lineup procedures. In United States v. Wade, 388 U.S. 218, 222-23 (1967), the US Supreme Court specifically approved compelling a suspect to utter specific words or perform certain actions during a lineup. Several years later, Texas courts also permitted this practice. E.g., McInturf v. State, 544 S.W.2d 417 (Tex. Crim. App. 1976). Prior to Olson v. State, 484 S.W.2d 756 (Tex. Crim. App. 1969), Texas courts had held that requiring a suspect to utter words spoken by the perpetrator violated the Texas constitutional privilege against self-incrimination (art. I, sec. 10). See, e.g., Beachem v. State, 144 Tex. Crim. 272, 162 S.W.2d 706 (1942). Olson expressly overruled Beachem by holding that the Texas Constitution extended its protection only to "testimonial" compulsion.

A suspect has no right to refuse to participate in a lineup, and no law requires the police to warn him of the consequences of his refusal to do so. However, such a warning often increases a suspect's cooperation by insuring that he understands the seriousness of a refusal. See United States v. Parhms, 424 F.2d 152 (9th Cir. 1970). A suspect's cooperation has particular importance because forced participation will inherently

appear highly suggestive, even if the other participants also feign resistance. For this reason, a suspect should not be forced to participate, without a court order.

Rule 14:3.13 emphasizes the limited role of defense counsel as an observer during the lineup. United States v. Wade, 388 U.S. 218, 224-38 (1967). While no law requires the police to solicit suggestions regarding lineup composition and arrangement from defense attorneys, it makes sense to do so because the suggestion may relate to an oversight which could have jeopardized both the lineup and the in-court identifications. On the other hand, adopting an improper suggestion might taint the lineup. If the lineup contains only one suspect, counsel should be given more latitude. If the lineup contains two or more suspects, Rule 14:3.13(f) limits each attorney's ability to move his client, to avoid creating suggestiveness with respect to the other suspects.

Just as a defense attorney cannot stop a lineup by failing to appear, he cannot halt it by walking out. (Rule 14:3.13(i).) Indeed, argumentative defense counsel can be ejected from the lineup room. United States v. Cunningham, 423 F.2d 1269, 1274 (4th Cir. 1970) (dictum). In either case, the officer in charge should delay the lineup for a short time while trying to obtain substitute counsel. (See Rule 14:3.08.) Only after these efforts have failed, may the lineup continue without defense counsel. Alternatively, the lineup may be postponed, provided such delay will not hinder the investigation or greatly inconvenience the witness.

Rule 14:3.13(c) recognizes that defense counsel may not transform a lineup into a discovery device or an opportunity to interview witnesses.

United States v. Cunningham, 423 F.2d 1269, 1274 (4th Cir. 1970); United States v. Eley, 286 A.2d 239 (D.C. 1972). Refusal to allow defense counsel to question a witness prior to a lineup does not violate the defendant's right to due process. Vasquez v. State, 500 S.W.2d 518 (Tex. Crim. App. 1973). However, a witness may talk to defense counsel after the lineup (Rule 14:3.14(f)).

Rule 14:3.14 lists the lineup procedures for witnesses. A witness should be told that his identity and address will not be revealed during the lineup. Thus, no one should ever address witnesses by name in the presence of the suspect or defense counsel. The police should also avoid revealing whether the witness is an eyewitness or a victim, since that might embarrass the witness or others. Under Rule 14:3.14(e) a witness may seek to compel the lineup participants to say or do certain things during a lineup. The police should only ask the participants to say or do something at the witness' request, and only if all the participants in the lineup say or do the same thing. (See Rule 14:3.10(b).) Thus, even if a witness wants someone he has tentatively identified to say or do something, all participants must do the same thing. Crume v. Beto, 383 F.2d 36, 40 (5th Cir. 1967).

Rule 14:3.15 discusses the composition of a fair lineup. When practical, the lineup should have at least six people. Although no law mandates a particular number of participants, the Supreme Court approved a six-person lineup in Coleman v. Alabama, 399 U.S. 1 (1970). The court in Graham v. State, 422 S.W.2d 922 (Tex. Crim. App. 1968), approved a four-person lineup. In their 1974 Model Rules for Law

Enforcement Series, the College of Law of Arizona State University and the Police Foundation published a volume on Eyewitness Identification (hereinafter cited as ASU Model Rules). Rule 407A of the ASU Model Rules fixed the required number at five. While the courts in other jurisdictions have approved three-person lineups, at least six participants should be used whenever possible.

To eliminate unfairness and suggestiveness, Rule 14:3.15(b) requires that lineup participants have the same sex and race. Courts do not automatically equate dissimilarity with suggestiveness. Garcia v. State, 563 S.W.2d 925 (Tex. Crim. App. 1978). Indeed, total similarity would make identification impossible. Thus, although the participants should look reasonably like each other, they need not look identical. Dissimilarity becomes suggestive only to the extent that it singles out and focuses the attention of a witness on a suspect. United States v. Kopacsi, 488 F.2d 900 (5th Cir. 1973). Consequently, the uniqueness of any described feature (such as a scar, beard, or tattoo) must be eliminated by removing, concealing, or duplicating the feature. On the whole, Texas courts have realized that, while it might be better practice, neither due process nor common sense requires the use of persons whose every feature matches. Jordan v. State, 495 S.W.2d 949 (Tex. Crim. App. 1973). In Chapman v. State, 489 S.W.2d 584 (Tex. Crim. App. 1973), the court approved a lineup in which the defendant was from four to eight inches taller than the other participants. In that case, however, the problem of finding similar participants was compounded because the defendant had an unusual scar. Similarly, in Martin v. United States, 462 F.2d 60 (5th Cir. 1972), the court upheld a

lineup composed of four males, the youngest of whom was 10 years older and seven inches taller than the 18 year-old defendant. The other two men were 31 and 41 years old. In Glover v. State, 470 S.W.2d 688, 690 (Tex. Crim. App. 1971), the court used the "totality of the circumstances" test in approving a lineup in which the defendant was "the only blond . . . or at least the blondest."

Rule 14:3.15(c), like Rule 407C of the ASU Model Rules, allows the suspect to select his initial position and to change his position after each viewing. This opportunity should avoid a claim of suggestive positioning without causing confusion or unnecessary delay.

Rule 14:3.15(d) attempts to avoid suggestiveness arising from the conduct of the participants during the lineup proceedings. Suggestiveness often becomes acute when in-custody "fillers" participate in the lineup. Consequently, all participants must be instructed to behave uniformly. If the suspect must remain handcuffed during the lineup, handcuff all the participants (or at least instruct them to keep their arms behind them). However, if the suspect draws attention to himself, by hiding his face or refusing to speak certain words, this suggestiveness will not taint the procedure.

Rule 14:3.17 supplements Rule 14:2.03 by listing specific record-keeping procedures during lineups. Such stringent procedures enable the Court to reconstruct the proceedings in order to determine whether they were properly conducted. Also, strict procedures may one day eliminate the need for having counsel present. United States v. Wade, 388 U.S. 218, 239 (1967).

SECTION FOUR: FIELD IDENTIFICATIONS

14:4.01. If a suspect is arrested near the scene of the offense and within approximately one hour after it occurs, he may be:

(a) Held at the location of his arrest for identification by the witness, or
(b) Taken to the witness for identification.

14:4.02. Prior to using a field identification, an officer should consider the mental and emotional condition of the witness. For example, if the witness appears hysterical or disoriented, an officer should not hold a field identification but should use a lineup after an appropriate delay.

14:4.03. A field identification must take place as soon as practical after the arrest. If the witness does not identify the suspect, the officer shall release the suspect unless the officer still has probable cause to believe that he committed an offense. The suspect has no right to counsel at an on-the-scene showup.

14:4.04. If there is probable cause to arrest a suspect, but the suspect consents to a field identification, the officer may conduct a showup without first arresting the suspect.

14.4.05. Even without probable cause, if an officer reasonably suspects that a person (who he detained at the scene within approximately one hour of an offense) committed that offense, the officer may detain him for [no more than 30 minutes] in order to conduct a field identification. (See Chapter Nine on Stop-and-Frisk.) The witness shall be brought to the scene of the detention as soon as possible. Without his consent, the suspect shall not be taken to the witness' location. The suspect has no right to counsel at a field identification held during a temporary detention.

14:4.06. Following the arrest of a suspect, an officer may arrange a field identification if a medical emergency exists and medical authorities approve. A medical emergency exists when a witness is in danger of death or blindness, or the suspect is in danger of death. The exigent circumstances of a medical emergency showup excuses the absence of counsel for the suspect.

14:4.07. If there are two or more witnesses, to the extent practical, only one witness should view the suspect. Use the other witnesses at a lineup to verify the identification.

(continued)

14:4.08. The officer shall make a written record of the circumstances of the showup. The record should include:

(a) A description of the place where the showup occurred, including lighting conditions;
(b) The distance during the showup between the suspect and the witness;
(c) The number and identity of each witness who viewed the suspect at the showup;
(d) The name of all persons present during the showup; and
(e) All remarks made by witnesses, the officer, the suspect, or anyone else present during the showup.

No law requires that special circumstances prevent a formal lineup before police may resort to a field identification. E.g., United States v. Hines, 455 F.2d 1317, 1329 (D.C. Cir. 1971). However, greater accuracy should result when a witness views a suspect in the company of others who look like him (i.e., have similar facial and physical characteristics) and under circumstances which minimize suggestions of a suspect's guilt. In addition, in highly emotional crimes (such as those involving violence and bodily injury) a witness' identification loses reliability. The delay needed to hold a lineup may yield a more considered and reliable identification (Rule 14:4.02). This explains the preference for lineups.

Concerned with the relationship between suggestiveness and misidentification, the US Supreme Court noted the widespread condemnation of the practice of showing suspects singly for the purpose of identification. Stovall v. Denno, 388 U.S. 293, 302 (1967). However, a field identification does not in itself violate due process. Rather, due process depends upon the totality

of the circumstances surrounding the particular showup. E.g., Manson v. Brathwaite, 432 U.S. 98 (1977); Allen v. Estelle, 568 F.2d 108 (5th Cir. 1978); United States v. Abshire, 471 F.2d 116 (5th Cir. 1972). However, if a very substantial likelihood of misidentification does exist, most courts will exclude evidence of the identification. Thus, each court will individually analyze and decide the admissibility of a particular identification. According to Manson, each court must first decide whether the police used an impermissibly suggestive identification procedure. If the court concludes they did, it must then determine whether the procedure created a substantial risk of misidentification. The US Supreme Court, as indicated, has focused on the reliability of the identification. The Court expressly rejected a per se exclusionary rule. Thus, reliable information produced by impermissibly suggestive identification procedures could remain admissible, even when a more reliable procedure was available. The Texas Court of Criminal Appeals has not yet specifically ruled on whether to apply an exclusionary rule to unnecessarily suggestive confrontations which do not violate due process.

Rule 14:4.01 allows an officer to bring a suspect to the witness for identification. Courts have upheld such procedures since the accuracy and reliability of a fresh identification more than compensate for the dangers inherent in one-person field identifications. Furthermore, a prompt return to the scene reduces unnecessary detentions and allows police to resume their investigation if they have detained the wrong person. E.g., Harris v. Dees, 421 F.2d 1079, 1082 (5th Cir. 1970). To make these considerations effective, however, the on-the-scene identification must occur promptly. The one-hour limit between the time of the

offense and the apprehension of the suspect has some flexibility although officers should act conservatively in extending it. The rule does not specify any time limit within which the confrontation must occur. However, in most cases it will occur immediately, since the rule requires that the confrontation follow the apprehension as soon as practical.

Certainly the freshness of an on-the-scene identification would be lost by any unnecessary delay in presenting the suspect to the witness. Courts have not yet placed any absolute limits on the amount of time that may elapse between the offense and the identification. In fact, many courts have rejected an artificial time limit in favor of a more elastic standard. E.g., United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971); Writt v. State, 541 S.W.2d 424, 427 (Tex. Crim. App. 1976); Piper v. State, 484 S.W.2d 776, 778 (Tex. Crim. App. 1972). Rule 14:4.01 contains no specific geographic limitation, since the place of apprehension depends on variables such as the time of day, access to transportation, and geographic location. A suspect has no right to counsel at a prompt on-the-scene showup because adversary judicial criminal proceedings have not yet begun. Kirby v. Illinois; Wyatt v. State.

Under Rule 14:4.04, an officer may delay an arrest if the suspect consents to a field identification. If the witness is sure that the suspect is not the offender, the officer should reassess his probable cause to arrest. Rule 14:4.05, in conformity with Section Three of Chapter Nine on Stop-and-Frisk, permits an officer to detain a suspect temporarily upon reasonable suspicion. Rule 14:4.05 amplifies this rule by suggesting a maximum holding time of 30 minutes for a showup confrontation. If

probable cause for arrest develops during the detention, an officer may take the suspect into custody and follow Rule 14:4.01. However, if probable cause does not develop within that time, the officer must allow the suspect to leave, although he may ask him to remain voluntarily. The witness should be brought to a temporarily detained suspect, unless the suspect consents to be taken to the witness. Any involuntary removal of the suspect infringes on his liberty more than necessary.

Rule 14:4.06 recognizes that under exigent circumstances a field identification confrontation may not only be proper, but may also be the only feasible identification procedure. In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court approved a face-to-face confrontation because of the possible imminent death of the victim. No time limitations have been placed on emergency showups, since they may be used whenever necessary. In Stovall, for instance, the defendant was arrested the day after the offense and presented to the critically ill witness the day after that. An emergency field identification may still be necessary after a suspect has been formally charged and thereby acquired the right to counsel at identification procedures. In such instances, the field identification must be fair and impartial but the exigent circumstances will probably excuse the requirement of counsel, since time is of the essence. When practical, however, counsel should be notified and permitted to attend the field identification.

Rule 14:4.07 extends the principle of Rule 14:2.03 regarding separate viewings. Although simultaneous viewings by more than one witness do not necessarily violate due process, courts have consistently urged separate

viewings when possible. This rule also limits, when practical, the use of field identification to one witness. Other witnesses can be used more profitably at a subsequent lineup.

An officer, because of the suggestiveness inherent in all showups, must avoid saying or doing anything which might suggest to the witness the guilt of a suspect. (See Rule 14:2.01.) Suggestiveness often results from the unavoidable fact that the suspect is in custody. However, even having a suspect viewed in handcuffs in the back of a police car does not in itself violate due process. A suspect may also be wearing clothing which the witness recognizes as similar to clothing worn by the offender. Watkins v. State, 452 S.W.2d 444 (Tex. Crim. App. 1970) (dictum). Nevertheless, defense counsel will often raise these types of factors to show that the identification was unreliable. Consequently, the officer should do all that he can to minimize the suggestive nature of the showup.

Rule 14:4.08 lists factors to include in the record of a showup. A written record by the officer will suffice, since use of photographs, audio recordings, or videotapes will be impractical, if not impossible.

SECTION FIVE: PHOTO IDENTIFICATION DISPLAYS

14:5.01. A photo identification display may be used only when a lineup is impractical because:

- *(a) There is no suspect,*
- *(b) No probable cause exists to arrest the suspect,*
- *(c) The suspect cannot be located,*
- *(d) The suspect refuses to participate in a lineup,*
- *(e) The suspect is in custody far from the witness,*
- *(f) The witness is unable or refuses to attend a lineup, or*
- *(g) Persons who look like the suspect cannot be found for a lineup.*

14:5.02. If a lineup is impractical for the reason listed in either Rule 14:5.01(e) or Rule 14:5.01(f), the witness may look at a photograph (preferably in color) of a proper lineup that includes the suspect. When possible, an officer should use this procedure instead of the procedure set forth in Rule 14:5.05.

14:5.03. A mug book or photographs (preferably in color) may be used when the police have no particular suspect. To assure a more accurate identification, show the witness a reasonable number of photos even if the witness selects the suspect almost immediately.

14:5.04. Use composites, drawings, sketches, or other nonphotographic pictorial representations only when photographs are unavailable.

14:5.05. Whenever a witness views a photograph of a definite suspect:

- *(a) Show the witness a randomly arranged series of at least eight photos (preferably in color), including only one of the suspect.*
- *(b) As far as practical, make sure that all the photos are unmarked and are the same size and nature.*
- *(c) Make sure that the persons in the photographs look substantially alike (i.e., size, height, weight, age, hairstyle and color, and skin color).*
- *(d) If there are two or more suspects, include only one per series of photographs.*

14:5.06. If a witness fails to identify the offender in a photo display, do not use a second photo display.

(continued)

14:5.07. If a witness' positive photo identification establishes probable cause to arrest a particular suspect, arrest that suspect and (where possible) use lineup procedures instead of showing the photographs to other witnesses.

14:5.08. An officer shall never:

- *(a) Assist a witness in identifying photographs, or*
- *(b) Indicate or in any manner suggest to the witness who the suspect is, or*
- *(c) Pressure the witness to identify a particular photograph.*

14:5.09. When a witness identifies a photograph of a suspect, on the back of that photograph he shall sign, date, and write the time and place where he made the identification. The officer should also sign as witnessing the identification and signature of the witness.

14:5.10. The officer conducting the photo display must secure all displayed photos as evidence and keep a written record of the entire procedure including:

- *(a) The identity of all persons present during the viewing,*
- *(b) All the photographs used,*
- *(c) How the photos were displayed,*
- *(d) All remarks made by the witness while viewing the photos,*
- *(e) All mistakes or failures in identification, and*
- *(f) How long it took the witness to identify the suspect.*

14:5.11. The suspect has no right to counsel at any photographic identification procedure.

Use of photographs for identification is often effective both in apprehending offenders and in sparing innocent suspects the ignominy of arrest. However, photo identification displays are inherently more suggestive than lineups and should be used only when a lineup is impractical. Photo displays often work well in the investigative stage, particularly when the police have no suspect. They may also be used to develop probable cause

to arrest a suspect. Once the police have a suspect in custody, however, they have no reason to use photographs unless a lineup is not available.

In Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court imposed a due process test for all photo identification procedures, holding (at 384) that:

> . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . .

The Court further concluded that the propriety of a photo identification must be determined on a case-by-case basis. However, it did mention several unfair procedures for the police to avoid. This chapter has adapted those suggestions.

Rule 14:5.01 restricts the use of a photo identification display, particularly after the arrest of a suspect. The Fifth Circuit has said that the availability of more desirable methods of identification has no relevance in determining whether a photo identification was impermissibly suggestive. United States v. Sutherland, 428 F.2d 1152 (5th Cir. 1970). Nevertheless, because of their greater suggestiveness, police should use photo identifications only when a lineup is unavailable. In Simmons, the US Supreme Court recognized (at 383) that even if the police follow the most correct photographic identification procedures, some danger still exists that the witness will make an incorrect identification. Thereafter the witness will likely remember the image of the photograph rather than of the person seen. This would correspondingly reduce the trustworthiness of a subsequent lineup or courtroom identification. If

the witness cannot attend the lineup or the suspect is in custody at a distant location, the police should use (Rule 14:5.02) a "Lawrence Lineup," where the witness is shown a photograph of a proper lineup. People v. Lawrence, 4 Cal. 3d 273, 481 P.2d 212, 93 Cal. Rptr. 204 (1971) (en banc). However, the police cannot use this procedure to circumvent the Wade requirement of counsel at a corporeal lineup.

Rule 14:5.03 recognizes that mug books or other photographic materials may prove particularly helpful during the investigatory stage, before there is any suspect. A witness may view an unlimited number of photographs. However, even if the witness makes a quick identification, he should still look at a reasonable number of additional photographs. Rule 14:5.04 allows the police to use composite drawings or sketches as a last resort, when use of a mug book or other photographs are unavailable. Once a suspect is recognized, the police should arrest him and conduct a lineup.

Rule 14:5.05 lists procedures to follow when showing a witness a photo identification display. For example, never show the witness only a single photo. Manson v. Brathwaite, 432 U.S. 98, 117 (1977); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979); Navajar v. State, 496 S.W.2d 61, 64 (Tex. Crim. App. 1973) (five photographs used). On the other hand, no law requires a minimum number of photographs. In Simmons v. United States, 390 U.S. 377, 386 n.6 (1968), six pictures were apparently used, but the Supreme Court noted that it would have been preferable to have shown the witness more. In most cases, the police can readily assemble eight photographs. (Rule 306 of the ASU Model Rules also suggested at least eight.)

The police should not call attention to a suspect by having his photograph recur or placed in a conspicuous place. In Simmons, the Supreme Court noted that the likelihood of misidentification heightens if the picture of a single individual recurs in a photo spread. While such a recurrence does not require a court to find the procedure unnecessarily suggestive, its use should be discouraged. United States v. Cooper, 472 F.2d 64, 66 (5th Cir. 1973). In Smith v. State, 459 S.W.2d 642 (Tex. Crim. App. 1970), the court approved the use of a stack of photographs with a photo of the suspect on top. However, the Fifth Circuit has indicated that placing the defendant's photo on the top of the stack becomes a key element in analyzing the "totality of the circumstances." United States v. Gibson, 462 F.2d 400 (5th Cir. 1972). To the extent practical, all the photos in a display should be unmarked and of the same size and nature (e.g., all full-length or all mug photos). This avoids accentuating any particular photograph. Ward v. State, 474 S.W.2d 471, 474 (Tex. Crim. App. 1971).

The police should also avoid suggestiveness by preventing anything from appearing in the photographs which would make the suspect stand out, such as unusual clothes or hairstyle. Although it may be impossible to use eight photographs of very similar looking persons, the police should ensure that not only the suspect's photograph matches the description of the offender. Ward v. State, 474 S.W.2d 471, 476 (Tex. Crim. App. 1971). In order to avoid guilt by association, the police should not present more than one suspect together in a single photo display. If the witness identifies one suspect, the chance that he will "guess" the second suspect increases if both suspects appear in the same group. United States v. Johnson, 452 F.2d 1363, 1368 (D.C. Cir. 1971).

Rule 14:5.06 also attempts to avoid suggestiveness by forbidding the use of a second photo spread. Rule 14:5.07 reflects the preference for lineups, as expressed in Rules 14:3.01 and 14:5.01. The reliability of an identification procedure can be increased by allowing only one of several witnesses to view pictures of the suspect. If that one witness identifies the suspect, the other witnesses may view him later in a lineup. In this way, the accuracy of a corporeal identification supplements the use of photographs. United States v. Simmons, 390 U.S. 377, 385 n.6 (1968). A witness who previously identified the suspect's photograph may later view the suspect in a lineup. Ward v. State, 474 S.W.2d 471, 477 (Tex. Crim. App. 1971). Nevertheless, this probably increases the hazards of misidentification, in contrast to holding a lineup not preceded by a photo display. However, if probable cause does not exist, despite the composite identification, other witnesses may be shown photo displays in order to establish probable cause.

Rule 14:5.08 applies the general rule against suggestiveness to photographic identifications. A witness may feel obliged to pick out a picture and may even tend to select one that he thinks looks like a criminal. The officer must, therefore, not only avoid creating any additional suggestiveness, but must also seek to minimize inherent suggestiveness. In order to remove any question about which photograph a witness identifies, Rule 14:5.09 requires the officer to sign the identified photo and to have the witness sign and date the back of the photo.

Rule 14:5.10 applies the general record-keeping requirements of Rule 14:2.04 to photo identifications. Courts will often want to reconstruct the identification procedure in order to determine if it was unnecessarily

suggestive. Keeping the photographs and a record of how they were displayed will help dispel claims of undue suggestiveness. The officer must secure as evidence all of the photographs used in a photo identification display. This will permit a court to answer any questions regarding that procedure. Rule 14:5.11 reflects US Supreme Court cases which hold that the sixth amendment right to counsel does not apply to showing photographs of suspects at any time, whether prearrest, postarrest, or even after the filing of formal charges. Moore v. Illinois, 434 U.S. 220 (1977); United States v. Ash, 413 U.S. 300 (1973).

SECTION SIX: INFORMAL IDENTIFICATIONS

14:6.01. An officer may use informal identification procedures only when probable cause to arrest the suspect does not exist.

14:6.02. If a witness suggests an appropriate public location where the suspect may be located, the witness may be taken to that location to attempt to identify the suspect.

14:6.03. A detailed record shall be kept of all informal identification procedures, including:

(a) The date and time of any observation or identification,
(b) The exact location of any observation or identification,
(c) The approximate number of viewed persons who looked like the suspect,
(d) The suspect's reaction if he became aware that he was being viewed, and
(e) The witness' reaction upon seeing the suspect.

Informal identification procedures are least objectionable during preliminary investigations, before the police have a definite suspect and when suggestiveness regarding a particular suspect is unlikely. For example, a witness may know a place frequented by the alleged offender without being able to provide a sufficient description or knowing the name of that suspect. Therefore, as the best way to identify that suspect, an officer should accompany the witness to that suggested location where the witness can informally point out the suspect. However, once suspicion has focused on a particular individual, an officer should use informal procedures only when he has no probable cause to arrest and other identification procedures are not feasible (for instance, if he cannot get a picture of the suspect or if a witness believes he can make only a "live" identifi-

cation). An officer may also use informal procedures when a witness has tentatively made a photo identification, but the officer still lacks probable cause to arrest. Conducting an informal confrontation after the suspect has been charged probably violates his right to counsel. See Kirby v. Illinois, 406 U.S. 682 (1972); Massiah v. United States, 377 U.S. 201 (1964). (For a contrary interpretation, see Section V of the ASU Model Rules.)

The main objection to informal identification procedures stems from the difficulty of controlling, and later reconstructing, the conditions which surrounded them. Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968). Therefore this section largely rejects the rules and commentary of Section V of the ASU Model Rules. However, Rule 14:6.04 requires strict record-keeping procedures and draws on Rule 503 of the ASU Model Rules.

Appendix A

WAIVER OF RIGHT TO ATTORNEY AT LINEUP

Name Place

Address Date

Age Time

WARNING

Before appearing at any lineup or other confrontation with any witnesses being conducted by [Name of Police Department] in relation to [Description of Offense], you must understand your legal rights.

The results of the confrontation can and will be used against you in court.

You have the right to the presence and advice of an attorney of your choice at any such confrontation. The lineup will be delayed for a reasonable time in order to allow your attorney to appear.

If you want an attorney but cannot afford one, an attorney will be appointed for you at no cost to you, before any confrontation is held.

WAIVER

I have been told that I have a right to the advice of an attorney and to have an attorney present at any confrontation with witnesses. I have also been told that, if I cannot afford a lawyer, one will be appointed for me before any such confrontation occurs. I completely understand these rights, but I voluntarily want to waive them.

I understand and know what I am doing. I do not want a lawyer.

The police made no promises to me. No pressures of any kind have been used against me.

_____ _____

Name of Suspect (Typed or Printed) Signature of Suspect

CERTIFICATION

I, [Name of Officer], hereby certify that I read the above warning to [Name of Suspect] on [Date], that he indicated that he understood his rights, and that he signed the WAIVER form in my presence.

_____ _____

Signature of Witness Signature of Officer

_____ _____

Name of Witness (Typed or Printed) Name of Officer (Typed or Printed)

SOURCE: Adapted from J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer 305 (1979).

Appendix B

WITNESS LINEUP IDENTIFICATION FORM

The positions of the persons in the lineup will be numbered left to right, beginning with number 1 on your left.

A. If you have previously seen one or more of the persons in the lineup, place an "X" in the space which corresponds to the number of the person in the lineup.

B. Then sign your name and fill in the date.

C. When completed, hand this sheet to the officer.

1	2	3	4	5	6	7	8
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

Name of Witness
(Typed or Printed)

Signature of Witness

Date and Time

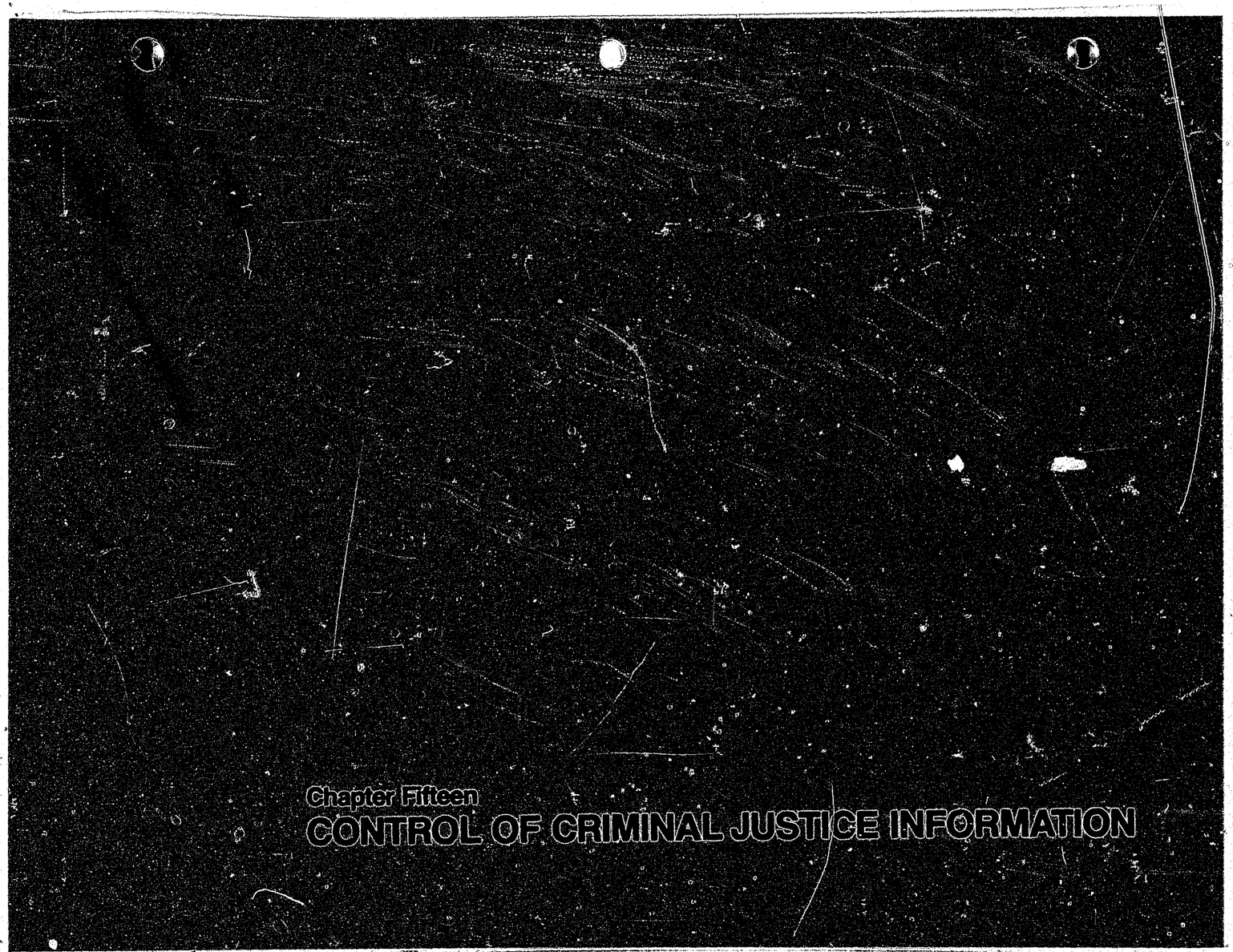
Signature of Law Enforcement Officer

Name of Officer
(Typed or Printed)

Signature of Attorney for Suspect

Name of Attorney
(Typed or Printed)

SOURCE: Adapted from J. N. Ferdico, Criminal Procedure for the Law Enforcement Officer 309 (1979).



Chapter Fifteen

CONTROL OF CRIMINAL JUSTICE INFORMATION

CHAPTER FIFTEEN

CONTROL OF CRIMINAL JUSTICE INFORMATION

These rules attempt to ensure that each law enforcement organization operates its criminal justice information system, and handles all criminal justice information, with completeness, accuracy, integrity, fairness, and security while protecting each individual's privacy and other rights. These rules apply wherever such information appears and they relate to procedures involving data collection, storage, and dissemination.

Each law enforcement agency may face a situation involving record disclosure which presents a question not answered by a specific rule or regulation. In these instances, the agency should attempt to weigh, evaluate, and balance the legitimate competing interests. Thus, the agency may have to balance the "people's right to know" with an individual's right to privacy. The leading case of Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976), addresses these issues. In addition, the Attorney General of Texas renders "Open Record Decisions" on these matters as they relate to the Texas Open Records Act, Texas Revised Civil Statutes Annotated article 6252--17a (Vernon Supp. 1980).

The Law Enforcement Assistance Administration (LEAA) of the US Department of Justice, pursuant to sections 501 and 524(b) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 USCA secs. 3751 and 3771(b), respectively), as amended by the Crime Control Act of 1973, has promulgated

regulations which affect this area. In brief, any state or local criminal justice agency which collects, stores, or disseminates criminal history record information processed by manual or automated operation where such collection, storage, or dissemination has been or will be funded, even if only indirectly and partially, with funds the LEAA made available after July 1, 1973 to the Criminal Justice Division (CJD) of the Office of the Governor, must comply with the CJD and LEAA regulations. These LEAA regulations, upon which the Model Rules are partly based, appear in the Code of Federal Regulations, Title 28, Part 20--Criminal Justice Information Systems. The LEAA regulations appear as Appendix A to this chapter.

Thus, federal law and LEAA regulations required the CJD to adopt regulations addressing this same subject. These state regulations, which became effective on January 9, 1980 comply with the federal requirement that the CJD document and certify the implementation by participating criminal justice agencies throughout Texas of both the federal regulations and the CJD guidelines for such items as individual access, challenge and review requirements, administrative security, maximum physical security, description of dissemination of criminal history record information, and operating standards and procedures.

The promulgation of the CJD regulations eliminates the need for the Model Rules to set forth detailed guidelines and procedures in this area. Therefore, this chapter will incorporate the CJD provisions and focus on intraagency controls and suggest further, optional protections which a given law enforcement agency may wish to consider. For convenience, the CJD regulations, which appear in the Texas Register (volume 4, number 96, December 25, 1979), appear as Appendix B to this chapter. The CJD regulations

require (sec. .010(e)) that each employee who works with or has access to the CHRI system "be made familiar with the substance and intent of [the CJD] rules and guidelines."

These rules also draw upon the Project SEARCH (System for Electronic Analysis and Retrieval of Criminal Histories of the California Crime Technological Research Foundation) Technical Memorandum No. 4, Model Administrative Regulations for Criminal Offender Record Information (1972), although much of the SEARCH format is based upon legislation and administrative orders which are not in effect in Texas or in any other state. (References throughout this chapter to "Project SEARCH Regulations" relate to sections of this Technical Memorandum No. 4.) While the language of these Model Rules often does not track the source documents, in substance they are often similar. Frequently, the rules differ from the sources because they exceed the minimum protections mandated by Texas and federal law or because they relate to implementation within a single autonomous department. (For a background discussion, see Release of Arrest and Conviction Records, a volume in the 1974 Model Rules for Law Enforcement Series of the College of Law of Arizona State University and the Police Foundation.)

The orientation of the LEAA and CJD regulations, and these rules, is to ensure security and to protect individual constitutional rights in criminal justice information systems. Except in connection with an individual's access right to his own records, the rules and regulations do not mandate or increase access to anyone (see sec. .007 of the CJD regulations). Each law enforcement agency remains able to establish its own operating rules, as long as those rules do not fall below the state

or federal standards. Thus, for example, a department may choose to institute tighter security measures than required in the establishment and maintenance of the CHRI system.

SECTION ONE: DEFINITIONS

15:1.01. Administration of Criminal Justice - Performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information. (From section .002(b) of the CJD regulations.)

15:1.02. Agency Disposition - Information from a criminal justice agency which reveals the decision made by that agency with regard to its disposition of the offender or his case or both. (From section .002(j) of the CJD regulations.)

15:1.03. CHRI System - A system, including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation, or dissemination of criminal history record information (CHRI). (From section 20.3(a) of the LEAA regulations.)

15:1.04. CJI System - A system, including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation, or dissemination of criminal justice information (CJI).

15:1.05. Conviction Data - All notations of criminal transactions related to an offense that have resulted in a conviction, guilty plea, or a plea of nolo contendere. (From section .002(l) of the CJD regulations.)

15:1.06. Corrections - Those criminal justice agencies which supervise criminal offenders under sentence of a court whether incarcerated or not, e.g., probation departments, county jails, Texas Department of Corrections (TDC), Board of Pardons and Paroles, and the Texas Youth Council. (From section .002(h) of the CJD regulations.)

15:1.07. Criminal History Record Information (CHRI) - Includes records and related data contained in either a manual or an automated criminal justice information system, compiled by criminal justice agencies for purposes of identifying criminal offenders and maintaining as to such persons notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release. Criminal history record information is a general term which includes within its definition both conviction data and nonconviction data. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. (From section .002(c) of the

(continued)

CJD regulations.) However, this chapter does not apply to CHRI contained in certain types of documents; section .003 of the CJD regulations sets forth these exempted documents.

15:1.08. Criminal Justice Agency - Includes courts and any government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice. (From section .002(a) of the CJD regulations.)

15:1.09. Criminal Justice Information (CJI) - Includes CHRI (as defined in Rule 15:1.07) plus all other information collected by any criminal justice agency on identifiable individuals, such as intelligence, analytical, and investigative data.

15:1.10. Department - The law enforcement agency [e.g., the police department of the city of _____].

15:1.11. Direct Access - Having the authority to access the CHRI data base. (From section .002(m) of the CJD regulations.)

15:1.12. Disposition - Information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for postponement. Dispositions shall include but not be limited to acquittal, acquittal by reason of insanity, charge dismissed due to mental incompetency, charge still pending due to insanity, charge still pending due to mental incompetence, guilty plea, nolle prosequi, nolo contendere plea, failure to indict by the grand jury (no bill), convicted, youthful offender determination, deceased, deferred disposition, dismissed--civil action, found insane, found mentally incompetent, pardoned, probation before conviction, sentence commuted, adjudication withheld, mistrial--defendant discharged, executive clemency, placed on probation, paroled, or released from correctional supervision. (From section .002(i) of the CJD regulations.)

15:1.13. Dissemination of CHRI - The release, either verbally or printed (hard copy), of CHRI by an agency to another agency or individual or the transfer of CHRI from computer to computer. (From section .002(d) of the CJD regulations.)

15:1.14. Expunction (or Expungement) - The official removal, obliteration, or destruction of information from an information system by eliminating all indications that the information had ever been recorded.

(continued)

15:1.15. Nonconviction Data - Arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals. (From section .002(k) of the CJD regulations.)

15:1.16. Noncriminal-Justice Agency - Any person, organization, or other entity which is not a criminal justice agency.

As indicated, most of these definitions refer to the definitions set forth in the CJD regulations (Appendix B to this chapter). The definition of "CJI system" sweeps broadly in order to encompass all information about ascertainable individuals within the entire system, including its physical components. As noted in Rule 15:1.09, and as discussed in Rule 15:3.01 and the accompanying commentary, "criminal justice information" includes "criminal history record information" (CHRI) as well as other types of information. The definition of "expunction" and "expungement" complies with the Texas Code of Criminal Procedure articles 55.01-.05 which appear as Appendix C to this chapter.

SECTION TWO: SPECIAL REQUIREMENTS FOR JUVENILE RECORDS

15:2.01. The department shall maintain all juvenile offender criminal justice information separately from adult criminal justice information.

15:2.02. The Texas Family Code (secs. 51.14-.16, which appear as Appendix D to this chapter) sets forth the controlling law on handling juvenile offender files and records. No rule in this chapter shall supersede, or in any way lessen the individual safeguards of, the statutory provisions. Where no conflict exists, the laws, regulations, and rules of this chapter which apply to nonjuveniles shall be implemented.

15:2.03. To the extent that juvenile offender criminal justice information subsequently forms part of an adult individual's criminal justice information, they shall remain subject to the rules and laws which would govern them as juvenile offender records.

The Model Rules do not address procedures relating to juvenile records. The Family Code establishes a separate procedure to follow. However where the Family Code is silent, an agency's handling of juvenile records should comply with the general laws, regulations, and rules which apply to the collection, storage, and dissemination of criminal justice information.

SECTION THREE: DISSEMINATION CONTROLS

15:3.01. The following CJI shall not be entered into the CHRI system or, except by court order, disseminated to or reviewed by any noncriminal-justice agency:

(a) Intelligence data and records about any person(s) that deal with the detection and investigation of crime;

(b) Information, notations, and records about an individual maintained for internal use in matters relating to law enforcement; and

(c) Informal, speculative, or subjective information regarding an individual's guilt, innocence, credibility, behavior, or attitudes.

15:3.02. Only those persons and agencies which the chief of police specifically and expressly designates in writing shall have the authority to receive or review CHRI or CJI from this department. However, dissemination of nonconviction data must comply with section .005 of the CJD regulations and dissemination of CJI must comply with Rule 15:3.01 above. No member of this department shall disseminate CHRI or CJI to any unauthorized person or agency.

15:3.03. The chief of police has the exclusive authority to issue, and keep current, a list of each authorized individual and each designated representative of each authorized agency entitled to receive or review this department's CJI. This list shall also set forth any limitations on such authorization. This list shall be issued to all members of this department who have the authority to disseminate CJI, and shall be available to all other members of the department and to the public.

Rule 15:3.01 deals with a broad category of data and information included in CJI but not included within CHRI as set forth in the regulatory scheme of the LEAA and CJD. Early support for not entering this type of CJI into the CHRI system appears in Project SEARCH Regulation 7. Subsequently, both the LEAA and CJD defined CHRI to exclude these types of data. The commentary to section 20.3(b) of the LEAA regulations specifies that the definition of CHRI:

> . . . does not extend to other information contained in criminal justice agency reports. Intelligence or investigative information (e.g., suspected criminal activity, associates, hangouts, financial information, ownership of property and vehicles) is not included in the definition of criminal history information.

Significantly, the Texas Open Records Act (sec. 3(a)(8)) carves out the following exception from its definition of "public information":

> (8) records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for internal use in matters relating to law enforcement. . . .

Other exceptions of the Open Records Act might also close this category of information to public scrutiny. For example, section 3(a)(1) refers to "information deemed confidential by law." See also sections 3(a)(3), 3(a)(7), 3(a)(11). The Houston Chronicle case, cited at the beginning of this chapter, also deals with this issue by holding (531 S.W.2d 177, 187) that the public's right of access to governmental information:

> . . . should not extend to such matters as a synopsis of a purported confession, officers' speculations of a suspect's guilt, officers' views as to the credibility of witnesses, statements by informants, ballistics reports, fingerprint comparisons, or blood and other laboratory tests. . . .

For the opinion of the attorney general on this question, see Tex. Att'y Gen. Op. No. ORD-18 (1974). The attorney general has also held that the Open Records Act does not require a police department to compile or extract any information (e.g., a list of individuals arrested for a particular offense) for someone if the requestor himself could gather that information by having access to general records (e.g., a daily police blotter or arrest sheet). Tex. Att'y Gen. Op. Nos. ORD-243 (1980), ORD-144 (1976), ORD-127 (1976).

This section, in general, establishes a general prohibition on release of CJI to unauthorized persons or agencies by obligating each chief of police to make written designations of who can receive CJI.

SECTION FOUR: AUTHORIZED DISSEMINATION PERSONNEL

15:4.01. Only the following members of this department have the authority to disseminate or approve the dissemination of CJI:

(a) Officers in charge of bureaus, sections, divisions, and precincts, and any officer acting in the place of such officer in charge; and
(b) Any supervisory member of the department assigned to regular duty in the [Records, Communications, or Identification] Sections.

The chief of police has the exclusive authority to specify by name such other personnel as he deems necessary. A current list of all such authorized personnel shall be issued to every member of the department and shall be available to the public. A new list shall be prepared whenever necessary. No member not so authorized shall disseminate CJI to any person or agency outside this department, even if such outside person or agency has authority to receive the subject information.

Rule 15:4.01(a) establishes that any officer in a command-level position has the requisite authority to disseminate CJI. The second category extends authorization to officers whose assignments, by their nature, require them to handle and release such information. In order to eliminate doubt as to who has release authority, a list of all such persons should be maintained. Whenever possible, the list should specify such persons by name, even officers in command positions. This requirement subjects the release of any information to a command-level decision. Thus, unless designated on the list, a patrolman or sergeant would not have the authority to give CJI to a civilian or an officer from another department. In sum, this rule does not limit release of any information <u>within</u> the department but does restrict the channels for allowing the information to leave the department.

SECTION FIVE: SECURITY, ACCURACY, AND LOGGING

15:5.01. No person shall make or authorize any addition, deletion, or change of any kind upon the records maintained in the CHRI system except to record some official action by a criminal justice agency which relates to the CHRI of an individual. Any such addition, deletion, or change shall be made solely and exclusively by a person specifically authorized to do so by the chief of police, and only after express approval from the officer in charge of the CHRI system or his designee.

15:5.02. Whenever any officer deals with any information or activity which may be recorded in a CJI system or log, that officer shall take every reasonable step to ensure that the information will be completely and accurately entered into the CJI system. Each member of this department who handles CJI bears the responsibility to ensure the accuracy and completeness of such information.

15:5.03. Each dissemination of any CHRI shall be promptly recorded in a log, subject to the exceptions of section .008 of the CJD regulations. The log entries shall be made chronologically and grouped by individual in order to facilitate the ability of an individual who wishes to correct his CHRI to trace when and where the department has sent his CHRI. Each transaction shall include the following information:

(a) Requesting agency (and the agency's designated recipient) or individual;
(b) Date of dissemination;
(c) Name of person whose record is being disseminated;
(d) Particular nature of the released CHRI;
(e) Name of person who approved the dissemination; and
(f) Name of person who made the dissemination.

Each entry on the log shall be retained in the CHRI system for at least three years after it is made.

Section Five establishes general rules to assure the accuracy and security of the system. The particular steps or procedures taken to implement this section will vary in every department according to the size and physical nature of the system. Under Rule 15:5.01 the officer in charge of the information system must authorize changes in information contained in the the system. Subordinates may handle the actual paperwork,

but a senior officer or his designee must review and approve (preferably in writing) all changes in information. This method assures accountability for the accuracy of the system and prevents tampering. Again, the particular procedure for obtaining this approval may vary.

Rule 15:5.02 in part, responds to section .004 of the CJD regulations (sec. 20.21(a) of the LEAA regulations) regarding completeness and accuracy of all the CHRI in the system. Since local procedures for reporting such information may vary, the officers responsible for the action generating that data must bear the burden of assuring that new data correctly enter the system. Each officer who deals with any information which may be recorded in the CJI system, and not just persons who actually place the data in the system, remains responsible for the accuracy and promptness of his own participation in the record-keeping process. This directive relates to an officer who gathers or receives CJI as well as to the person who physically enters the information in the CHRI or CJI system.

Rule 15:5.03 requires maintenance of a detailed log which will contain a record of all releases of information. The log might be a notation or a letter in the individual's "main folder" or "rap sheet." It might also be a separate computerized record. The key elements of the logging requirement--that it be both chronological and readily accessible for a person to find where his records have been sent--could be accomplished in a variety of ways. The logging system, whatever its configuration, must permit tracing and later correction or expunction, if necessary, of released information. (See secs. .011(d) and (e) of the CJD regulations; secs. 20.21(e) and 20.21(g)(4) and (5) of the LEAA regulations; and Regulation 15 of Project SEARCH.) More generally, this rule, while not

mandating a written request in all instances (such as requests by radio or telephone), does require notation of all disseminations, subject to the specified exceptions.

Section .008 of the CJD regulations establishes three categories of permissible exceptions to the logging requirement. Of course, a law enforcement agency or police department cannot expand these exceptions but may narrow or eliminate them. For example, a department may find it easier to log every request than to follow a list of excepted agencies. In addition, even if a department establishes these exceptions, a department should facilitate authorized correction or expunction of CHRI by routinely sending all such updated information to the excepted agencies.

More complete logs increase the efficacy of the safeguards to protect each individual's privacy and other rights. Towards this end, Rule 15:5.03 limits the proviso ("to the extent that logs are available") which the CJD regulations (secs. .011(d) and (e)) attached to the original LEAA language (secs. 20.21(g)(4) and (5)). Similarly, the last sentence of Rule 15:5.03 requires the department to retain its logs for at least three years, the minimum proposed by section .008(a) of the CJD regulations. Where no undue burden arises, it seems unreasonable to destroy the log as long as the underlying CHRI, to which the log relates, exists in the department's records. Otherwise, given the potential for delay in the criminal justice system, an individual seeking to have his records corrected or expunged may have a right without a fully effective remedy. Although perhaps uncommon, such delays can exceed three years. E.g., Dean v. Gladney, 451 F. Supp. 1313 (S.D. Tex. 1978).

SECTION SIX: EXPUNCTION/EXPUNGEMENT

15:6.01. No expunction of any CHRI shall occur without the express approval, in writing, of the chief of police.

Each police department must follow the expunction rules and procedures set forth in articles 55.01-.05 of the Texas Code of Criminal Procedure (Vernon Supp. 1980) which appears as Appendix C to this chapter. An expunction generally occurs pursuant to an appropriate court order. In accordance with article 55.05 of that statute:

> On release or discharge of an arrested person, the person responsible for the release or discharge shall give him a written explanation of his rights under this chapter and a copy of the provisions of this chapter.

SECTION SEVEN: PERSONAL REVIEW AND CERTIFIED COPIES

15:7.01. Any person, upon satisfactory verification of his identity, has the right to review without undue burden to either the department or that person any CHRI maintained about him by this department, in accordance with section .011 of the CJD regulations. This department shall permit such review according to the following procedures:

(a) The files and records made available to the person shall not be removed from the premises of this department, or leave the presence of a designated officer of this department.
(b) Such personal review shall be allowed only during normal daytime business hours.
(c) Such personal review shall be permitted only after the person has submitted a written application requesting a review of CHRI about him and verifying his identity. The request shall include the following information:

(1) Name and address of applicant;
(2) Complete set of applicant's fingerprints taken by a police officer on an approved FBI form;
(3) Date of file review;
(4) Signature of applicant;
(5) Signature of officer verifying identity; and
(6) Time review began and ended.

Where possible, the applicant's fingerprints shall be compared with police records in order to verify his identity. Fingerprints taken for verification of identity need not be retained unless it appears that the requesting person is not the subject of the information he seeks to review, and may be furnishing false information to the police.

(d) A successful applicant may bring one attorney or other advisor of his choice to review his CHRI with him.
(e) The reviewing individual may make and retain a written summary or notes in his own handwriting of the information reviewed.
(f) If, after an applicant has reviewed his CHRI, he believes that the CHRI is incorrect or incomplete in any respect and he wishes to challenge, change, correct, or update his CHRI, he has the right to receive (without undue burden to either the department or himself) a copy of the affected portion of his CHRI.

This section establishes a procedure to implement the personal review requirements mandated by the CJD and LEAA regulations. The CJD and LEAA

regulations state that an

> . . . individual shall . . . be entitled to review without undue burden to either the criminal justice agency or the individual, any criminal history record information maintained about the individual and obtain a copy thereof when necessary for the purpose of challenge or correction.

(See section .011(a) of the CJD regulations, section 20.21(g)(1) of the LEAA regulations. See also section 20.34 of the LEAA regulations.) Rule 15:7.01 also draws upon Project SEARCH Regulation 13. A recent opinion by the Attorney General of Texas directly addresses the issue of an individual's access to his own criminal history record information. Tex. Att'y Gen. Op. No. MW-95 (1979). This attorney general opinion indicates that a law enforcement agency probably cannot assess a fee against an individual because he requests access to, or receives a copy of, his CHRI.

SECTION EIGHT: CORRECTION OF RECORD

15:8.01. Upon request, the individual may be provided with a form (see Appendix E) upon which to record any exceptions or challenges to information in the record. The form shall be accompanied by a notice of the procedure for obtaining review and correction of any inaccurate or incomplete information in the record.

15:8.02. Upon appointment by the chief of police, an impartial officer or review committee shall receive and review challenges to criminal record history information by the person to whom they relate. Upon receipt of such a challenge, this investigating officer or committee shall audit the record to identify those entries on the record which originated with this department. The officer shall then investigate any transaction underlying those challenged records to determine whether the record does or does not completely and accurately reflect the nature of the transaction. Any challenged record which did not originate with this department shall be forwarded to the originating department along with a copy of the challenge to that record. The individual shall be referred to that department for further action.

15:8.03. If the investigating officer determines that the record does not completely or accurately reflect the underlying transaction, he shall report to the chief of police, in writing, in what manner the record should be altered. Only the chief of police may then authorize, in writing, the correction to be made in the record and such authorization shall then become a part of the file. A copy of such correction shall also be forwarded to each person or agency to whom the original inaccurate or incomplete information was released.

15:8.04. If the investigating officer determines that the record as it stands is in his judgment complete and accurate, he shall in writing so inform the person requesting correction and detail the reasons for this determination. (See Appendix F.)

15:8.05. If the determination of the investigating officer does not satisfy the individual, he may request the chief of police to make a special review of the evidence and decide whether to correct the information. The judgment of the chief of police shall be final, subject to judicial review.

Section Eight outlines a rather skeletal procedure for examining and correcting CHRI. Project SEARCH Regulation 13 proposed establishment of a "review committee" and Project SEARCH Regulation 14 set forth extensive

administrative review procedures. However, this section assumes that, in the overwhelming proportion of cases, the review will primarily involve a relatively straightforward factual determination as to whether the record accurately reflects the actual circumstances.

SECTION NINE: RESEARCH USE

15:9.01. The department shall not disseminate, or permit access to, CHRI for any research, evaluative, or statistical activity unless it is pursuant to section .005(a)(4) of the CJD regulations and in compliance with the rules set forth in this chapter.

15:9.02. In addition, the chief of police or his designated officer has the exclusive authority to examine the research plan and monitor its implementation to assure compliance with the following conditions:

(a) The department shall not permit any research use of any non-conviction data CHRI unless such data does not identify the identity of any particular individual and the requesting person or agency:

(1) Prepares written procedures reasonably calculated to minimize threats to individual privacy and to prevent injury or embarrassment, and
(2) Will not use the research to the detriment of persons to whom the information relates or for any purpose other than those specified in the research project.

(b) The department shall not disseminate, or permit any research access to, any nonconviction data CHRI which identifies a particular individual, except where such dissemination is required by a state or federal statute or federal executive order. Absent such special authorization, all names and other identifying data shall be deleted and obscured before release of the information. This department shall require each participant in a research program which involves access to CHRI to execute a sworn statement that he shall not disclose any such information to any unauthorized person or agency.

Although no law now appears to require Texas police agencies to release CHRI to any noncriminal-justice agency, this rule establishes a controlled procedure by which a local department may permit such dissemination if a research organization can meet the department's requirements regarding need and security.

This section implements special procedures to control the release of CHRI for research uses. These additional rules attempt to conform with

the CJD regulations (sec. .005(a)(4)) and the LEAA regulations (sec. 20.21 (b)(4)). These particular rules, in substantial part, follow Project SEARCH Regulation 11.

Research requests regarding a department's CHRI occur infrequently. Nevertheless, a department may wish to have an established procedure for dealing with such requests. If a research organization (or any other authorized entity permitted pursuant to sections .005(a)(2), (a)(3), or (b) of the CJD regulations) wishes to receive or have access to any CHRI, a department's procedures should probably require that such organization submit a written request to the chief of police on forms provided by the department. The request should probably include the following information, plus any other information the chief may demand:

(a) Name and address of the agency;

(b) Name and address of all officers and managers/directors (or analogous officials) of the agency;

(c) Business form of agency (e.g., corporation, partnership, whether publicly or privately owned, place of incorporation, etc.);

(d) Nature and purpose of the agency;

(e) A list of all agency personnel who would or might have access to the requested information if the request is granted;

(f) Purpose for which the CHRI will be used and a detailed statement which explains and justifies the need for such information, including reference to any legal authorization for receipt and use of such information;

(g) Two clear sets of fingerprints (taken by a police officer on an approved FBI form) of all agency personnel who would or might have access to the requested information if the request is granted;

(h) A sworn statement by each such person that he will use the CHRI only for the purpose stated in the request, will take sufficient measures to safeguard the security of the CHRI, and will not disseminate, disclose, or permit access to any CHRI to any unauthorized person or agency; and

(i) A sworn statement by each such person that he has familiarity with, and will comply with, the LEAA and CJD regulations relating to CHRI.

In evaluating a request from an agency for authorization to review or receive a department's CHRI, the chief of police may wish to consider the following factors:

(a) Whether the requesting agency has shown a compelling need for such information;

(b) Whether release of such information to the agency could aid in the prevention of crime;

(c) Whether any existing law prevents or requires the release of such information to the agency;

(d) Whether the request can be narrowed and still accomplish the purpose of the request; and

(e) Whether it appears that the agency can and will use the information only for the stated purpose and will protect the security of such information.

The chief would balance the competing interests between the purpose of the agency's request and the risk of injury to the privacy and confidentiality of each affected individual's CHRI. This balancing, of course, must not breach the parameters of state and federal law, as set forth in the CJD and LEAA regulations. Whenever possible, the department should attempt to respond to the request within 15 days from the date of the request. The best practice might be for the chief of police to state in writing his reasons for either approving or disapproving the request. The department may wish to send one copy of the statement to the requesting agency and to file one copy at the department. The department file may be open to the public. Of course, the chief's determination shall be final, subject to judicial review.

Even if the request is granted, the chief of police may withdraw his

approval of any request, and revoke or limit the authorization to receive CHRI, for any violation of the letter or spirit of departmental rules. Once again, the chief may wish to issue and explain such revocation in writing. In general, the chief shall limit the dissemination to the fewest people and least amount of information which will accomplish the purpose of the request.

Appendix A

LEAA REGULATIONS
Title 28, Judicial Administration
Chapter 1--Department of Justice

PART 20—CRIMINAL JUSTICE INFORMATION SYSTEMS

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APPENDIX—Commentary on selected sections of the regulations on criminal history record information systems

AUTHORITY: Pub. L. 93-83, 87 Stat. 197, (42 U.S.C. 3701, et seq.; 28 U.S.C. 534), Pub. L. 92-544, 86 Stat. 1115.

SOURCE: Order No. 601-75, 40 FR 22114, May 20, 1975, unless otherwise noted.

Subpart A—General Provisions

SOURCE: 41 FR 11714, Mar. 19, 1976, unless otherwise noted.

§ 20.1 Purpose.

It is the purpose of these regulations to assure that criminal history record information wherever it appears is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy and security of such information and to protect individual privacy.

§ 20.2 Authority.

These regulations are issued pursuant to sections 501 and 524(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Crime Control Act of 1973, Pub. L. 93-83, 87 Stat. 197, 42 USC 3701, *et seq.* (Act), 28 USC 534, and Pub. L. 92-544, 86 Stat. 1115.

§ 20.3 Definitions.

As used in these regulations:

(a) "Criminal history record information system" means a system including the equipment, facilities, procedures, agreements, and organizations thereof, for the collection, processing, preservation or dissemination of criminal history record information.

(b) "Criminal history record information" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system.

(c) "Criminal justice agency" means: (1) Courts; (2) a government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

(d) The "administration of criminal justice" means performance of any of the following activities: Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information.

(e) "Disposition" means information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for such postponement. Dispositions shall include, but not be limited to, acquittal,

acquittal by reason of insanity, acquittal by reason of mental incompetence, case continued without finding, charge dismissed, charge dismissed due to insanity, charge dismissed due to mental incompetency, charge still pending due to insanity, charge still pending due to mental incompetence, guilty plea, nolle prosequi, no paper, nolo contendere plea, convicted, youthful offender determination, deceased, deferred disposition, dismissed—civil action, found insane, found mentally incompetent, pardoned, probation before conviction, sentence commuted, adjudication withheld, mistrial—defendant discharged, executive clemency, placed on probation, paroled, or released from correctional supervision.

(f) "Statute" means an Act of Congress or State legislature of a provision of the Constitution of the United States or of a State.

(g) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(h) An "executive order" means an order of the President of the United States or the Chief Executive of a State which has the force of law and which is published in a manner permitting regular public access thereto.

(i) "Act" means the Omnibus Crime Control and Safe Streets Act, 42 USC 3701, *et seq.*, as amended.

(j) "Department of Justice criminal history record information system" means the Identification Division and the Computerized Criminal History File systems operated by the Federal Bureau of Investigation.

(k) "Nonconviction data" means arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

(l) "Direct access" means having the authority to access the criminal history record data base, whether by manual or automated methods.

Subpart B—State and Local Criminal History Record Information Systems

SOURCE: 41 FR 11715, Mar. 19, 1976, unless otherwise noted.

§ 20.20 Applicability.

(a) The regulations in this subpart apply to all State and local agencies and individuals collecting, storing, or disseminating criminal history record information processed by manual or automated operations where such collection, storage, or dissemination has been funded in whole or in part with funds made available by the Law Enforcement Assistance Administration subsequent to July 1, 1973, pursuant to Title I of the Act. Use of information obtained from the FBI Identification Division or the FBI/NCIC system shall also be subject to limitations contained in Subpart C.

(b) The regulations in this subpart shall not apply to criminal history record information contained in: (1) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons; (2) original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long standing custom to be made public, if such records are organized on a chronological basis; (3) court records of public judicial proceedings; (4) published court or administrative opinions or public judicial, administrative or legislative proceedings; (5) records of traffic offenses maintained by State departments of transportation, motor vehicles or the equivalent thereof for the purpose of regulating the issuance, suspension, revocation, or renewal of driver's, pilot's or other operators' licenses; (6) announcements of executive clemency.

(c) Nothing in these regulations prevents a criminal justice agency from disclosing to the public criminal history record information related to the offense for which an individual is currently within the criminal justice system. Nor is a criminal justice agency prohibited from confirming prior criminal history record information to members of the news media or any other person, upon specific inquiry as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed, on a specified date, if the arrest record information or criminal record information disclosed is based on data excluded by paragraph (b) of this section. The regulations do not prohibit the dissemination of criminal history record information for purposes of international travel, such as issuing visas and granting of citizenship.

§ 20.21 Preparation and submission of a Criminal History Record Information Plan.

A plan shall be submitted to LEAA by each State on March 16, 1976, to set forth all operational procedures, except those portions relating to dissemination and security. A supplemental plan covering these portions shall be submitted no later than 90 days after promulgation of these amended regulations. The plan shall set forth operational procedures to—

(a) *Completeness and accuracy.* Insure that criminal history record information is complete and accurate.

(1) Complete records should be maintained at a central State repository. To be complete, a record maintained at a central State repository which contains information that an individual has been arrested, and which is available for dissemination, must contain information of any dispositions occurring within the State within 90 days after the disposition has occurred. The above shall apply to all arrests occurring subsequent to the effective date of these regulations. Procedures shall be established for criminal justice agencies to query the central repository prior to dissemination of any criminal history record information unless it can be assured that the most up-to-date disposition data is being used. Inquiries of a central State repository shall be made prior to any dissemination except in those cases where time is of the essence and the repository is technically incapable of responding within the necessary time period.

(2) To be accurate means that no record containing criminal history record information shall contain erroneous information. To accomplish this end, criminal justice agencies shall institute a process of data collection, entry, storage, and systematic audit that will minimize the possibility of recording and storing inaccurate information and upon finding inaccurate information of a material nature, shall notify all criminal justice agencies known to have received such information.

(b) *Limitations on dissemination.* Insure that dissemination of nonconviction data has been limited, whether directly or through any intermediary only to:

(1) Criminal justice agencies, for purposes of the administration of criminal justice and criminal justice agency employment;

(2) Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate State or local officials or agencies;

(3) Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, insure the security and confidentiality of the data consistent with these regulations, and provide sanctions for violation thereof;

(4) Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency. The agreement shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, insure the confidentiality and security of the data consistent with these regulations and with section 524(a) of the Act and any regulations implementing section 524(a), and provide sanctions for the violation thereof. These dissemination limitations do not apply to conviction data.

(c) *General policies on use and dissemination.* (1) Use of criminal history

record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.

(2) No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.

(3) Subsection (b) does not mandate dissemination of criminal history record information to any agency or individual. States and local governments will determine the purposes for which dissemination of criminal history record information is authorized by State law, executive order, local ordinance, court rule, decision or order.

(d) *Juvenile records.* Insure that dissemination of records concerning proceedings relating to the adjudication of a juvenile as delinquent or in need or supervision (or the equivalent) to noncriminal justice agencies is prohibited, unless a statute, court order, rule or court decision specifically authorizes dissemination of juvenile records, except to the same extent as criminal history records may be disseminated as provided in § 20.21(b) (3) and (4).

(e) *Audit.* Insure that annual audits of a representative sample of State and local criminal justice agencies chosen on a random basis shall be conducted by the State to verify adherence to these regulations and that appropriate records shall be retained to facilitate such audits. Such records shall include, but are not limited to, the names of all persons or agencies to whom information is disseminated and the date upon which such information is disseminated. The reporting of a criminal justice transaction to a State, local or Federal repository is not a dissemination of information.

(f) *Security.* Wherever criminal history record information is collected, stored, or disseminated, each State shall insure that the following requirements are satisfied by security standards established by State legislation, or in the absence of such legislation, by regulations approved or issued by the Governor of the State.

(1) Where computerized data processing is employed, effective and technologically advanced software and hardware designs are instituted to prevent unauthorized access to such information.

(2) Access to criminal history record information system facilities, systems operating environments, data file contents whether while in use or when stored in a media library, and system documentation is restricted to authorized organizations and personnel.

(3)(i) Computer operations, whether dedicated or shared, which support criminal justice information systems, operate in accordance with procedures developed or approved by the participating criminal justice agencies that assure that:

(*a*) Criminal history record information is stored by the computer in such manner that it cannot be modified, destroyed, accessed, changed, purged, or overlaid in any fashion by non-criminal justice terminals.

(*b*) Operation programs are used that will prohibit inquiry, record updates, or destruction of records, from any terminal other than criminal justice system terminals which are so designated.

(*c*) The destruction of records is limited to designated terminals under the direct control of the criminal justice agency responsible for creating or storing the criminal history record information.

(*d*) Operational programs are used to detect and store for the output of designated criminal justice agency employees all unauthorized attempts to penetrate any criminal history record information system, program or file.

(*e*) The programs specified in paragraphs (f)(3)(i)(*b*) and (*d*) of this section are known only to criminal justice agency employees responsible for criminal history record information system control or individuals and agencies pursuant to a specific agreement with the criminal justice agency to provide such programs and the program(s) are kept continuously under maximum security conditions.

(*f*) Procedures are instituted to assure that an individual or agency authorized direct access is responsible for (*A*) the physical security of criminal history record information under its control or in its custody and (*B*) the protection of such information

from unauthorized access, disclosure or dissemination.

(*g*) Procedures are instituted to protect any central repository of criminal history record information from unauthorized access, theft, sabotage, fire, flood, wind, or other natural or man-made disasters.

(ii) A criminal justice agency shall have the right to audit, monitor and inspect procedures established above.

(4) The criminal justice agency will:

(i) Screen and have the right to reject for employment, based on good cause, all personnel to be authorized to have direct access to criminal history record information.

(ii) Have the right to initiate or cause to be initiated administrative action leading to the transfer or removal of personnel authorized to have direct access to such information where such personnel violate the provisions of these regulations or other security requirements established for the collection, storage, or dissemination of criminal history record information.

(iii) Institute procedures, where computer processing is not utilized, to assure that an individual or agency authorized direct access is responsible for (*a*) the physical security of criminal history record information under its control or in its custody and (*b*) the protection of such information from unauthorized access, disclosure, or dissemination.

(iv) Institute procedures, where computer processing is not utilized, to protect any central repository of criminal history record information from unauthorized access, theft, sabotage, fire, flood, wind, or other natural or man-made disasters.

(v) Provide that direct access to criminal history record information shall be available only to authorized officers or employees of a criminal justice agency and, as necessary, other authorized personnel essential to the proper operation of the criminal history record information system.

(5) Each employee working with or having access to criminal history record information shall be made familiar with the substance and intent of these regulations.

(g) *Access and review.* Insure the individual's right to access and review of criminal history information for purposes of accuracy and completeness by instituting procedures so that—

(1) Any individual shall, upon satisfactory verification of his identity, be entitled to review without undue burden to either the criminal justice agency or the individual, any criminal history record information maintained about the individual and obtain a copy thereof when necessary for the purpose of challenge or correction;

(2) Administrative review and necessary correction of any claim by the individual to whom the information relates that the information is inaccurate or incomplete is provided;

(3) The State shall establish and implement procedures for administrative appeal where a criminal justice agency refuses to correct challenged information to the satisfaction of the individual to whom the information relates;

(4) Upon request, an individual whose record has been corrected shall be given the names of all non-criminal justice agencies to whom the data has been given;

(5) The correcting agency shall notify all criminal justice recipients of corrected information; and

(6) The individual's right to access and review of criminal history record information shall not extend to data contained in intelligence, investigatory, or other related files and shall not be construed to include any other information than that defined by § 20.3(b).

[41 FR 11715, Mar. 19, 1976, as amended at 42 FR 61595, Dec. 6, 1977]

§ 20.22 Certification of Compliance.

(a) Each State to which these regulations are applicable shall with the submission of its plan provide a certification that to the maximum extent feasible action has been taken to comply with the procedures set forth in the plan. Maximum extent feasible, in this subsection, means actions which can be taken to comply with the procedures set forth in the plan that do not require additional legislative authority or involve unreasonable cost or do not exceed existing technical ability.

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(b) The certification shall include—

(1) An outline of the action which has been instituted. At a minimum, the requirements of access and review under § 20.21(g) must be completely operational;

(2) A description of any legislation or executive order, or attempts to obtain such authority that has been instituted to comply with these regulations;

(3) A description of the steps taken to overcome any fiscal, technical, and administrative barriers to the development of complete and accurate criminal history record information;

(4) A description of existing system capability and steps being taken to upgrade such capability to meet the requirements of these regulations; and

(5) A listing setting forth categories of non-criminal justice dissemination. See § 20.21(b).

§ 20.23 Documentation: Approval by LEAA.

Within 90 days of the receipt of the plan, LEAA shall approve or disapprove the adequacy of the provisions of the plan and certification. Evaluation of the plan by LEAA will be based upon whether the procedures set forth will accomplish the required objectives. The evaluation of the certification(s) will be based upon whether a good faith effort has been shown to initiate and/or further compliance with the plan and regulations. All procedures in the approved plan must be fully operational and implemented by March 1, 1978. A final certification shall be submitted in March 1, 1978.

Where a State finds it is unable to provide final certification that all required procedures as set forth in § 20.21 will be operational by March 1, 1978, a further extension of the deadline will be granted by LEAA upon a showing that the State has made a good faith effort to implement these regulations to the maximum extent feasible. Documentation justifying the request for the extension including a proposed timetable for full compliance must be submitted to LEAA by March 1, 1978. Where a State submits a request for an extension, the implementation date will be extended an additional 90 days while LEAA reviews the documentation for approval or disapproval. To be approved, such revised schedule must be consistent with the timetable and procedures set out below:

(a) July 31, 1978—Submission of certificate of compliance with:

(1) Individual access, challenge, and review requirements;

(2) Administrative security;

(3) Physical security to the maximum extent feasible.

(b) Thirty days after the end of a State's next legislative session—Submission to LEAA of a description of State policy on dissemination of criminal history record information.

(c) Six months after the end of a State's legislative session—Submission to LEAA of a brief and concise description of standards and operating procedures to be followed by all criminal justice agencies covered by LEAA regulations in complying with the State policy on dissemination.

(d) Eighteen months after the end of a State's legislative session—Submission to LEAA of a certificate attesting to the conduct of an audit of the State central repository and of a random number of other criminal justice agencies in compliance with LEAA regulations.

[41 FR 11715, Mar. 19, 1976, as amended at 42 FR 61596, Dec. 6, 1977]

§ 20.24 State laws on privacy and security.

Where a State originating criminal history record information provides for sealing or purging thereof, nothing in these regulations shall be construed to prevent any other State receiving such information, upon notification, from complying with the originating State's sealing or purging requirements.

§ 20.25 Penalties.

Any agency or individual violating Subpart B of these regulations shall be subject to a fine not to exceed $10,000. In addition, LEAA may initiate fund cut-off procedures against recipients of LEAA assistance.

Subpart C—Federal System and Interstate Exchange of Criminal History Record Information

§ 20.30 Applicability.

The provisions of this subpart of the regulations apply to any Department of Justice criminal history record information system that serves criminal justice agencies in two or more states and to Federal, state and local criminal justice agencies to the extent that they utilize the services of Department of Justice criminal history record information systems. These regulations are applicable to both manual and automated systems.

§ 20.31 Responsibilities.

(a) The Federal Bureau of Investigation (FBI) shall operate the National Crime Information Center (NCIC), the computerized information system which includes telecommunications lines and any message switching facilities which are authorized by law or regulation to link local, state and Federal criminal justice agencies for the purpose of exchanging NCIC-related information. Such information includes information in the Computerized Criminal History (CCH) File, a cooperative Federal-State program for the interstate exchange of criminal history record information. CCH shall provide a central repository and index of criminal history record information for the purpose of facilitating the interstate exchange of such information among criminal justice agencies.

(b) The FBI shall operate the Identification Division to perform identification and criminal history record information functions for Federal, state and local criminal justice agencies, and for noncriminal justice agencies and other entities where authorized by Federal statute, state statute pursuant to Pub. L. 92-544 (86 Stat. 1115), Presidential executive order, or regulation of the Attorney General of the United States.

(c) The FBI Identification Division shall maintain the master fingerprint files on all offenders included in the NCIC/CCH File for the purposes of determining first offender status and to identify those offenders who are unknown in states where they become criminally active but known in other states through prior criminal history records.

§ 20.32 Includable offenses.

(a) Criminal history record information maintained in any Department of Justice criminal history record information system shall include serious and/or significant offenses.

(b) Excluded from such a system are arrests and court actions limited only to nonserious charges, e.g., drunkenness, vagrancy, disturbing the peace, curfew violation loitering, false fire alarm, non-specific charges of suspicion or investigation, traffic violations (except data will be included on arrests for manslaughter, driving under the influence of drugs or liquor, and hit and run). Offenses committed by juvenile offenders shall also be excluded unless a juvenile offender is tried in court as an adult.

(c) The exclusions enumerated above shall not apply to Federal manual criminal history record information collected, maintained and compiled by the FBI prior to the effective date of these Regulations.

§ 20.33 Dissemination of criminal history record information.

(a) Criminal history record information contained in any Department of Justice criminal history record information system will be made available:

(1) To criminal justice agencies for criminal justice purposes; and

(2) To Federal agencies authorized to receive it pursuant to Federal statute or Executive order.

(3) Pursuant to Pub. L. 92-544 (86 Stat. 115) for use in connection with licensing or local/state employment or for other uses only if such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States. When no active prosecution of the charge is known to be pending arrest data more than one year old will not be disseminated pursuant to this subsection unless accompanied by information relating to the disposition of that arrest.

(4) For issuance of press releases and publicity designed to effect the apprehension of wanted persons in connec-

tion with serious or significant offenses.

(b) The exchange of criminal history record information authorized by paragraph (a) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) Nothing in these regulations prevents a criminal justice agency from disclosing to the public factual information concerning the status of an investigation, the apprehension, arrest, release, or prosecution of an individual, the adjudication of charges, or the correctional status of an individual, which is reasonably contemporaneous with the event to which the information relates.

§ 20.34 Individual's right to access criminal history record information.

(a) Any individual, upon request, upon satisfactory verification of his identity by fingerprint comparison and upon payment of any required processing fee, may review criminal history record information maintained about him in a Department of Justice criminal history record information system.

(b) If, after reviewing his identification record, the subject thereof believes that it is incorrect or incomplete in any respect and wishes changes, corrections or updating of the alleged deficiency, he should make application directly to the agency which contributed the questioned information. The subject of a record may also direct his challenge as to the accuracy or completeness of any entry on his record to the Assistant Director of the FBI Identification Division, Washington, D.C. 20537. The FBI will then forward the challenge to the agency which submitted the data requesting that agency to verify or correct the challenged entry. If the contributing agency corrects the record, it shall promptly notify the FBI and, upon receipt of such a notification, the FBI will make any changes necessary in accordance with the correction supplied by the contributor of the original information.

[Order No. 601-75, 40 FR 22114, May 20, 1975, as amended by Order No. 805-78, 43 FR 50173, Oct. 27, 1978]

§ 20.35 National Crime Information Center Advisory Policy Board.

There is established an NCIC Advisory Policy Board whose purpose is to recommend to the Director, FBI, general policies with respect to the philosophy, concept and operational principles of NCIC, particularly its relationships with local and state systems relating to the collection, processing, storage, dissemination and use of criminal history record information contained in the CCH File.

(a)(1) The Board shall be composed of twenty-six members, twenty of whom are elected by the NCIC users from across the entire United States and six who are appointed by the Director of the FBI. The six appointed members, two each from the judicial, the corrections and the prosecutive sectors of the criminal justice community, shall serve for an indeterminate period of time. The twenty elected members shall serve for a term of two years commencing on January 5th of each odd numbered year.

(2) The Board shall be representative of the entire criminal justice community at the state and local levels and shall include representation from law enforcement, the courts and corrections segments of this community.

(b) The Board shall review and consider rules, regulations and procedures for the operation of the NCIC.

(c) The Board shall consider operational needs of criminal justice agencies in light of public policies, and local, state and Federal statutes and these Regulations.

(d) The Board shall review and consider, on a continuing basis, security and privacy aspects of the NCIC system and shall, as needed, appoint ad hoc subcommittees to provide information and recommendations to the Board concerning security and privacy of the NCIC system

(e) The Board shall recommend standards for participation by criminal justice agencies in the NCIC system.

(f) The Board shall report directly to the Director of the FBI or his designated appointee.

(g) The Board shall operate within the purview of the Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770.

(h) The Director, FBI, shall not adopt recommendations of the Board which would be in violation of these Regulations.

(28 U.S.C. 509, 510 ,534; 5 U.S.C. 301)

[Order No. 601-75, 40 FR 22114, May 20, 1975, as amended by Order 819-79, 44 FR 12031, Mar. 5, 1979]

§ 20.36 Participation in the Computerized Criminal History Program.

(a) For the purpose of acquiring and retaining direct access to CCH File each criminal justice agency shall execute a signed agreement with the Director, FBI, to abide by all present rules, policies and procedures of the NCIC, as well as any rules, policies and procedures hereinafter approved by the NCIC Advisory Policy Board and adopted by the NCIC.

(b) Entry of criminal history record information into the CCH File will be accepted only from an authorized state or Federal criminal justice control terminal. Terminal devices in other authorized criminal justice agencies will be limited to inquiries.

§ 20.37 Responsibility for accuracy, completeness, currency.

It shall be the responsibility of each criminal justice agency contributing data to any Department of Justice criminal history record information system to assure that information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible dispositions for all arrest data included therein. Dispositions should be submitted by criminal justice agencies within 120 days after the disposition has occurred.

§ 20.38 Sanction for noncompliance.

The services of Department of Justice criminal history record information systems are subject to cancellation in regard to any agency or entity which fails to comply with the provisions of Subpart C.

APPENDIX—COMMENTARY ON SELECTED SECTIONS OF THE REGULATIONS ON CRIMINAL HISTORY RECORD INFORMATION SYSTEMS

Subpart A—§ 20.3(b). The definition of criminal history record information is intended to include the basic offender-based transaction statistics/computerized criminal history. (OBTS/CCH) data elements. If notations of an arrest, disposition, or other formal criminal justice transactions occur in records other than the traditional "rap sheet" such as arrest reports, any criminal history record information contained in such reports comes under the definition of this subsection.

The definition, however, does not extend to other information contained in criminal justice agency reports. Intelligence or investigative information (e.g., suspected criminal activity, associates, hangouts, financial information, ownership of property and vehicles) is not included in the definition of criminal history information.

§ 20.3(c). The definitions of criminal justice agency and administration of criminal justice of § 20.3(c) must be considered together. Included as criminal justice agencies would be traditional police, courts, and corrections agencies as well as subunits of noncriminal justice agencies performing a function of the administration of criminal justice pursuant to Federal or State statute or executive order. The above subunits of noncriminal justice agencies would include for example, the Office of Investigation of the U.S. Department of Agriculture which has as its principal function the collection of evidence for criminal prosecutions of fraud. Also included under the definition of criminal justice agency are umbrella-type administrative agencies supplying criminal history information services such as New York's Division of Criminal Justice Services.

§ 20.3(e). Disposition is a key concept in section 524(b) of the Act and in § 20.21(a)(1) and § 20.21(b). It, therefore is defined in some detail. The specific dispositions listed in this subsection are examples only and are not to be construed as excluding other unspecified transactions concluding criminal proceedings within a particular agency.

§ 20.3(k). The different kinds of acquittals and dismissals as delineated in § 20.3(e) are all considered examples of nonconviction data.

Subpart B—§ 20.20(a). These regulations apply to criminal justice agencies receiving funds under the Omnibus Crime Control and Safe Streets Act for manual or automated systems subsequent to July 1, 1973. In the hearings on the regulations, a number of those testifying challenged LEAA's authority to promulgate regulations for manual systems by contending that section 524(b) of the Act governs criminal history information contained in automated systems.

The intent of section 524(b), however, would be subverted by only regulating automated systems. Any agency that wished to circumvent the regulations would be able to create duplicate manual files for purposes

contrary to the letter and spirit of the regulations.

Regulation of manual systems, therefore, is authorized by section 524(b) when coupled with section 501 of the Act which authorizes the Administration to establish rules and regulations "necessary to the exercise of its functions * * *."

The Act clearly applies to all criminal history record information collected, stored, or disseminated with LEAA support subsequent to July 1, 1973.

Limitations as contained in Subpart C also apply to information obtained from the FBI Identification Division or the FBI/NCIC System.

§ 20.20 (b) and (c). Section 20.20 (b) and (c) exempts from regulations certain types of records vital to the apprehension of fugitives, freedom of the press, and the public's right to know. Court records of public judicial proceedings are also exempt from the provisions of the regulations.

Section 20.20(b)(2) attempts to deal with the problem of computerized police blotters. In some local jurisdictions, it is apparently possible for private individuals and/or newsmen upon submission of a specific name to obtain through a computer search of the blotter a history of a person's arrests. Such files create a partial criminal history data bank potentially damaging to individual privacy, especially since they do not contain final dispositions. By requiring that such records be accessed solely on a chronological basis, the regulations limit inquiries to specific time periods and discourage general fishing expeditions into a person's private life.

Subsection 20.20(c) recognizes that announcements of ongoing developments in the criminal justice process should not be precluded from public disclosure. Thus, announcements of arrest, convictions, new developments in the course of an investigation may be made. It is also permissible for a criminal justice agency to confirm certain matters of public record information upon specific inquiry. Thus, if a question is raised: "Was X arrested by your agency on January 3, 1975" and this can be confirmed or denied by looking at one of the records enumerated in subsection (b) above, then the criminal justice agency may respond to the inquiry. Conviction data as stated in § 20.21(b) may be disseminated without limitation.

§ 20.21. The regulations deliberately refrain from specifying who within a State should be responsible for preparing the plan. This specific determination should be made by the Governor. The State has 90 days from the publication of these revised regulations to submit the portion of the plan covering §§ 20.21(b) and 20.21(f).

§ 20.21(a)(1). Section 524(b) of the Act requires that LEAA insure criminal history information be current and that, to the maximum extent feasible, it contain disposition as well as current data.

It is, however, economically and administratively impractical to maintain complete criminal histories at the local level. Arrangements for local police departments to keep track of dispositions by agencies outside of the local jurisdictions generally do not exist. It would, moreover, be bad public policy to encourage such arrangements since it would result in an expensive duplication of files.

The alternatives to locally kept criminal histories are records maintained by a central State repository. A central State repository is a State agency having the function pursuant to a statute or executive order of maintaining comprehensive statewide criminal history record information files. Ultimately, through automatic data processing the State level will have the capability to handle all requests for in-State criminal history information.

Section 20.20(a)(1) is written with a centralized State criminal history repository in mind. The first sentence of the subsection states that complete records should be retained at a central State repository. The word "should" is permissive; it suggests but does not mandate a central State repository.

The regulations do require that States establish procedures for State and local criminal justice agencies to query central State repositories wherever they exist. Such procedures are intended to insure that the most current criminal justice information is used.

As a minimum, criminal justice agencies subject to these regulations must make inquiries of central State repositories whenever the repository is capable of meeting the user's request within a reasonable time. Presently, comprehensive records of an individual's transactions within a State are maintained in manual files at the State level, if at all. It is probably unrealistic to expect manual systems to be able immediately to meet many rapid-access needs of police and prosecutors. On the other hand, queries of the State central repository for most noncriminal justice purposes probably can and should be made prior to dissemination of criminal history record information.

§ 20.21(b). The limitations on dissemination in this subsection are essential to fulfill the mandate of section 524(b) of the Act which requires the Administration to assure that the "privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes." The categories for dissemination established in this section reflect suggestions by hearing witnesses and respondents submitting written commentary.

The regulations distinguish between conviction and nonconviction information insofar as dissemination is concerned. Conviction information is currently made available without limitation in many jurisdictions. Under these regulations, conviction data and pending charges could continue to be disseminated routinely. No statute, ordinance, executive order, or court rule is necessary in order to authorize dissemination of conviction data. However, nothing in the regulations shall be construed to negate a State law limiting such dissemination.

After December 31, 1977, dissemination of nonconviction data would be allowed, if authorized by a statute, ordinance, executive order, or court rule, decision, or order. The December 31, 1977, deadline allows the States time to review and determine the kinds of dissemination for non-criminal justice purposes to be authorized. When a State enacts comprehensive legislation in this area, such legislation will govern dissemination by local jurisdictions within the State. It is possible for a public record law which has been construed by the State to authorize access to the public of all State records, including criminal history record information, to be considered as statutory authority under this subsection. Federal legislation and executive orders can also authorize dissemination and would be relevant authority.

For example, Civil Service suitability investigations are conducted under Executive Order 10450. This is the authority for most investigations conducted by the Commission. Section 3(a) of 10450 prescribes the minimum scope of investigation and requires a check of FBI fingerprint files and written inquiries to appropriate law enforcement agencies.

§ 20.21(b)(3). This subsection would permit private agencies such as the Vera Institute to receive criminal histories where they perform a necessary administration of justice function such as pretrial release. Private consulting firms which commonly assist criminal justice agencies in information systems development would also be included here.

§ 20.21(b)(4). Under this subsection, any good faith researchers including private individuals would be permitted to use criminal history record information for research purposes. As with the agencies designated in § 20.21(b)(3) researchers would be bound by an agreement with the disseminating criminal justice agency and would, of course, be subject to the sanctions of the Act.

The drafters of the regulations expressly rejected a suggestion which would have limited access for research purposes to certified research organizations. Specifically "certification" criteria would have been extremely difficult to draft and would have inevitably led to unnecessary restrictions on legitimate research.

Section 524(a) of the Act which forms part of the requirements of this section states:

"Except as provided by Federal law other than this title, no officer or employee of the Federal Government, nor any recipient of assistance under the provisions of this title shall use or reveal any research or statistical information furnished under this title by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this title. Copies of such information shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action suit, or other judicial or administrative proceedings."

LEAA anticipates issuing regulations, pursuant to Section 524(a) as soon as possible.

§ 20.21(c)(2). Presently some employers are circumventing State and local dissemination restrictions by requesting applicants to obtain an official certification of no criminal record. An employer's request under the above circumstances gives the applicant the unenviable choice of invasion of his privacy or loss of possible job opportunities. Under this subsection routine certifications of no record would no longer be permitted. In extraordinary circumstances, however, an individual could obtain a court order permitting such a certification.

§ 20.21(c)(3). The language of this subsection leaves to the States the question of who among the agencies and individuals listed in § 20.21(b) shall actually receive criminal records. Under these regulations a State could place a total ban on dissemination if it so wished. The State could, on the other hand, enact laws authorizing any member of the private sector to have access to non-conviction data.

§ 20.21(d). Non-criminal justice agencies will not be able to receive records of juveniles unless the language of a statute or court order, rule, or court decision specifies that juvenile records shall be available for dissemination. Perhaps the most controversial part of this subsection is that it denies access to records of juveniles by Federal agencies conducting background investigations for eligibility to classified information under existing legal authority.

§ 20.21(e) Since it would be too costly to audit each criminal justice agency in most States (Wisconsin, for example, has 1075 criminal justice agencies) random audits of a "representative sample" of agencies are the next best alternative. The term "representative sample" is used to insure that audits do not simply focus on certain types of agencies. Although this subsection requires that there be records kept with the names of all persons or agencies to whom in-

formation is disseminated, criminal justice agencies are not required to maintain dissemination logs for "no record" responses.

§ 20.21(f). Requirements are set forth which the States must meet in order to assure that criminal history record information is adequately protected. Automated systems may operate in shared environments and the regulations require certain minimum assurances.

§ 20.21(g)(1). A "challenge" under this section is an oral or written contention by an individual that his record is inaccurate or incomplete; it would require him to give a correct version of his record and explain why he believes his version to be correct. While an individual should have access to his record for review, a copy of the record should ordinarily only be given when it is clearly established that it is necessary for the purpose of challenge.

The drafters of the subsection expressly rejected a suggestion that would have called for a satisfactory verification of identity by fingerprint comparison. It was felt that States ought to be free to determine other means of identity verification.

§ 20.21(g)(5). Not every agency will have done this in the past, but henceforth adequate records including those required under 20.21(e) must be kept so that notification can be made.

§ 20.21(g)(6). This section emphasizes that the right to access and review extends only to criminal history record information and does not include other information such as intelligence or treatment data.

§ 20.22(a). The purpose for the certification requirement is to indicate the extent of compliance with these regulations. The term "maximum extent feasible" acknowledges that there are some areas such as the completeness requirement which create complex legislative and financial problems.

NOTE: In preparing the plans required by these regulations, States should look for guidance to the following documents: National Advisory Commission on Criminal Justice Standards and Goals, Report on the Criminal Justice System; Project SEARCH: Security and Privacy Considerations in Criminal History Information Systems, Technical Reports No. 2 and No. 13; Project SEARCH: A Model State Act for Criminal Offender Record Information, Technical Memorandum No. 3; and Project SEARCH: Model Administrative Regulations for Criminal Offender Record Information, Technical Memorandum No. 4.

Subpart C—§ 20.31. Defines the criminal history record information system operated by the Federal Bureau of Investigation. Each state having a record in the Computerized Criminal History (CCH) file must have a fingerprint card on file in the FBI Identification Division to support the CCH record concerning the individual.

Paragraph (b) is not intended to limit the identification services presently performed by the FBI for Federal, state and local agencies.

§ 20.32. The grandfather clause contained in the third paragraph of this Section is designed, from a practical standpoint, to eliminate the necessity of deleting from the FBI's massive files the non-includable offenses which were stored prior to February, 1973.

In the event a person is charged in court with a serious or significant offense arising out of an arrest involving a non-includable offense, the non-includable offense will appear in the arrest segment of the CCH record.

§ 20.33. Incorporates the provisions of a regulation issued by the FBI on June 26, 1974, limiting dissemination of arrest information not accompanied by disposition information outside the Federal government for non-criminal justice purposes. This regulation is cited in 28 CFR 50.12.

§ 20.34. The procedures by which an individual may obtain a copy of his manual identification record are particularized in 28 CFR 16.30-34.

The procedures by which an individual may obtain a copy of his Computerized Criminal History record are as follows:

If an individual has a criminal record supported by fingerprints and that record has been entered in the NCIC CCH File, it is available to that individual for review, upon presentation of appropriate identification, and in accordance with applicable state and Federal administrative and statutory regulations.

Appropriate identification includes being fingerprinted for the purpose of insuring that he is the individual that he purports to be. The record on file will then be verified as his through comparison of fingerprints.

Procedure. 1. All requests for review must be made by the subject of his record through a law enforcement agency which has access to the NCIC CCH File. That agency within statutory or regulatory limits can require additional identification to assist in securing a positive identification.

2. If the cooperating law enforcement agency can make an identification with fingerprints previously taken which are on file locally and if the FBI identification number of the individual's record is available to that agency, it can make an on-line inquiry of NCIC to obtain his record on-line or, if it does not have suitable equipment to obtain an on-line response, obtain the record from Washington, D.C., by mail. The individual will then be afforded the opportunity to see that record.

3. Should the cooperating law enforcement agency not have the individual's fingerprints on file locally, it is necessary for that agency to relate his prints to an existing record by having his identification prints compared with those already on file in the FBI, or, possibly, in the State's central identification agency.

4. The subject of the requested record shall request the appropriate arresting agency, court, or correctional agency to initiate action necessary to correct any stated inaccuracy in his record or provide the information needed to make the record complete.

§ 20.36. This section refers to the requirements for obtaining direct access to the CCH file.

§ 20.37. The 120-day requirement in this section allows 30 days more than the similar provision in Subpart B in order to allow for processing time which may be needed by the states before forwarding the disposition to the FBI.

[Order No. 662-76, 41 FR 34949, Aug. 18, 1976]

Appendix B

CRIMINAL JUSTICE DIVISION REGULATIONS

Office of the Governor

Criminal Justice Division

Criminal Justice Information Systems—Security and Privacy 001.55.21

The Criminal Justice Division adopts Rules 001.55.21.001-.016, concerning criminal justice information systems—security and privacy. These adopted rules and guidelines cover collection, maintenance, dissemination, and security of criminal history record information.

The Criminal Justice Division received two written responses from John B. Duncan, executive director, Texas Civil Liberties Union, and written response from Robert E. DeLong, Jr., general counsel, Texas Department of Corrections. The Criminal Justice Division held a public hearing to receive comments on Wednesday, November 21, 1979, at the request of John B. Duncan, executive director, Texas Civil Liberties Union, and David Spencer, attorney at law, Austin.

The first objection raised by the Texas Civil Liberties Union was the definition of "conviction data" in Rule .002(l) of the proposed rules and guidelines. The interpretation placed by the Texas Civil Liberties Union upon this definition leads to an unintended result since the definition is not explicit and is, to some extent, ambiguous. The Criminal Justice Division adopts the following definition of "conviction data" in lieu of Rule .002(l) of the proposed rules. "Conviction data" means all notations of criminal transactions related to an offense that have resulted in a conviction, guilty plea, or a plea of nolo contendere. This definition is taken from the Privacy and Security Instructions, Criminal Justice Information Systems, revised April 1976, issued by the Law Enforcement Assistance Administration, and A Guide to Dissemination, published by the Law Enforcement Assistance Administration.

The next objection raised was the limitation on dissemination being confined to nonconviction data under Rule .005. The Texas Civil Liberties Union suggested that Rule .005 on dissemination limitations apply to all criminal history record information, including conviction data, and not be limited to nonconviction data. The federal regulations provide that

SOURCE: 4 Tex. Reg. 4708 (1979).

conviction data may be disseminated to anyone without any limitation. Therefore, the Criminal Justice Division adopts Rule .005 as proposed.

The next objection raised by the Texas Civil Liberties Union was including "ordinances and executive orders" under Rule .005(a)(2). The Criminal Justice Division concurs that the executive orders issued by the governor do not have the force and effect of law as a statute, and that local agencies do not have the power to pass ordinances under Texas law, which would allow the release of such information. The Criminal Justice Division adopts Rule .005(a)(2) as proposed with the deletion of the words "ordinance, executive order."

The next objection raised by the Texas Civil Liberties Union was that the one-year period for maintenance of dissemination logs is too short under Rule .008. This same objection was raised by David Spencer, attorney at law, and more particularly in the area of expunction of arrest records as provided for in Chapter 55 of the Code of Criminal Procedure. The federal regulations place no time limit for maintaining dissemination logs. The Privacy and Security Planning Instructions, published by the Law Enforcement Assistance Administration, recommends that the dissemination logs be retained for a period of not less than one year. It should be noted that recipients of federal funds from the Criminal Justice Division are required to keep all other records for a minimum of three years. The adoption of a three-year period for maintenance of dissemination logs should provide adequate time for tracking through court proceedings any dissemination of arrest information to be expunged under Chapter 55, Code of Criminal Procedure. Further, it should provide adequate time to anyone who wishes to review and challenge the record being maintained on that person. Therefore, the Criminal Justice Division adopts Rule .008 as proposed with a three-year maintenance of dissemination logs requirement in lieu of the proposed one-year requirement.

The next objection raised by the Texas Civil Liberties Union was the exemption from maintenance of dissemination logs under Rule .008(b) and (c). The concern expressed is to assure that CHRI is not disseminated outside the criminal justice system. The provisions of Rule .008(b) and (c) limit dissemination to other criminal justice agencies within the criminal justice system. Therefore, the Criminal Justice Division adopts Rule .008(b) and (c) as proposed.

David Spencer raised an objection that there were no provisions for defense lawyers to obtain criminal records by court order, as in the case of witnesses or prospective witnesses in a case, criminal or civil, and that there should be an exception where defense lawyers can get their own client's "rap sheet" without a court order. The Privacy and Security Planning Instructions, Criminal Justice Information Systems, revised April 1976, issued by the Law Enforcement Assistance Administration points out that the definition of "administration of criminal justice" does not include criminal defense functions. Criminal defense attorneys are, therefore, not eligible to obtain criminal history record information except by court order.

David Spencer expressed a concern that the Criminal Justice Division does not have the authority to pass rules which would automatically bind every sheriff and police department and any other criminal justice agency. He thought it might be possible to do what the federal government has done in cutting off funds for failure to comply with the rules. The Criminal Justice Division follows the federal government's approach and provides for withholding of funds for noncompliance in Rule .014 and termination of funds for continued noncompliance after withholding of funds in Rule .015.

David Spencer also raised a general objection to dissemination of any criminal history record information outside the criminal justice system without the person's consent. It appears that his general objection includes information on police blotters (see Rule .003(b)(2)—may be disseminated to the public), criminal history record information related on an offense currently in the criminal justice system (see Rule .003(c)—may be disseminated to the public), conviction data (see Rule .005(b)—may be disseminated to the public) and information in offense reports (except front page, Houston Chronicle *v.* City of Houston, 531 SW2d 177, 536 SW2d 559 nre—may not be disseminated to the public), and personal history and arrest record (Houston Chronicle *v.* City of Houston, 531 SW2d 177, 536 SW2d 559 nre—may not be disseminated to the public).

The proposed rules and guidelines as adopted comply with the federal regulations, Texas statutes, Texas case decisions, and Texas attorney general's opinions. Legislation would be required to effectuate the changes sought.

David Spencer further raised an objection to the fact that arrest information may be disseminated (see Rules .003(b)(2) and .003(c)), but the rules and guidelines prohibit dissemination of information regarding acquittal or dismissal of charge resulting from an arrest (see Rule.002(k)). To allow dissemination of acquittals and dismissals would require legislative change.

The Texas Department of Corrections expressed concern about the provision of Rule .011(b) which provides that points of review shall be the Texas Department of Corrections (for inmates of TDC only) because it appears that this is in conflict with Article 42.12, Section 27, Texas Code of Criminal Procedure.

The Criminal Justice Division concurs that it appears that there is a probable conflict and therefore adopts Rule .011(b) deleting the following "the Texas Department of Corrections (for inmates of TDC only)." These rules and guidelines are adopted under the authority of Title 28, Judicial Administration, Chapter I, Department of Justice, Part 20, Criminal Justice Information Systems, Code of Federal Regulations, and issued pursuant to Sections 501 and 524(b) of Title I, Omnibus Crime Control and Safe Streets Act of 1968, as amended, and pursuant to rules and guidelines promulgated by the Law Enforcement Assistance Administration.

.001. Purpose. It is the purpose of these rules and guidelines to insure that criminal history record information, wherever it appears, is collected, stored, and disseminated in a manner to insure the completeness, integrity, accuracy, and security of such information and to protect individual privacy.

.002. Definitions.

(a) "Criminal justice agency" includes courts and any government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

(b) "Administration of criminal justice" means performance of any of the following activities: detection, apprehension, detention, pretrial release, posttrial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information.

(c) "Criminal history record information" (CHRI) includes records and related data contained in either a manual or an automated criminal justice information system, compiled by criminal justice agencies for purposes of identifying criminal offenders and maintaining as to such persons notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, rehabilitation, and release. Criminal history record information is a general term which includes within its definition both conviction data and nonconviction data. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system.

(d) "Dissemination" means the release, either verbally or printed (hard copy), of CHRI by an agency to another agency or individual or the transfer of CHRI from computer to computer.

(e) "Law enforcement" means those criminal justice agencies which employ sworn peace officers and are significantly involved in detecting and apprehending criminal offenders.

(f) "Prosecution" means those criminal justice agencies which represent the state in the prosecution of criminal cases.

(g) "Clerk" includes both district and county clerks.

(h) "Corrections" means those criminal justice agencies which supervise criminal offenders under sentence of a court whether incarcerated or not, e.g., probation departments, county jails, Texas Department of Corrections (TDC), Board of Pardons and Paroles, and the Texas Youth Council.

(i) "Disposition" means information disclosing that criminal proceedings have been concluded, including information disclosing that the police have elected not to refer a matter to a prosecutor or that a prosecutor has elected not to commence criminal proceedings and also disclosing the nature of the termination in the proceedings; or information disclosing that proceedings have been indefinitely postponed and also disclosing the reason for postponement. Dispositions shall include but not be limited to acquittal, acquittal by reason of insanity, charge dismissed due to mental incompetency, charge still pending due to insanity, charge still pending due to mental incompetence, guilty plea, nolle prosequi, nolo contendere plea, failure to indict by the grand jury (no-bill), convicted, youthful offender determination, deceased, deferred disposition, dismissed—civil action, found insane, found mentally incompetent, pardoned, probation before conviction, sentence commuted, adjudication withheld, mistrial—defendant discharged, executive clemency, placed on probation, paroled, or released from correctional supervision.

(j) "Agency disposition" means information from a criminal justice agency which reveals the decision made by that agency with regard to its disposition of the offender or his case or both.

(k) "Nonconviction data" means arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

(l) "Conviction data" means all notations of criminal transactions related to an offense that have resulted in a conviction, guilty plea, or a plea of nolo contendere.

(m) "Direct access" means having the authority to access the CHRI data base.

.003. Applicability.

(a) These rules and guidelines apply to all state and local agencies and individuals which collect, store, or disseminate CHRI processed by manual or automated operation where such collection, storage, or dissemination has been funded in whole or in part with funds made available by LEAA subsequent to July 1, 1973.

(b) These rules and guidelines shall not apply to CHRI contained in:

(1) posters, announcements, or lists for identifying or apprehending fugitives or wanted persons;

(2) original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or longstanding custom to be made public, if such records are organized on a chronological basis;

(3) court records of public judicial proceedings;

(4) published court or administrative opinions or public judicial, administrative, or legislative proceedings;

(5) records of traffic offenses maintained by the Department of Public Safety for the purpose of regulating the issuance, suspension, revocation, or renewal of driver's, pilot's, or other operators' licenses;

(6) announcements of executive clemency.

(c) Nothing in these rules or guidelines prevents criminal justice agencies from disclosing to the public CHRI related to the offense for which an individual is currently within the criminal justice system. Nor are criminal justice agencies prohibited from confirming prior CHRI to members of the news media or any other person, upon specific inquiry, as to whether a named individual was arrested, detained, indicted, or whether an information or other formal charge was filed, on a specific date, if the arrest record information or criminal record information disclosed is based on data excluded by subsection (b) of this rule. These rules and guidelines do not prohibit the dissemination of CHRI for purposes of international travel, such as issuing visas and granting of citizenship.

.004. Completeness and Accuracy. Each criminal justice agency shall query the Department of Public Safety prior to dissemination of any CHRI unless it can assure that the most up-to-date disposition data is being used. The only exception is where time is of the essence and the Department of Public Safety is technically incapable of responding within the necessary time period.

.005. Dissemination—Limitations.

(a) Dissemination of nonconviction data shall be limited, whether directly or through any intermediary, only to:

(1) Criminal justice agencies for the purpose of administration of criminal justice and criminal justice agency employment.

(2) Individuals and agencies for a purpose authorized by statute or court rule decision or order as construed by appropriate state or local officials or agencies.

(3) Individuals and agencies pursuant to specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes stated, and insure the security and confidentiality of the data consistent with these rules and guidelines.

(4) Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency. The agreement shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, and insure the confidentiality and security of the data consistent with these rules and guidelines and with Section 524(a) of the Omnibus Crime Control and Safe Streets Act, Title I, as amended, and any regulations implementing Section 524(a).

(b) These dissemination limitations do not apply to conviction data.

(c) Dissemination of information obtained from the FBI Identification Division or the FBI/NCIC system shall be disseminated only to criminal justice agencies for criminal justice purposes and agencies with specific statutory authority.

.006. Existence or Nonexistence of CHRI. No agency or individual shall confirm the existence or nonexistence of CHRI to any person or agency that would not be eligible to receive the information itself.

.007. Dissemination Not Mandated. Dissemination of CHRI is not mandated to any agency or individual.

.008. Dissemination Logs.

(a) Dissemination of CHRI must be recorded in a log. The information required for each transaction shall include the requesting agency or individual, date, and the name of the person whose record is being requested. The log shall also be cross-indexed by the person's name whose record is being requested and the requesting agency. The logs may be destroyed after a period of three years from the date of the request.

(b) No log is required when CHRI is disseminated in the normal course of processing through the criminal justice system.

(c) No log is required when CHRI is disseminated by a criminal justice agency to another criminal justice agency in the same county.

(d) No log is required when CHRI is disseminated to the Department of Public Safety for inclusion in that person's CHRI.

.009. Dissemination of Juvenile Records. Dissemination of juvenile records shall be in accordance with Section 51.14, Texas Family Code.

.010. Security.

(a) Where computerized data processing is employed, effective and technologically advanced software and hardware designs shall be instituted to prevent unauthorized access to such information.

(b) Access to CHRI system facilities, systems operating environments, data file contents, whether while in use or when stored in a media library, and system documentation shall be restricted to authorized organizations and personnel.

(c) Computer operations, whether dedicated or shared, which support criminal justice information systems, shall be operated in accordance with procedures developed or approved by the participating criminal justice agencies that assure that:

(1) Criminal history record information shall be stored by the computer in such manner that it cannot be modified, destroyed, accessed, changed, purged, or overlaid in any fashion by noncriminal justice terminals.

(2) Operation programs shall be used that will prohibit inquiry, record updates, or destruction of records from any terminal other than criminal justice system terminals which are so designated.

(3) The destruction of records shall be limited to designated terminals under the direct control of the criminal justice agency responsible for creating or storing the CHRI.

(4) Operational programs shall be used to detect and store for the output of designated criminal justice agency employees all unauthorized attempts to penetrate any CHRI system, program, or file.

(5) The programs specified in (2) and (4) of this rule shall be known only to criminal justice agency employees responsible for CHRI system control or individuals and agencies pursuant to a specific agreement with the criminal justice agency to provide such programs and the programs are kept continuously under maximum security conditions.

(6) Procedures shall be instituted to assure that an individual or agency authorized direct access is responsible for the physical security of CHRI under its control or in its custody and the protection of such information from unauthorized access, disclosure, or dissemination.

(7) Procedures shall be instituted to protect any central repository of CHRI from unauthorized access, theft, sabotage, fire, flood, wind, or other natural or manmade disasters.

A criminal justice agency shall have the right to audit, monitor, and inspect procedures established above.

(d) The criminal justice agency will:

(1) screen and have the right to reject for employment, based on good cause, all personnel to be authorized to have direct access to CHRI;

(2) have the right to initiate or cause to be initiated administrative action leading to the transfer or removal of personnel authorized to have direct access to such information where such personnel violate the provisions of these rules and regulations or other security requirements established for the collection, storage, or dissemination of CHRI;

(3) institute procedures, where computer processing is not utilized, to assure that an individual or agency authorized direct access is responsible for the physical security of CHRI under its control or in its custody and the protection of such information from unauthorized access, disclosure, or dissemination;

(4) institute procedures, where computer processing is not utilized, to protect any central repository of CHRI from unauthorized access, theft, sabotage, fire, flood, wind, or other natural or manmade disasters;

(5) provide that direct access to CHRI shall be available only to authorized officers or employees of a criminal justice agency and, as necessary, other authorized personnel essential to the proper operation of the CHRI system.

(e) Each employee working with or having access to CHRI shall be made familiar with the substance and intent of these rules and guidelines.

.011. Access and Review.

(a) Any individual shall, upon satisfactory verification of his identity, be entitled to review without undue burden to either the criminal justice agency or the individual, any CHRI maintained about the individual and obtain a copy of the portion challenged thereof when necessary for the purpose of challenge or correction.

(b) Points of review shall be DPS headquarters, and all sheriffs' offices, police departments, and federal criminal justice agencies which have fingerprint identification capability.

(c) Administrative review shall be provided and necessary correction made of any claim by the individual to whom the information relates that the information is inaccurate or incomplete.

(d) Upon request, an individual whose record has been corrected shall be given the names of all noncriminal justice agencies to whom the data has been given to the extent that logs are available.

(e) The correcting agency shall notify all criminal justice recipients of corrected information to the extent that logs are available.

(f) The individual's right to access and review of CHRI shall not extend to data contained in intelligence, investigatory, or other related files and shall not be construed to include any other information than that defined by the CHRI definition in Rule .002(c).

.012. Audit. Each state and local agency shall retain the appropriate records which shall include but not be limited to the names of all persons or agencies to whom information is disseminated and the date upon which such information is disseminated. (The reporting of a criminal justice transaction to a state, local, or federal repository is not a dissemination of information.)

.013. Certification. Each state and local criminal justice agency which collects, stores, or disseminates CHRI processed by manual or automated operation where such collection, storage, or dissemination has been funded, either directly or indirectly, in whole or in part, with funds made available by LEAA subsequent to July 1, 1973, shall immediately certify compliance with these rules and guidelines to the general counsel, Criminal Justice Division, 411 West 13th Street, Austin, Texas 78701. Each state or local criminal justice agency which collects, stores, or disseminates CHRI processed by manual or automated operation where such collection, storage, or dissemination is funded subsequent to these rules and guidelines, either directly or indirectly, in whole or in part, with funds made available by LEAA shall certify compliance with these rules and guidelines upon the acceptance of the grant award to the general counsel, Criminal Justice Division, 411 West 13th Street, Austin, Texas 78701.

.014. Failure to Comply with Any LEAA Rule or CJD Rule or Guideline/CHRI/Security and Privacy. Failure of any state or local criminal justice agency to comply with any LEAA rule or CJD rule or guideline/CHRI/security and privacy may result in withholding of all grant funds.

.015. Termination of Funds. Failure of any grantee to comply with any LEAA rule or CJD rule or guideline/CHRI/security and privacy within 30 days after funds are withheld may result in a termination of all grant funds.

Issued in Austin, Texas, on December 17, 1979.

Doc. No. 799584

James B. Adams
Executive Director
Criminal Justice Division

Effective Date: January 9, 1980
Proposal Publication Date: October 16, 1979
For further information, please call (512) 475-6065.

Appendix C

EXPUNCTION OF CRIMINAL RECORDS
TEXAS CODE OF CRIMINAL PROCEDURE ARTICLES 55.01-.05
(Vernon Supp. 1980)

CHAPTER FIFTY-FIVE—EXPUNCTION OF CRIMINAL RECORDS

Article 55.01. Right to expunction

A person who has been arrested for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if each of the following conditions exist:

(1) an indictment or information charging him with commission of a felony has not been presented against him for an offense arising out of the transaction for which he was arrested or, if an indictment or information charging him with commission of a felony was presented, it has been dismissed and the court finds that it was dismissed because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense or because it was void;

(2) he has been released and the charge, if any, has not resulted in a final conviction and, is no longer pending and there was no court ordered supervision under Article 42.13, Code of Criminal Procedure, 1965, as amended, nor a conditional discharge under Section 4.12 of the Texas Controlled Substances Act (Article 4476—15, Vernon's Texas Civil Statutes); and

(3) he has not been convicted of a felony in the five years preceding the date of the arrest.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.

Art. 55.02. Procedure for Expunction

Section 1. (a) A person who is entitled to expunction of records and files under this chapter may file an ex parte petition for expunction in a district court for the county in which he was arrested.

(b) The petitioner shall include in the petition a list of all law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state and of all central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction.

Sec. 2. The court shall set a hearing on the matter no sooner than thirty days from the filing of the petition and shall give reasonable notice of the hearing to each official or agency or other entity named in the petition by certified mail, return receipt requested, and such entity may be represented by the attorney responsible for providing such agency with legal representation in other matters.

Sec. 3. (a) If the court finds that the petitioner is entitled to expunction of any records and files that are the subject of the petition, it shall enter an order directing expunction and directing any state agency that sent information concerning the arrest to a central federal depository to request such depository to return all records and files subject to the order of expunction. Any petitioner or agency protesting the expunction may appeal the court's decision in the same manner as in other civil cases. When the order of expunction is final, the clerk of the court shall send a

certified copy of the order by certified mail, return receipt requested, to each official or agency or other entity of this state or of any political subdivision of this state named in the petition that there is reason to believe has any records or files that are subject to the order. The clerk shall also send a certified copy by certified mail, return receipt requested, of the order to any central federal depository of criminal records that there is reason to believe has any of the records, together with an explanation of the effect of the order and a request that the records in possession of the depository, including any information with respect to the proceeding under this article, be destroyed or returned to the court.

(b) All returned receipts received by the clerk from notices of the hearing and copies of the order shall be maintained in the file on the proceedings under this chapter.

Sec. 4. (a) If the state establishes that the petitioner is still subject to conviction for an offense arising out of the transaction for which he was arrested because the statute of limitations has not run and there is reasonable cause to believe that the state may proceed against him for the offense, the court may provide in its order that the law enforcement agency and the prosecuting attorney responsible for investigating the offense may retain any records and files that are necessary to the investigation.

(b) Unless the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested, the provisions of Articles 55.03 and 55.04 of this code apply to files and records retained under this section.

Sec. 5. (a) On receipt of the order, each official or agency or other entity named in the order shall:

(1) return all records and files that are subject to the expunction order to the court or, if removal is impracticable, obliterate all portions of the record or file that identify the petitioner and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order.

(b) The court may give the petitioner all records and files returned to it pursuant to its order.

(c) If an order of expunction is issued under this article, the court records concerning expunction proceedings are not open for inspection by anyone except the petitioner unless the order permits retention of a record under Section 4 of this article and the petitioner is again arrested for or charged with an offense arising out of the transaction for which he was arrested. The clerk of the court issuing the order shall obliterate all public references to the proceeding and maintain the files or other records in an area not open to inspection.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.

Art. 55.03. Effect of Expunction

After entry of an expunction order:

(1) the release, dissemination, or use of the expunged records and files for any purpose is prohibited;

(2) except as provided in Subdivision 3 of this article, the petitioner may deny the occurrence of the arrest and the existence of the expunction order; and

(3) the petitioner or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.

Art. 55.04. Violation of Expunction Order

Section 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

Sec. 2. A person who knowingly fails to return or to obliterate identifying portions of a record or file ordered expunged under this chapter commits an offense.

Sec. 3. An offense under this article is a Class B misdemeanor.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.

Art. 55.05. Notice of Right to Expunction

On release or discharge of an arrested person, the person responsible for the release or discharge shall give him a written explanation of his rights under this chapter and a copy of the provisions of this chapter.

Amended by Acts 1979, 66th Leg., p. 1333, ch. 604, § 1, eff. Aug. 27, 1979.

HANDLING JUVENILE OFFENDER FILES AND RECORDS
TEXAS FAMILY CODE, SECTIONS 51.14-.16

§ 51.14. Files and Records

(a) All files and records of a juvenile court, a clerk of court, or a prosecuting attorney relating to a child who is a party to a proceeding under this title are open to inspection only by:

(1) the judge, probation officers, and professional staff or consultants of the juvenile court;

(2) an attorney for a party to the proceeding;

(3) a public or private agency or institution providing supervision of the child by arrangement of the juvenile court, or having custody of the child under juvenile court order; or

(4) with leave of juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

(b) All files and records of a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court are open to inspection only by:

(1) the professional staff or consultants of the agency or institution;

(2) the judge, probation officers, and professional staff or consultants of the juvenile court;

(3) an attorney for the child; or

(4) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the work of the agency or institution.

(c) Law-enforcement files and records concerning a child shall be kept separate from files and records of arrests of adults and shall be maintained on a local basis only and not sent to a central state or federal depository.

(d) Except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public, but inspection of the files and records is permitted by:

(1) a juvenile court having the child before it in any proceeding;

(2) an attorney for a party to the proceeding; and

(3) law-enforcement officers when necessary for the discharge of their official duties.

§ 51.15. Fingerprints and Photographs

(a) No child may be fingerprinted without the consent of the juvenile court except as provided in Subsection (f) of this section. However, if a child 15 years of age or older is referred to the juvenile court for a felony, his fingerprints may be taken and filed by a law-enforcement officer investigating the case.

(b) No child taken into custody may be photographed without the consent of the juvenile court unless the child is transferred to criminal court for prosecution under Section 54.02 of this code.

(c) Fingerprint and photograph files or records of children shall be kept separate from those of adults, and fingerprints or photographs known to be those of a child shall be maintained on a local basis only and not sent to a central state or federal depository.

(d) Fingerprint and photograph files or records of children are subject to inspection as provided in Subsections (a) and (d) of Section 51.14 of this code.

(e) Fingerprints and photographs of a child shall be removed from files or records and destroyed if:

(1) a petition alleging that the child engaged in delinquent conduct or conduct indicating a need for supervision is not filed, or the proceedings are dismissed after a petition is filed, or the child is found not to have engaged in the alleged conduct; or

(2) the person reaches 18 years of age and there is no record that he committed a criminal offense after reaching 17 years of age.

(f) If latent fingerprints are found during the investigation of an offense, and a law-enforcement officer has reasonable cause to believe that they are those of a particular child, if otherwise authorized by law, he may fingerprint the child regardless of the age or offense for purpose of immediate comparison with the latent fingerprints. If the comparison is negative, the fingerprint card and other copies of the fingerprints taken shall be destroyed immediately. If the comparison is positive, and the child is referred to the juvenile court, the fingerprint card and other copies of the fingerprints taken shall be delivered to the court for disposition. If the child is not referred to the court, the fingerprint card and other copies of the fingerprints taken shall be destroyed immediately.

(g) When destruction of fingerprints or photographs is required by Subsection (e) or (f) of this section, the agency with custody of the fingerprints or photographs shall proceed with destruction without judicial order. However, if the fingerprints or photographs are not destroyed, the juvenile court, on its own motion or on application by the person fingerprinted or photographed, shall order the destruction as required by this section.

§ 51.16. Sealing of Files and Records

(a) On the application of a person who has been found to have engaged in delinquent conduct or conduct indicating a need for supervision, or a person taken into custody to determine whether he engaged in delinquent conduct or conduct indicating a need for supervision, or on the juvenile court's own motion, the court, after hearing, shall order the sealing of the files and records in the case, including those specified in Sections 51.14 and 51.15 of this code, if the court finds that:

(1) two years have elapsed since final discharge of the person, or since the last official action in his case if there was no adjudication;

(2) since the time specified in Subdivision (1) of this subsection, he has not been convicted of a felony or a misdemeanor involving moral turpitude or found to have engaged in delinquent conduct or conduct indicating a need for supervision, and no proceeding is pending seeking conviction or adjudication; and

(3) it is unlikely the person will engage in further delinquent conduct or conduct indicating a need for supervision or will commit a felony or a misdemeanor involving moral turpitude.

(b) The court may grant the relief authorized in Subsection (a) of this section at any time after final discharge of the person or after the last official action in his case if there was no adjudication.

(c) Reasonable notice of the hearing shall be given to:

(1) the person who made the application or who is the subject of the files or records named in the motion;

(2) the prosecuting attorney for the juvenile court;

(3) the authority granting the discharge if the final discharge was from an institution or from parole;

(4) the public or private agency or institution having custody of files or records named in the application or motion; and

(5) the law-enforcement agency having custody of files or records named in the application or motion.

(d) Copies of the sealing order shall be sent to each agency or official therein named.

(e) On entry of the order:

(1) all law-enforcement, prosecuting attorney, clerk of court, and juvenile court files and records ordered sealed shall be sent to the court issuing the order;

(2) all files and records of a public or private agency or institution ordered sealed shall be sent to the court issuing the order;

(3) all index references to the files and records ordered sealed shall be deleted;

(4) the juvenile court, clerk of court, prosecuting attorney, public or private agency or institution, and law-enforcement officers and agencies shall properly reply that no record exists with respect to such person upon inquiry in any matter; and

(5) the adjudication shall be vacated and the proceeding dismissed and treated for all purposes, including the purpose of showing a prior finding of delinquency, as if it had never occurred.

§ 51.16

(f) Inspection of the sealed files and records may be permitted thereafter by an order of the juvenile court on the petition of the person who is the subject of the files or records and only by those persons named in the order.

(g) On the final discharge of a child or on the last official action in his case if there is no adjudication, the child shall be given a written explanation of his rights under this section and a copy of the provisions of this section.

(h) A person whose files and records have been sealed under this Act is not required in any proceeding or in any application for employment, information, or licensing to state that he has been the subject of a proceeding under this Act; and any statement that he has never been found to be a delinquent child shall never be held against the person in any criminal or civil proceeding.

Amended by Acts 1975, 64th Leg., p. 2156, ch. 693, § 13, eff. Sept. 1, 1975.

1975 Amendment. Added subsec. (h).

1. In general

Vernon's Ann.Civ.St. art. 6701*l*—5 authorizes the administration of breath tests to minors as well as adults; records of such a test, when administered to a person under 17 years of age, must be maintained in conformance with the requirements of this section and § 51.14. Op.Atty.Gen.1977, No. H-1034.

Appendix E

CHALLENGE TO CRIMINAL RECORD HISTORY INFORMATION

1. Name of individual submitting challenge:_____

2. Name of agency:_____

3. Records to which exceptions taken:_____

Name of individual to whom records relate:_____

Identification number:_____

4. Summary of exceptions and reasons therefor:_____

5. Verification.

I affirm that I have taken the above exceptions in good faith, and to the best of my knowledge and belief.

_____
Signature of Individual

Date of verification: _____

6. Notice of Procedure. [Insert local procedure.]

SOURCE: Project SEARCH Tech. Memo. No. 4, p. 60.

Appendix F

NOTICE OF RESULTS OF AUDIT OF CRIMINAL RECORD HISTORY INFORMATION

To: _____

_____

_____

Pursuant to exceptions taken on _____, 19__, by _____to criminal record history information within the custody or under the control of _____ _____, an audit of the information has been conducted and, in accordance with the results of that audit, the exceptions have been _____. The following actions have been taken, or now are in progress, to implement the audit's findings:

_____

_____

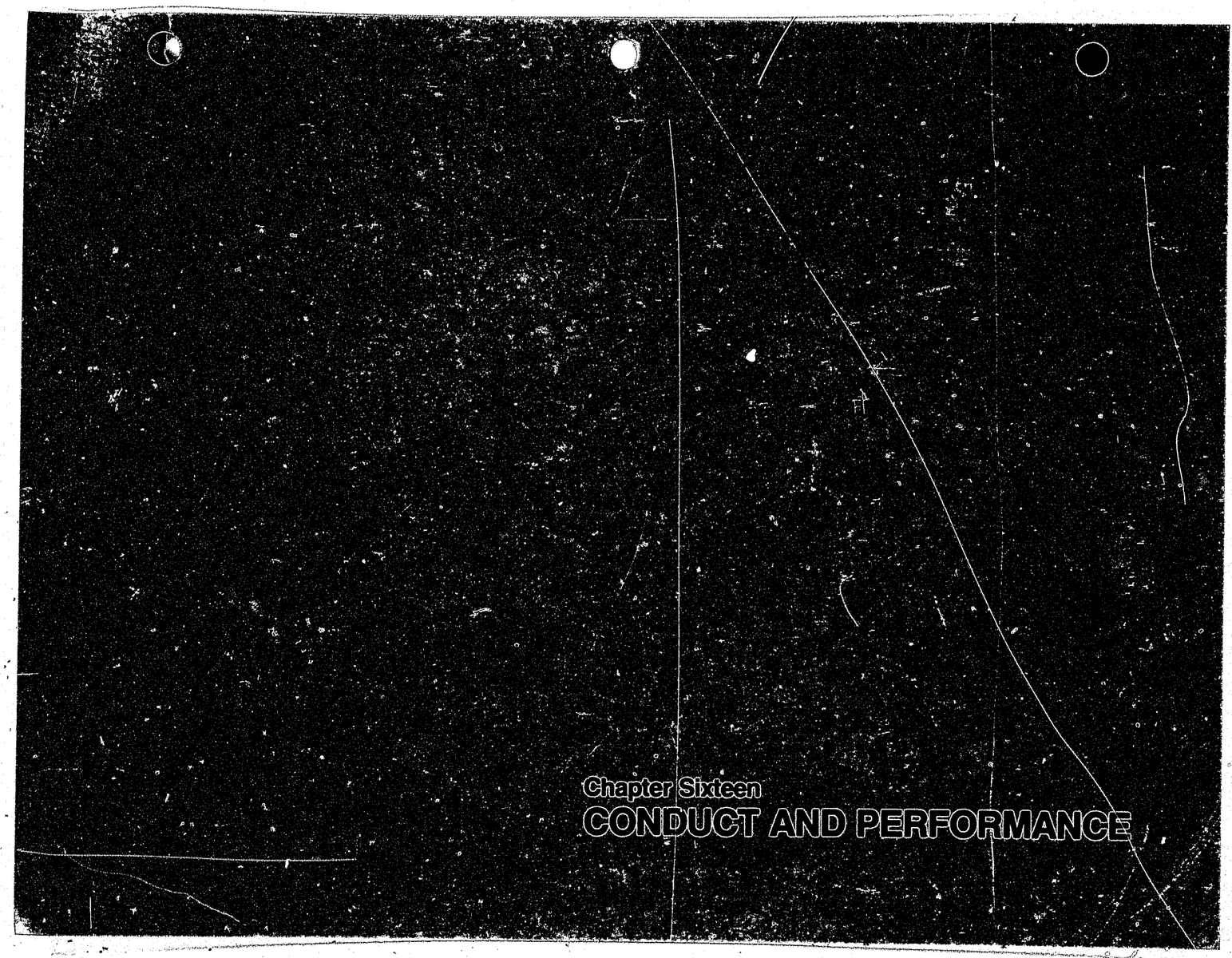
_____

_____

_____
[Name of officer conducting the audit.]
[Title]

Date: _____

SOURCE: Project SEARCH Tech. Memo. No. 4, p. 61.



Chapter Sixteen

CONDUCT AND PERFORMANCE

CHAPTER SIXTEEN

CONDUCT AND PERFORMANCE

This chapter sets forth suggested departmental rules on conduct and performance for peace officers to follow. Having all sworn members of a department observe the provisions of this chapter should promote discipline and good public relations. For a method of handling alleged violations of these rules, see Chapter Seventeen on Departmental Review and Discipline. A variety of law enforcement agencies should be able to adapt the rules of this chapter. Thus, although the rules refer, for the sake of convenience, to the "chief of police" or "the chief," they are meant to include any other "law enforcement chief executive," such as a sheriff or a constable. For a more thorough analysis of rules on conduct and performance, see International Association of Chiefs of Police (IACP), Managing for Effective Police Discipline (2d rev. ed. 1977).

SECTION ONE: UNIFORM, EQUIPMENT, AND APPEARANCE

16:1.01. Personal Appearance - An officer on duty shall maintain a neat, well-groomed appearance and shall style his hair and wear his uniform in accordance with established departmental procedures.

16:1.02. Condition of Uniform - An officer shall always keep his uniform neat, clean, and in good repair.

16:1.03. Identification - An officer shall always have his identification card on his person or in his immediate presence, except when inappropriate (e.g., while swimming).

16:1.04. Use of Departmental Equipment - An officer shall use departmental equipment in accordance with established departmental procedures and shall not intentionally or negligently abuse, damage, or lose departmental equipment.

SECTION TWO: RESPONSIBILITIES AND GENERAL CONDUCT

16:2.01. General Conduct - An officer shall always be considered on duty while within the department's jurisdiction; he shall always be prepared to act whenever circumstances indicate his services are required to protect life or property.

16:2.02. Out-of-Uniform Enforcement - An officer not in uniform shall not seek an arrest based on minor traffic violations and Class C misdemeanors. (This exception does not apply to flagrant or dangerous offenses such as "failure to stop and give information," "failure to stop and render aid," or "driving while intoxicated.")

16:2.03. Request for Identification - An officer shall politely furnish his name and badge number to any person requesting such information except when instructed otherwise by proper authority or when necessary in the performance of police work.

16:2.04. Courtesy - An officer shall be courteous to the public. An officer shall perform his duties with tact, by controlling his temper and exercising the utmost patience and discretion. An officer shall not engage in argumentative discussions even in the face of extreme provocation. In the performance of his duties, he shall not use coarse, violent, profane, or insolent language or gestures. An officer shall not express any prejudice concerning race, religion, politics, national origin, or similar personal characteristics.

16:2.05. Unbecoming Conduct - An officer shall always conduct himself (both on and off duty) in a way which reflects most favorably on the department. Unbecoming conduct includes unjustified behavior which brings the department into disrepute, discredits a member of the department, or impairs the operation of the department.

16:2.06. Reporting for Duty - An officer shall report for duty at the time and place specified by his superior officer. At the time he reports, an officer shall be mentally and physically fit to perform his duties. He shall be properly equipped so that he can immediately assume his duties.

16:2.07. Alertness on Duty - An officer shall remain awake and alert during the entire time he remains on duty. If unable to do so, he shall immediately report to his superior officer.

16:2.08. Neglect of Duty - An officer shall not engage in any activity, entertainment, or personal business which would distract him or cause him to neglect his official duties.

(continued)

16:2.09. Meals - An officer assigned to continuous duty for a period of eight or more hours may suspend patrol or other assigned activity, subject to immediate call, for the purpose of having one meal, but only for such period of time and at such time and place as permitted by departmental procedures. An officer assigned to uniform patrol shall request permission from (and give location of the meal stop to) the dispatcher to permit emergency communication.

16:2.10. Use of Tobacco - An officer, when in uniform, shall not use tobacco unless:

(a) He does not thereby offend citizens in his presence,
(b) He is not in formation, and
(c) He does not have to leave his post for the sole purpose of using tobacco.

16:2.11. Operation of Vehicles - An officer shall operate an official vehicle carefully and prudently. An officer shall obey all laws of the state as well as departmental orders pertaining to vehicle operation.

16:2.12. Use of Weapons - An officer shall handle and use weapons with extreme care and prudence. An officer shall use weapons in strict accordance with established departmental procedures.

16:2.13. Processing Evidence - An officer shall process evidence in strict accordance with departmental procedures. An officer shall not convert to his own use, destroy, or remove any evidence or other material found at the scene of any police investigation incident, unless otherwise authorized by the established departmental procedures.

16:2.14. Interference with Cases -

(a) Arrest and Prosecution - A member shall not interfere with any arrest or prosecution brought by other members of the department or by any other agency or person.
(b) Investigations - An officer, without consent, snall not interfere with cases assigned to other officers for investigation. A member shall not undertake any investigation or other police action not part of his regular police duties, unless he must act immediately. If he does take such action, the officer must make a written supplement on the case and notify the appropriate supervisor.
(c) Operations - An officer shall not interfere with the operation of any departmental bureau, division, section, or unit.

(continued)

16:2.15. Conflicting Orders - An officer who receives a proper order that conflicts with a previous order shall respectfully inform the superior who issued the second order of the conflict. If the superior officer does not alter or retract the conflicting order, the order shall stand. The superior issuing the second order shall have responsibility for any consequences of the conflicting order.

16:2.16. Request for Assistance - An officer shall respond to any citizen's reasonable request for assistance by obtaining all pertinent information in an official and courteous manner. The officer shall then act upon the request consistent with established departmental procedures.

16:2.17. Suggestions Pertaining to Services - An officer shall not recommend or suggest in any manner, except in the transaction of personal business, the employment or procurement of a particular product, professional service, or commercial service (e.g., an attorney, ambulance service, towing service, bondsman, mortician, etc.). For ambulance or towing service, when such a service is necessary but the person needing the service cannot or refuses to procure same, the officer shall proceed in accordance with established departmental procedures.

16:2.18. Equal Enforcement - An officer shall treat all persons fairly and equally in the enforcement of the law without regard to race, sex, religion, social status, ethnic origin, or other irrelevant personal characteristic.

16:2.19. Treatment of Persons in Custody - An officer shall not mistreat persons in his custody. An officer shall follow established departmental procedures for handling such persons.

16:2.20. Departmental Reports - An officer shall submit all necessary reports on time and in accordance with existing regulations. All reports submitted by an officer shall be truthful. No officer shall knowingly include or cause to be included any inaccurate, false, or improper information in any departmental record, report, or investigation.

16:2.21. Citizen Complaints - An officer shall never attempt to dissuade any citizen from lodging a complaint. An officer may attempt to resolve the complaint. If the officer cannot readily resolve the complaint, the officer shall promptly and courteously refer the citizen to the [appropriate supervisor or unit of the department].

(continued)

16:2.22. Violation of Rules - An officer shall not commit or omit any act that violates any of the rules and regulations of the department. Ignorance of the rules and regulations never justifies any such violation. An officer has full responsibility for his own acts; he shall not shift the burden of responsibility for executing or failing to execute a lawful order or police duty.

Constitutional questions can arise when a department disciplines an officer for "unbecoming conduct" (Rule 16:2.05). Whenever possible, a department should base a disciplinary action on a violation of a rule with less vagueness. To maintain morale and to protect itself from liability, a department should follow a rational and consistent enforcement policy. Thus, the conduct termed "unbecoming" should relate to the officer's ability to perform his duties. In addition, all officers should know, with significant specificity, what conduct the department will consider unbecoming. See IACP, Managing for Effective Police Discipline 46-47, 130-31, 270-77 (2d rev. ed. 1977).

SECTION THREE: PROFESSIONAL CONDUCT AND PERSONAL BEHAVIOR

16:3.01. Conformance to Laws - An officer shall obey all federal, state, and local laws. An officer violating any law shall be subject to appropriate disciplinary action, in accordance with departmental procedures and at the discretion of the chief.

16:3.02. Abuse of Position -

(a) Use of Official Identification or Position - An officer shall not use his official position, identification card, or badge for personal or financial gain or privilege except in the performance of duty. An officer shall not lend his identification card or badge to another person, or permit it to be photographed or reproduced.

(b) Use of Name, Photograph, or Title - An officer shall not permit or authorize the use of his name, photograph, or official title, which identifies him as a member of the [department or agency] for testimonials or advertisements of any commodity or commercial enterprise, or for any personal reasons, without the approval of the chief of police.

16:3.03. Press Relations at Crime Scenes - An officer at the crime scene shall grant access and supply public facts about the crime to the working press, to the extent this does not conflict with sound police procedure or interfere with the investigation. Whenever an officer is uncertain whether to provide access or release certain information, he should refer the press to the [appropriate supervisor (e.g., the highest ranking supervisor at the scene)].

16:3.04. Public Statements and Appearances - Without approval from the chief of police (or unless it is part of his assigned duties), an officer shall not permit himself to be held out (in public or in any of the media) as an official representative of this department. An officer shall not, directly or indirectly, seek publicity for his restoration to duty or for his promotion, transfer, or return to a particular duty station.

16:3.05. Confidentiality of Information - An officer shall treat the official business of the department as confidential. An officer shall only disseminate official information to those intended to receive it in accordance with established departmental procedures. An officer may remove or copy official records or reports from a police installation only in accordance with established departmental procedures. An officer shall not divulge the identity of a person giving confidential information, unless instructed otherwise by proper authority.

(continued)

16:3.06. Insubordination - An officer shall promptly obey any lawful order of a superior officer. "Superior officer" includes any officer having authority to exercise command in a given situation. Insubordination includes the willful disobedience of any order lawfully issued by a superior officer, or any insolent language or conduct toward a superior officer.

16:3.07. Criticism - An officer shall not publicly criticize or ridicule the department, its policies, or its members by talking, writing, or otherwise making defamatory, obscene, or unlawful statements which impair the operation of the department.

16:3.08. Polygraph and Other Examinations - All examinations carried out under this rule shall specifically relate to activities concerning the scope of employment or departmental affairs.

- *(a) Polygraph Examinations - When ordered by the chief, an officer shall submit to a polygraph examination when such an examination relates to a particular investigation by the [Internal Affairs Division]. However, when a citizen's complaint forms the basis for the investigation, and the conduct complained of is non-criminal, and no corroborating evidence has been discovered, the chief will ordinarily not require the officer to submit to a polygraph examination unless the citizen first submits to one.*
- *(b) Medical Examinations - An officer shall submit to any medical, chemical, drug, alcohol, ballistics, photographic, or other test when so ordered by the chief of police.*

16:3.09. Immoral Conduct - An officer shall maintain a level of moral conduct in his personal affairs in keeping with the highest standards of the law enforcement profession. No officer shall participate in any incident involving moral turpitude which may impair his ability to perform as an officer or cause the department to suffer disrepute.

16:3.10. Use of Intoxicants -

- *(a) On Duty or in Uniform - An officer shall not use intoxicants (e.g., alcohol or other drug) while in uniform. An officer shall not report for duty, or be on duty, while under the influence of any intoxicants to any degree whatsoever. A plainclothes officer on duty may only drink alcoholic beverages (but shall not become intoxicated) when such activity is appropriate in furthering a legitimate police mission.*

(continued)

- *(b) Alcohol in Police Installations - An officer shall not bring into or store alcoholic beverages in any police facility or vehicle, except those which may be held for evidence.*
- *(c) Off Duty - An officer, while off duty, shall refrain from consuming intoxicating beverages to the extent that it results in offensive behavior which might discredit the department.*
- *(d) Nonalcoholic Drugs - An officer shall not use narcotics, hallucinogens, or dangerous drugs except when prescribed by a physician or dentist. Whenever an officer must take dangerous drugs, narcotics, or hallucinogens, the officer shall so notify his supervisor.*

16:3.11. Gambling - An officer shall not engage or participate in gambling in any form while on duty or in uniform or while in any departmental facility. He shall not engage in any form of illegal gambling at any time, except in the performance of duty and while acting under proper and specific orders from his superior.

16:3.12. Associations - Except as directed by a superior, an officer shall avoid associating with persons whom he knows, or should know, are racketeers, gamblers, convicted felons, persons under criminal investigation or indictment, and persons with a reputation in the community for felonious criminal behavior. The superior officer will note the need for and status of rehabilitation of such persons and the need for some such associations because of a family relationship of the officer to such persons.

16:3.13. Prohibited Establishments - An officer shall not frequent, visit, or enter a house of prostitution, gambling house, or establishment where federal or state laws are violated, except as directed by a superior.

16:3.14. Gifts or Bribes - An officer shall not ask for or accept any gift or bribe, including food or drink for himself or others, from any individual, business establishment, or organization, which in any way results from his position as an officer. However, an officer may accept nominal food and drink only after his firm but courteous efforts to pay have failed. An officer should not frequent an establishment which he reasonably believes will not accept his payment. An officer shall not ask for or accept any fee, reward, or other direct or indirect reimbursement or benefit for the performance or nonperformance of his official duties, except as directed by the chief of police. An officer shall immediately report any such offer which may have occurred in an effort to affect his official conduct.

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16:3.15. Abuse of Process - An officer shall not make any false accusation or criminal charge, or intentionally manufacture, falsify, destroy, or withhold evidence or information.

16:3.16. Telephone - An officer shall have a telephone in his residence and shall immediately report any change of telephone number or address to his supervisor.

16:3.17. Financial Disclosure - An officer shall submit financial disclosure and responsibility statements in the manner prescribed by the Chief of Police in connection with an investigation of an allegation which makes such information material. To the extent the law permits, these statements shall be kept confidential.

16:3.18. Payment of Debts - An officer shall not incur any financial obligation which he knows or should know he cannot meet. An officer shall pay his just debts when due. Financial difficulties stemming from unforeseen medical expenses or personal disaster shall not be cause for discipline, provided that the officer has undertaken a good faith effort to settle all accounts. An officer shall not cosign a note for any superior officer.

16:3.19. Carrying of Firearms - An officer, when off duty, should carry an authorized firearm if he is traveling in public places within the jurisdiction of his department. When wearing civilian clothes, the officer shall conceal his firearm from public view. While off-duty and outside [the local jurisdiction], an officer need not carry a firearm.

Some law enforcement agencies find it beneficial to have a residency requirement. Other agencies find that it serves no purpose and creates recruiting and other problems. On balance, the Model Rules recommend not having a residency requirement. However, those agencies which wish to include one might consider the following alternatives:

> Residence - An officer shall reside within the local jurisdiction served by the department. A new officer shall have resided within the local jurisdiction at least one year before his appointment. [*Alternative:* An officer shall reside within [30] minutes travel time from his duty station. A new officer shall have resided within [30] minutes of his duty station at least [one year] before his appointment.]

An officer has a somewhat limited statutory exemption (Tex. Penal Code Ann. sec. 46.03(1) (Vernon Supp. 1980)) from the statutory prohibition against unlawfully carrying certain weapons (Tex. Penal Code Ann. sec. 46.02 (Vernon 1974)). Section 46.02(a) prohibits a person from carrying "on or about his person a handgun, illegal knife, or club." The terms "handgun," "illegal knife," and "club" are defined in sections 46.01(5), (6), and (1) respectively. "Club" includes, e.g., a blackjack, nightstick, and chemical irritant. Section 46.03(1) exempts a peace officer while "in the actual discharge of his official duties."

Thus, even as regards "handguns" and "clubs" authorized by his department, an officer may have no special legal authority to carry such weapons outside his jurisdiction. (Other citizens have other exemptions under section 46.03, e.g., while "traveling.") Case law, although arguably outdated, which interpreted the statutory antecedents to section 46.03, also casts doubts on an officer's authority to carry the "prohibited" weapons outside his jurisdiction unless he is actually discharging his official duties (or, e.g., "traveling"). See, e.g., Gandara v. State, 94 Tex. Crim. 535, 252 S.W. 166 (1923); Ray v. State, 44 Tex. Crim. 158, 70 S.W. 23 (1902); Corley v. State, 33 S.W. 975 (Tex. Crim. App. 1896); Munn v. State, 33 S.W. 977 (Tex. Crim. App. 1896). But see Williams v. State, 42 Tex. 466 (1875); Clayton v. State, 21 Tex. Crim. 343, 17 S.W. 261 (1886).

Discipline based on "criticism" (Rule 16:3.07) creates problems similar to those discussed regarding "unbecoming conduct" (Rule 16:2.05). See IACP, Managing for Effective Police Discipline 253-56, 277-81 (2d rev. ed. 1977). Although certain expressions of criticism enjoy first amendment protection,

"free speech" will generally be balanced against a law enforcement agency's need to maintain discipline. E.g., Attaway v. City of Mesquite, 563 S.W.2d 343 (Tex. Civ. App.--Dallas 1978, no writ).

SECTION FOUR: OUTSIDE ACTIVITIES

16:4.01. Outside Employment - [Alternative: *An officer shall not be employed in any capacity in other business, trade, occupation, or profession while employed by the department.*] [Alternative: *An officer may be employed in any lawful capacity in any other business, trade, occupation, or profession while employed by the department, as long as such employment does not bring the department into disrepute, reflect discredit upon the officer, or conflict with his employment or performance for this department. Before accepting any other employment, the officer must obtain permission from the chief of police (or his designee). Permission will be denied if the employment does not satisfy the above restrictions. When so employed, the officer shall notify the chief of police (or his designee) in writing of the place of employment and hours of work.*] [Alternative: *An officer may be employed outside the department only upon receiving prior approval from the chief of police (or his designee). Approval will be granted only when:*

(a) The officer is undergoing a critical financial hardship,
(b) Resolution of the hardship requires employment outside the department, and
(c) The employment sought by the officer will in no way conflict with his employment for the department.]

16:4.02. Labor Activities -

(a) An officer shall have the right to join labor organizations, but nothing shall compel the department to recognize or to engage in collective bargaining with any such labor organization.
(b) It is unlawful for any officer to engage in any strike against the department. An officer who violates this provision commits a misdemeanor and shall, after conviction, be subject to fine, imprisonment, and/or discharge from the department. (Tex. Rev. Civ. Stat. Ann. art. 1269m, sec. 27 (Vernon 1963).)

16:4.03. Political and Other Activities -

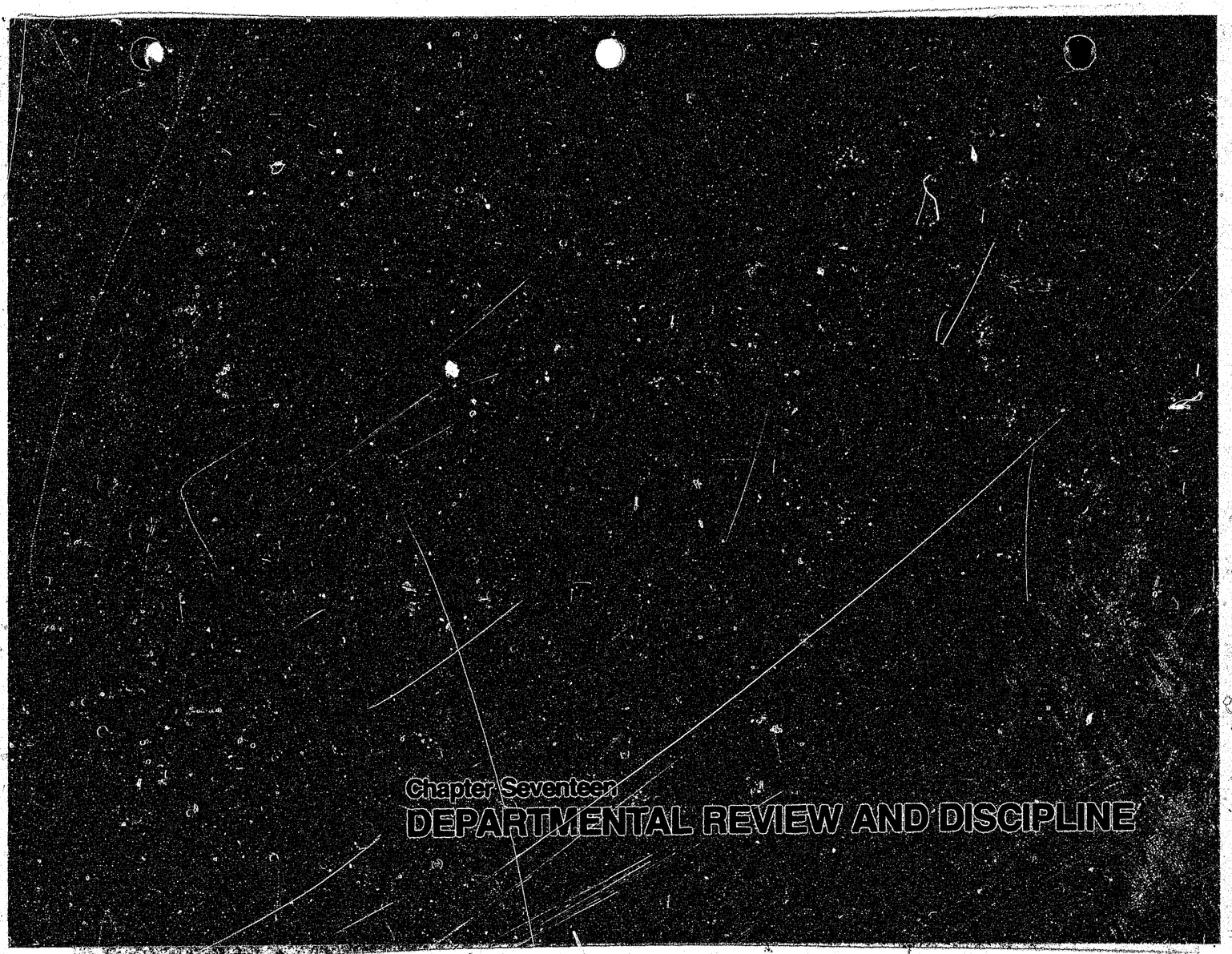
(a) No person may coerce an officer to participate or to refrain from participating in a political campaign. (Tex. Rev. Civ. Stat. Ann. art. 1269n (Vernon Supp. 1980).)
(b) An officer, while in uniform or on active duty, shall not take an active part in any political campaign of another for an elective position of the city. The term "active part" means making political speeches, passing out cards or other political literature, writing letters, signing petitions, actively and openly soliciting votes, and making public derogatory remarks about the candidates. (Tex. Rev. Civ. Stat. Ann. art. 1269m, sec. 22 (Vernon Supp. 1980).)

(continued)

(c) No one may require an officer to contribute to any political fund or to render any political service. No one may punish an officer in any way for refusing to do so. (Tex. Rev. Civ. Stat. Ann. art. 1269m, sec. 22 (Vernon Supp. 1980).)

(d) An officer shall receive reasonable leave of absence, provided there are a sufficient number of employees to carry out the normal functions of the department, to attend any police school, conventions, or meetings to secure more efficient departments and better working conditions. An officer may exercise his constitutional right to appear before or petition the Texas legislature. (Tex. Rev. Civ. Stat. Ann. art. 1269m, sec. 22 (Vernon Supp. 1980).) Such leave shall be without pay unless such representation involves the immediate and direct benefit of the department, as determined by the chief of police.

Rules 16:4.02(b) and 16:4.03(b), (c), and (d) derive directly from Texas Revised Civil Statutes Annotated article 1269m which applies to cities with a statutory Civil Service Commission. However, in general, these rules suggest applying the above standards to all law enforcement agencies.



Chapter Seventeen

DEPARTMENTAL REVIEW AND DISCIPLINE

CHAPTER SEVENTEEN

DEPARTMENTAL REVIEW AND DISCIPLINE

Diligent internal review of complaints against officers should serve both the professional interests of police administrators and officers and the general interest of the community in deterring police misconduct. The integrity of a law enforcement agency often depends on the way that agency handles complaints against its officers. A department should implement review and discipline procedures that promote the fair, prompt, and impartial resolution of all complaints made against officers.

This chapter presents alternative approaches that a variety of law enforcement agencies can adapt and tailor according to their particular needs. For ease of reference, this chapter uses the term "chief" or "chief of police." However, this term is meant to include any other "law enforcement chief executive," such as a sheriff or a constable. For a thorough discussion of police discipline and departmental procedures, see International Association of Chiefs of Police (IACP), Managing for Effective Police Discipline (2d rev. ed. 1977), particularly at 156-83. For a general discussion of internal affairs divisions, see Krajick, Police v. Police, Police Mag., May 1980, at 6.

SECTION ONE: DEFINITION

17:1.01. Allegation - A charge that an officer has violated a rule or regulation covered by the departmental disciplinary process.

SECTION TWO: GENERAL PROVISIONS

17:2.01. This chapter sets forth the method to handle every allegation that an officer violated a statute, ordinance, [city charter], departmental rule, regulation, order, or procedure.

17:2.02. Allegations of misconduct may be presented by supervisory or commanding officers, other officers or employees of this department, members of the general public, or public officials.

17:2.03. An officer shall not be disciplined except for just cause involving a sustained violation of a statute, ordinance, [city charter], departmental rule, regulation, order, or procedure. All officers shall receive a written list of specific potential violations and the expected corresponding range of penalties that apply to each violation.

17:2.04. As soon as practical, but no later than before the imposition of any discipline, the officer under investigation shall have received a [copy of the complaint or a] detailed summary of the charges against him and have had an adequate opportunity to rebut those charges.

17:2.05. Control logs -

(a) The [Internal Affairs Division] shall record and maintain a log of every allegation and matter coming before it in accordance with Rule 17:2.05(e).

(b) The control log shall contain the following information:

(1) A separate control number for each allegation or matter;
(2) Name, rank, and identifying number of the officer involved;
(3) Date and hour report received;
(4) Name and address of the complainant, if known;
(5) Disposition of investigation;
(6) Hearing disposition, if any; and
(7) Action taken, if any.

(c) Not less than once every [60] days, the appropriate officer shall verify that every allegation has been recorded and handled in accordance with this chapter. Any unresolved allegation shall be promptly investigated.

(d) Only authorized personnel may receive access to the control log. Logs and all complaint and investigatory materials must be kept confidential.

(e) Anonymous allegations of misconduct, whether oral or written, will be courteously accepted. However, an anonymous allegation will be investigated only at the chief's discretion or if it involves an alleged felony or Class A misdemeanor.

(continued)

(f) Whenever a report of an allegation is entered in the control log, the officer involved shall be notified in writing of the substance of the complaint within [24] hours, unless the chief determines that the notification should be delayed for good cause.

The way a law enforcement agency handles citizen complaints often becomes a focal point of administrative and community concern. As discussed in detail in IACP, Managing for Effective Police Discipline 37-40, 45-61, 98-101, 159-62 (2d rev. ed. 1977), a law enforcement agency should view citizen complaints as a resource which indicates community perceptions as well as possible incidents or patterns of misconduct. If properly used, complaints from the public can assist the law enforcement chief executive to improve the performance of his agency. For a discussion of these issues, see Zavislak, The Citizen Complaint Process: More Than A Necessary Evil, Police Chief, Mar. 1976, at 26. Viewed in this light, even anonymous reports of relatively minor allegations may merit attention. Many anonymous complaints have proven truthful and accurate. Thus, the proper investigative response varies in relation to the specific attributes of the allegation. For example, a full-scale investigation would only occur in response to a corroborated allegation of serious misconduct.

However, Texas law (Tex. Rev. Civ. Stat. Ann. art. 6252-20) imposes requirements on certain complaints against peace officers (and others):

> In order that a complaint against a . . . policeman may be considered by the head of a state agency or by a chief . . . of a . . . police department, neither of which is under the protection of a civil service statute,

> the complaint must be in writing and signed by the person making the complaint. A copy of the signed complaint must be presented to the affected officer or employee within a reasonable amount of time after the complaint is filed and before any disciplinary action may be taken against the affected employee.

This statute, although perhaps unclear, does not appear to restrict an investigation of an unwritten or unsigned complaint by department personnel other than the chief. Nonetheless, it does limit reliance on such complaints. In addition, almost every agency must carefully husband the limited amount of personnel and financial resources it has available for internal investigations. Thus, anonymity may be appropriately considered as one of the factors in determining the level of attention a particular complaint merits. Moreover, without investigatory safeguards, officer morale might suffer.

First-line supervisors carry the bulk of the responsibility for enforcing departmental rules. See, e.g., Jackson, A Practical Approach to Discipline, Police Chief, Feb. 1980, at 44. The chief executive often is the last to learn of alleged misconduct. Thus, a department needs to develop an appropriate complaint logging process. A department should also develop a system for periodically keeping the complainant apprised of the progress of the investigation and any action taken. If any part of this system becomes unwieldy or too burdensome to the department, adjustments can then be made. For a concise discussion of these issues, see Knox, A Procedural Model for Processing Citizen Complaints, FBI Law Enforcement Bull., Apr. 1980, at 10.

Community relations and education programs should explain complaint procedures. A department should not have needlessly complex or burdensome

procedures which would discourage a citizen from filing a valid complaint. Rather, the strong need to screen out frivolous complaints should be satisfied through prompt and efficient investigation. Thus, for example, a policy of ignoring all citizen complaints until the citizen comes to the station and signs a sworn statement and agrees to take a polygraph test presents undue deterrence. However, each of these steps may become proper at a later stage in the process. A simplified complaint form efficiently satisfies most initial documentation needs.

SECTION THREE: SUPERVISORY REPRIMANDS

17:3.01. A supervisory or commanding officer shall have the authority to reprimand a subordinate officer for minor infractions. Such reprimands, whether oral or written, may include a warning, corrective advice, or recommend additional counseling or training. A supervisor properly imposes a reprimand when he reasonably determines that the alleged misconduct does not require further investigation or action.

17:3.02. After imposing a reprimand, the supervisory or commanding officer shall explain that reprimand in a written report promptly forwarded to the chief.

17:3.03. The commanding or supervisory officer shall also promptly notify the involved officer that he has the right to have a supervisory reprimand reviewed. If the officer desires such review, he shall notify the chief within five days of receiving the supervisory reprimand. By failing to request such review, the officer permanently waives his right to such review.

17:3.04. A supervisory or commanding officer shall have the authority to temporarily relieve from duty any officer for the balance of the working day (with full pay and benefits) if the officer, by continuing to work, would tend to discredit or impair the operation of the department. The supervisory or commanding officer shall immediately notify the chief in writing of any such temporary action. The chief shall have the authority to continue such relief from duty for cause.

SECTION FOUR: INTERNAL INVESTIGATIONS

17:4.01. The chief, through the [Internal Affairs Division] [or the chief's designee], shall have the responsibility for investigating allegations of misconduct by officers of the department.

17:4.02. Procedures -

(a) Promptly upon receipt of an allegation of misconduct, the [Internal Affairs Division] shall assign an investigator to that matter. When feasible, the officer shall receive a summary of the charges against him.

(b) The investigator shall make every effort to interview the complainant (if known), the accused officer, witnesses, the officer's immediate supervisor, and any other persons whose statements might assist in the just resolution of the matter. Every statement shall be reduced to writing and verified by both the person making it and the investigator. Every page shall include the log number, be sequentially numbered, and be initialed by both the person making the statement and the investigator.

(c) Whenever a complainant or witness refuses either to make a statement or to verify a statement made and transcribed, the investigator shall note this refusal (and any explanation) in the record. A reviewing authority may weigh the refusal to make a statement or to verify a statement when considering the case and deciding whether to continue the investigation.

(d) Whenever chemical or other tests or photographs of the officer seem reasonably necessary to the investigation, the chief may (with a written order) require such tests performed or photographs taken.

(e) When ordered by the chief, an officer shall submit to a polygraph examination concerning the matter under investigation. However, when a citizen's complaint forms the basis for the investigation, and the conduct complained of is noncriminal, and no corroborating information has been discovered, the chief will ordinarily not require the officer to submit to a polygraph examination unless the citizen first submits to one.

(f) Any interview of the officer involved shall take place at a reasonable time in relation to the officer's work schedule, unless the situation requires otherwise. The interviewer shall identify himself to the officer and inform him of the administrative or criminal nature of the investigation. The interview may be recorded and transcribed. The officer may receive a copy upon request.

(g) The chief or his designee may order the officer to answer all material and relevant questions specifically, directly, and

(continued)

narrowly relating to the officer's performance of his official duties. However, any statement (and the fruits of that statement) made by an officer based on a threat of dismissal for failing to respond will be inadmissible against him in any subsequent criminal proceeding.

(h) In accordance with the type of investigation, the officer will be informed that his failure or refusal to answer any appropriate question, to take any test, or to be photographed (as set out in Rules 17:4.02(d)-(g)) is grounds for discipline or dismissal from the department as conduct prejudicial to good order.

(i) If an officer is under arrest or is a suspect in a criminal investigation and any answer sought by the investigator (or any information derived from such answer) is intended for use in a criminal trial, the officer shall be informed that:

(1) He has the right to remain silent,
(2) Anything he does say can and will be used against him in a court of law,
(3) He has the right to counsel during the interrogation,
(4) He has the right to have a free counsel appointed if he cannot afford to hire counsel, and
(5) He has the right to stop answering questions at any time.

(j) Upon completion of his investigation, the investigator shall prepare a detailed report of his investigation and conclusions. The investigator shall arrive at one of the following general conclusions:

(1) The investigation tends to disprove the allegation of misconduct,
(2) The investigation tends to support the reported facts but the conduct does not appear improper,
(3) The investigation yielded insufficient information either to prove or disprove the allegation of misconduct, or
(4) The investigation tends to support the allegation of misconduct.

(k) All pages of all investigatory reports and other documents relating to investigations shall be identified by log number. One copy of every report shall be retained [in the Internal Affairs Division files], and one copy shall be forwarded to the chief.

(l) Unless special circumstances prevent it, all investigations must be completed (and the report made) within 30 days from the receipt of the original allegation.

An internal administrative investigation faces fewer legal restrictions than a criminal investigation (e.g., no right to counsel). However, the interface between the two types of investigation creates a unique set of problems. Most of these problems arise when an internal disciplinary matter also involves an apparent violation of a criminal law. As soon as this potential for criminal liability arises (with an accusatory focus on a particular suspect), it triggers an array of constitutional requirements (e.g., Rule 17:4.02(i)). Generally, information gathered for internal discipline cannot be used in a criminal prosecution unless the investigation conformed to the standards of a criminal investigation. E.g., Garrity v. New Jersey, 385 U.S. 493 (1967). Although Garrity involved an express threat of dismissal for failure to answer questions, implied threats may also render evidence inadmissible.

An officer must answer administrative questions that "narrowly and directly" relate to his performance of his law enforcement duties, provided he receives assurance that his answers (and the "fruits" of those answers) cannot be used against him in a criminal proceeding. E.g., Gardner v. Broderick, 392 U.S. 273 (1968). Similarly, an officer must also cooperate with other investigative actions (e.g., polygraph, line-up participation). An officer's failure to cooperate may result in further disciplinary action, provided he first received a warning to that effect. An officer may not be disciplined solely for invoking his constitutional rights, such as his fifth amendment privilege against self-incrimination, or for refusing to sign a waiver of immunity.

To avoid the pitfalls in this area, the best approach in each case may require an initial assessment prior to each investigation to decide

whether to proceed in a strictly "administrative" or strictly "criminal" framework. For a practical discussion of these legal issues, see Davis, Interview of Public Employees Regarding Criminal Misconduct Allegations: Constitutional Considerations, FBI Law Enforcement Bull., Mar. 1980 (pt. 1), at 26; April 1980 (pt. 2), at 27.

SECTION FIVE: PROBATIONARY OFFICERS

17:5.01. An officer shall serve in a probationary capacity for a period of [one year], including academy training period, following his actual employment by the department.

17:5.02. A probationary officer may be disciplined (by his supervisory officer or the chief) or discharged (by the chief) without a hearing provided there is no public disclosure of the reasons for the action taken. A probationary officer shall be privately advised of the reasons for his discipline or discharge.

17:5.03. A disciplined or discharged probationary officer may submit a written rebuttal or explanation in response to the discipline or discharge.

This section provides that all police officers be required to serve an initial one-year probationary period. See Tex. Rev. Civ. Stat. Ann. art. 1269m, sec. 12 (Vernon Supp. 1980); cf., Tex. Rev. Civ. Stat. Ann. art. 4413(29aa), sec. 6 (Vernon Supp. 1980). This one-year probation should afford the administration an opportunity to observe the probationary officer on the job to determine his capability to perform his responsibilities as a police officer.

Rule 17:5.02 provides that a probationary officer may be disciplined or discharged without an opportunity for a hearing if there is no public disclosure of the reason for the action taken. The probationary officer has no legal claim of entitlement to his employment. Thus, without public disclosure of the reason for the action, he cannot claim that his "good name, reputation, honor, or integrity" have been tarnished. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972). Therefore, he has not been deprived of a property or liberty interest protected

by the due process clause of the fourteenth amendment of the US Constitution. An officer who accepts a position that includes a probationary period accepts that his employment is terminable at the will of the employer. Thus, he has no right to further due process if the employer makes no public disclosure of any "stigmatizing" reasons for the discipline or discharge. Bishop v. Wood, 426 U.S. 341, 348 (1976).

Rule 17:5.02 does suggest, in the interest of fairness, that the probationary officer be privately notified of the reasons for his discipline or dismissal. This notification will provide the officer an explanation for the action taken. If the case did not include discharge, the officer will also have an opportunity to amend his behavior accordingly. Rule 17:5.03 permits an officer to contribute to the "record" of a disciplinary action or discharge. This provides the officer with the opportunity to have the record reflect his explanation of the incident.

INTERNAL DISCIPLINE BOARDS

This section discusses various approaches a department may wish to consider in developing an appropriate administrative body to hear and review disciplinary matters. For prototype disciplinary procedures, see IACP, Managing for Effective Police Discipline 156-83 (2d rev. ed. 1977). The following discussion merely presents a few of the alternative components of a disciplinary structure. For a further discussion of these issues, see Fairbanks & Stewart, A Participative Due Process Model for Police Discipline, Police Chief, June 1979, at 67.

In general, regardless of its structure, an internal discipline board serves as a board of inquiry. It usually may request investigative assistance from another division (e.g., internal affairs). To achieve effectiveness, the board must diligently, fairly, and impartially investigate complaints concerning police officer misconduct. The board may conduct hearings to review and investigate allegations of misconduct. At the termination of a discipline hearing, the board will generally make findings of fact and submit recommendations to the chief regarding the proper disciplinary action to take in a given case. As an outgrowth of its hearings, the board may also informally make suggestions to the chief regarding the need for new or revised departmental rules, regulations, or procedures.

A properly established and functioning internal discipline board should fulfill the following goals:

(a) Improved morale and an esprit de corps will arise from impartial and just handling of disciplinary cases. Although the members of the agency will know that they receive close supervision to assure their proper conduct, they will respect discipline procedures that provide them with adequate safeguards and equitable accountability.

(b) Members will feel a sense of participation in the maintenance of discipline.

(c) The community will recognize that its complaints are properly considered, that adequate investigation is made, and that appropriate disciplinary action will follow the inquiry.

(d) The chief of police and elected officials will have confidence that the law enforcement agency serves the best interests of its members as well as the public.

For a further discussion, see International City Management Association, Local Government Police Management 346 (1977).

In addition to these general goals, local circumstances (e.g., size and nature of the agency, existence of a civil service commission, particular local needs) will influence the structure of a department's disciplinary process. Thus, each department should weigh the various alternatives and select the internal discipline board structure which best meets its needs and circumstances. At a minimum, the agency should consider alternative compositions of the board, the nature of the hearing, the range of penalties, and the appeals process.

Composition of Internal Discipline Board

The board should be composed of persons who are neutral, impartial, and detached from prior involvement in the matter under investigation. Board members may be selected in a variety of ways. For example, in many departments the chief appoints each member of the internal discipline board and they serve at his pleasure. The chief may appoint members to serve on an ad hoc, rotating, or permanent basis. Although some departments have internal discipline boards comprised of only upper-level administrators, the trend is toward including personnel of various ranks.

Relying on a broad range of employees to serve as board members often benefits the agency. For example, a department in which responsibility for discipline is widespread improves voluntary compliance and "tends to become self-disciplining" (Id. at 345). However, commentators suggest that at least one board member hold the same rank as the officer facing charges but that no board member hold a lower rank.

The chief need not appoint each member of the board. For example, an internal committee might select the board members. Alternatively, the agency might use an arbitration panel format. This procedure allows the accused officer and the chief each to appoint one member (or another equal number of members) of the panel. These appointees, in turn, agree upon the third member (or another odd number of members) of the panel. Under this format a new panel or board is selected to hear each case of alleged misconduct. Advocates of this procedure approvingly cite its balanced structure and lack of bias.

The board may also have a rotating membership. Under this alternative, board composition would rotate or change periodically (e.g., once every three months). Although this board should probably include representatives of all ranks, it might be appropriate to require a certain minimum membership of certain higher ranks. In an ad hoc format, the chief would, as needed, appoint a new board to hear each case. This alternative might prove most attractive in a small department which hears few cases.

Nature of Hearing

Each law enforcement agency has broad administrative discretion in

deciding the amount of "process" due an accused officer in a hearing before an internal discipline board. In an administrative setting, constitutional law has significant flexibility. Generally, it is advisable to conduct the hearing informally with the nonadversarial objective of determining the facts of an allegation and arriving at a just and effective remedy. The hearing should not be conducted as an adversary proceeding. Thus, individual departments are free to decide whether, for example, to permit cross-examination or to allow the officer to have an attorney or other representative present at the hearing.

Range of Penalties

The chief can mandate the range of penalties from which the discipline board must select. In general, however, at the termination of the hearing, the board should reach one of the following conclusions:

- Unfounded: The investigation reveals no verifiable factual base for the complaint.
- Exonerated: The investigation reveals that the officer acted properly.
- Not Sustained: The investigation verified a basis for the complaint but did not reveal sufficient evidence to determine the officer's guilt or innocence.
- Sustained: The investigation reveals that the officer is guilty of the complaint as charged.

Culver, Policing the Police: Problems and Perspectives, 3 J. Police Sci. & Ad. 125, 127 (1975).

Pending an investigation and determination in a serious matter, an agency may wish to place an officer on "desk" duty or otherwise restrict his official activities. If the charges against an accused officer are sustained, an appropriate penalty should be imposed by either the board

or the chief of police. The range of penalties, for example, may include any of the following:

- Oral or written reprimand,
- Counseling or training,
- Suspension (with or without pay) for a fixed period of time,
- Demotion, or
- Discharge.

In addition, special penalties might be considered for specific misconduct. For example, restitution could be required for damaged departmental property or deductions from salary could compensate for tardiness. In other words, penalties could be tailored to fit the infraction.

Disciplinary Appeals Process

In general, an agency need not provide for an administrative appeals procedure from decisions of the internal discipline board. An agency that decides to permit an administrative appeal usually structures it to run through the chain of command to the chief of police. However, if the chief originally prescribed the discipline, an officer must take his appeal as provided by local ordinances or other established procedures (e.g., to the city manager, mayor, or civil service commission). An aggrieved officer may, as a last resort after exhausting his administrative appeals, appeal to the courts for a trial de novo (or pursue arbitration, if appropriate).

Cities with Civil Service Commissions

Many cities have passed ordinances or adopted state legislation to establish local civil service commissions. (Tex. Rev. Civ. Stat. Ann. art. 1269m sets forth the limitations and requirements placed on police internal disciplinary action by statutory civil service commissions.) A local civil service commission may have the authority to oversee police department disciplinary actions against police officers. They are often a step in the appeals process. If applicable, an agency must understand the operation of the local civil service commission and its rules regarding police disciplinary action. For a general discussion of these issues, see National Institute of Law Enforcement and Criminal Justice (Law Enforcement Assistance Administration of the US Department of Justice), Civil Service Systems: Their Impact on Police Administration (1979).

END