TEXAS CRIMINAL DEFENSE GUIDE E-BOOK

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CRIMINAL DEFENSE COURT PROCESS

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CONTENTS

COURT PROCESS

HOW CRIMINAL CASES PROCEED

In the United States, a person can be charged with a crime in state or federal court. Where charges are filed depends on the nature of the offense and decisions made by prosecutors. The vast majority of offenses committed are state crimes that must be tried in state court. Federal prosecutors generally have jurisdiction in cases involving government fraud or interstate commerce, such as bank robbery or shipping illegal substances from one state to another.

Federal prosecutors tend to prefer cases that are "big and easy," so where both state and federal can laws apply, the scale of the offense matters. For instance, a case involving a single kilogram of cocaine might be charged in state court. But if many kilograms are involved, along with several co-defendants or co-conspirators and multiple cooperating witnesses, then the case might be filed in federal court.

In extremely rare circumstances, a case can be charged in **both** state and federal court — although usually not at the same time. In one famous example, the police officers that beat Rodney King were acquitted in California state court, but were subsequently charged and convicted in federal court. This was possible because of the doctrine of "dual sovereignty": because state and federal court systems are independent, a defendant can be charged in one even if they have been acquitted in the other.

Regardless of where charges are filed, a criminal attorney needs the right training and experience. For federal cases, an attorney must be licensed in federal court. State and federal court practices differ in significant ways and a lawyer who can handle a case in state court is not necessarily equipped to handle one in federal court — and vice-versa.

FEDERAL CASES TEND TO MOVE MUCH MORE QUICKLY THAN STATE CASES, SO IF YOU HAVE BEEN CHARGED IN FEDERAL COURT, IT IS IMPORTANT TO ACT QUICKLY TO HIRE A QUALIFIED LAWYER AS SOON AS POSSIBLE.

Continue reading to learn about the 8 steps in a criminal case.

PRE-TRIAL HEARINGS AND MOTIONS

Certain proceedings, such as bond reduction or suppression hearings, take place before a trial starts. **The importance of proper pre-trial motions cannot be underestimated.** Cases can be dismissed during the pre-trial phase due to Speedy Trial violations, illegal search and seizure, violations of the right to counsel, incorrectly written charges and so on. Often a pre-trial motion filed at the right time can get a case thrown out before it ever makes it to trial.

BOND HEARINGS

To be released from custody, a defendant must post "bond."

- **Cash bond** is when a defendant pays the full amount of the bond in cash to the Sheriff. The money will be refunded once the case is over.
- **Bail bond** is when a defendant uses a bonding company or bail bondsman to borrow the collateral for the bond. The bondsman will charge a fee and may require additional conditions. The bail fee is **not** refunded when the case is over. This is the most common type of bond. We pride ourselves on having excellent working relationships with reputable bondsmen who will not unduly burden the defendant with conditions such as weekly in-person reporting. Unlike some lawyers, we have no business or financial interest in bonding companies.
- **Personal recognizance bond (PR bond)** is when the court uses its discretion to release the defendant without requiring a surety or other form of collateral. These are rarely given in Harris County and are not an option in some serious felony offenses.

If bail is too high, a defendant can request a hearing to reduce the bond. The defendant has to show that they:

- Do not have enough collateral to fund the bond
- Are not a flight risk
- Have ties to the community
- Are not a danger to the public or the alleged victim

If the court refuses to reduce the bond, the defendant can appeal. Bond appeals are "expedited" or sped up, since the defendant is currently being held in custody. We have handled bond appeals and had the trial court's illegally high bond reversed.

SUPPRESSION

Another important pre-trial proceeding involves suppressing or excluding evidence. In suppression motions, the defense asks the court to "suppress" evidence in order to prevent the prosecution from using it at trial. These motions can cover suppression of physical evidence, such as a gun or drugs seized in a search, or statements like a defendant's confession. The court can base its decision on the suppression motion itself, on prosecution affidavits, or on oral testimony.

PLEA NEGOTIATIONS

Sometimes the best option for a defendant is to settle the case. This may occur when there is no defense available after a full factual and legal investigation. In such cases, the prosecution and defense will engage in "plea negotiations" to try to settle case.

The defense attorney talks to the prosecutor and tries to negotiate the best plea bargain possible on the defendant's behalf. The defense attorney has a duty to inform the defendant of any offers from the prosecution. Ultimately, the defendant must make the decision to plead guilty or not. To accept a plea bargain, the defendant must plead "guilty" or "no contest" and may have to waive certain rights.

If the prosecution and defense agree on a plea bargain, the court is not required to accept the deal. In rare situations, the court may reject a plea. If this happens, the defendant is allowed to withdraw the plea of guilty or no contest.

DISCOVERY PROCEEDINGS

Discovery is the process by which information about a case is exchanged between the prosecutor and the defendant. In some cases, the defendant may have to file motions with the court to obtain information from the prosecution or third parties. These discovery skirmishes are covered in pre-trial proceedings.

In criminal law, discovery is basically a one-way street — from the prosecutor to the defense. The prosecution can obtain very little from the defense. For instance, the prosecution may request the names and addresses of defense experts, but they cannot request statements or reports that the defense has prepared as part of its investigation.

On the other hand, while the defendant is entitled to receive a copy of the offense report, they cannot view the actual work product of the prosecutor. For example, if the prosecutor took notes on his impressions during interviews with witnesses, the defendant cannot inspect them.

In general, discovery is much more limited in criminal cases than in civil proceedings. Crucially, in criminal cases there is no process to depose witnesses before the trial or send them questions to answer.

Only in unusual cases—such as the witness being unavailable for trial due to age, poor health or military deployment—can someone file a motion to depose witnesses. Ultimately the court has wide discretion whether to grant the motion.

STATE COURT PROCESS

COMPLAINT

In Texas, the formal court process begins when charges are filed, usually based on the complaint of a law enforcement officer after conducting their investigation. A "complaint" is a sworn statement alleging that probable cause exists to believe that a person committed a crime. In felony cases only, a prosecutor may obtain an indictment directly from a grand jury without a complaint being formerly filed, but this is uncommon.

In Harris County, the process typically starts with police suspecting that a crime has occurred. Police either witness the alleged offense or receive information about it. Police then call the "intake division" of the Harris County District Attorney's office to see if the prosecutor will accept the charges. The intake division is open every day, all day, all year.

Say, for example, police stop a suspect for DWI. He fails field sobriety tests. Police call the DA's intake division and speak to a prosecutor: "I just stopped Danny Defendant in traffic for swerving. I approached him and he smelled like alcohol. I did field sobriety tests and he failed all of them. He refuses to take a breath or blood test. Will you take charges for DWI?"

If the DA's office accepts the charges, then the defendant is arrested and charges are filed. If the charges are "declined," then the defendant is released.

In other Texas counties, such as Galveston County, the defendant is arrested and charged, and the prosecutor reviews the file later to determine if they will proceed with charges.

Many people think a complainant's word alone is not enough for charges to be filed. However, most cases rest on just the complainant's word. For example, if someone calls the police and says that her boyfriend assaulted her, her word is sufficient for police to file charges, for the case to go to trial, and for the defendant to be convicted if the complainant is considered believable.

In fact, if you think about it, most cases are based just on the complainant's word. If you have been robbed in a parking lot and you are the only witness, then that robbery case is based on your word alone.

ARREST

Police must give Miranda warnings to a defendant once they're arrested. These include advising the defendant of their rights:

- To remain silent—and that if they speak, their statements may be used against them later
- To consult with an attorney before or during questioning, and to have one appointed if they cannot pay for one
- To have their attorney actually present before and during questioning.

AS A DEFENDANT, YOU MUST AFFIRMATIVELY ASSERT THESE RIGHTS. This means clearly invoking them — not by saying, "Maybe I should get a lawyer" or "I'm not sure about that," but by saying "Thank you, officer. I want a lawyer before I say anything further."

If the police do not deliver the Miranda warnings, it does not mean that the charges will be dismissed automatically. Instead, any evidence that resulted from the failure to give Miranda warnings—including a confession—can be challenged or "suppressed" in court. Successfully preventing this evidence from being presented could, in fact, lead to the dismissal of the charges, depending on the case.

For example, say police arrest a defendant. They don't "Mirandize" him, but he doesn't give any statements. Here, there is nothing to challenge in court because the defendant didn't give any statements after police failed to Mirandize him.

INITIAL APPEARANCE

Under law, a defendant must appear before a judge within 48 hours of arrest. The judge informs the defendant of the charges. The judge also advises the defendant of their right to:

- Retain a lawyer, or have one appointed if the defendant cannot afford one
- Remain silent—and that if they decide to make a statement to the police or court, then the statement may be used against them
- Have an attorney present during any interview with peace officers or attorneys representing the state
- Terminate an interview at any time
- Conduct an "examining trial," which is a hearing to establish the reasons for the arrest or probable cause for the charges

In Harris County, judges called "magistrates" often conduct the initial appearance via a closed-circuit television. They sometimes hear probable cause — meaning the prosecutor reads a summary of the case and the magistrate determines if probable cause exists to keep the defendant in custody. Probable cause is a low standard of proof and is almost always found to exist. Magistrates often set bond as well, if one has not been previously set.

Harris County magistrates follow a pre-set bond schedule in setting bond. This schedule was set up by the Harris County courts and might be illegal, since it contradicts a defendant's constitutional and statutory right to bond based on the specific circumstances surrounding their case.

In some cases, particularly in family violence cases, a bond is not set until a temporary restraining order is entered. In other cases, the defendant may be ineligible for a bond because of his criminal history or the type of offense.

ARRAIGNMENT

Once charges are filed and bond has been set, the defendant appears in court. The court determines probable cause if the jail magistrate has not done so previously. The court (that is, the judge) will tell the defendant to remain silent while the prosecutor reads the charge. The court then asks the defendant their plea. The plea will almost always be "not guilty."

The court will ask the defendant if they can afford an attorney. If they are in custody and indigent, an attorney will be appointed. If the defendant is out on bond, the court usually requires him to call around and hire a lawyer. Courts generally believe that if a defendant can afford to post bond, they can afford to hire a lawyer.

The trial court will set the bond if necessary. In determining bond, the trial court strongly weighs the defendant's criminal history, financial means (e.g., whether they might have enough money to flee), and the facts and circumstances of the alleged offense. If bond is posted, the court may also order certain conditions such as electronic monitoring. The case is then "reset" for the defense to conduct its investigation.

RESETS

Cases can be reset several times before they are finally dismissed, settled or tried. For a number of reasons, cases can take anywhere from a month to a year or two to resolve, especially if they are on track for trial. Trial settings are often backed up with cases scheduled based on their age and whether the defendant is being held in custody.

In addition, prosecutors with a large backlog of cases prioritize older cases over newer ones. Finally, proper defense investigations take time and may include obtaining records, interviewing witnesses and conducting a thorough investigation/evaluation of the case.

In our experience, cases are like wine—they get better with age. Over time, witnesses may die or get arrested, memories fade or circumstances change, and this often helps the defendant. Prosecutors also have more incentive to "fish or cut bait" on older cases and will often seek a quick resolution - including dismissing charges if appropriate. We have seen more than one case where the arresting officer got in trouble while a case was pending and the charges were ultimately dismissed.

TRIAL

In Texas, a defendant has the right to have a jury determine guilt or innocence and sentencing. Texas is one of the last states in the U.S. to allow a jury to decide sentencing. In our experience, a jury (not a judge) is the best decision-maker if the case goes to trial. In Texas, there are three stages in every trial:

- **Jury selection.** Both the prosecution and defense attorneys question a panel and watch out for jurors who are potentially biased, unfavorable or unqualified. Prosecution and defense lawyers can strike jurors. For misdemeanor cases, the first six unstruck jurors will sit on the jury. For felony cases, the first twelve unstruck jurors make up the jury.
- **Determination of guilt or innocence.** This is where the prosecution tries to prove the defendant's guilt beyond a reasonable doubt. The prosecutors present evidence such as witnesses, lab reports, audio, video, etc. The defense can cross-examine prosecution witnesses and present its own case on the defendant's behalf, including calling defense witnesses to testify. Whether the defendant testifies is ultimately up to the defendant. If the defendant decides not to testify, that decision cannot be held against them.
- **Sentencing.** If the defendant is convicted on charges, the trial moves to the Sentencing phase. Both sides present evidence and the jury decides the appropriate sentence. In Texas, crimes have a wide sentencing range. For first-degree theft, for example, a defendant can receive anything from probation to life in prison.

APPEAL

Defendants convicted of an offense generally have a right to appeal the conviction unless they previously gave up this privilege as part of a plea bargain.

The appeal process begins with a decision by the defendant whether to file a motion for new trial. Such motions are granted rarely and only in limited circumstances such as jury misconduct or ineffective assistance of counsel.

The next step in the appeal, after any motion for new trial has been filed, is to file a notice of appeal. The deadline for this notice is strictly enforced so the defendant must ensure it is filed promptly.

The next step is preparation of the "trial record." This is the full record of everything that occurred in the court related to the case. The trial record includes all documents filed by either side, records of all hearings and the courtroom proceedings. Unless the defendant is indigent, they must pay for the trial record to be prepared. This costs around $800 per day of trial. Failure to do so can lead to dismissal of the appeal.

After the trial record is prepared, both sides review it and file briefs with the appeals court. A panel of three appeals court justices hears the appeal. The judges review the trial record and briefs, and may listen to oral arguments if they believe it will be helpful. The appeals judges must issue a written opinion. It takes a majority of justices to win the appeal.

The time it takes to resolve an appeal varies greatly depending on the complexity of the case. Some appeals take a few months after filing, others can take a year or more.

If a defendant loses in the appeals court, they can file a petition with the Texas Court of Criminal Appeals. Made up of nine judges in Austin, this is the highest court for criminal cases in Texas. Unlike the appeals court, the Court of Criminal Appeals does not have to take an appeal. Instead, the Court decides whether it wants to hear the appeal. The Court hears only a small percentage of appeals each year.

If a defendant loses on appeal in the Texas Court of Criminal Appeals, they may be able to appeal to the United States Supreme Court. The U.S. Supreme Court takes even fewer cases than the Texas Court of Criminal Appeals. The vast majority of lawyers never appear before the Supreme Court.

FEDERAL COURT PROCESS

CHARGES

There are different ways that a defendant can be charged in federal court. Sometimes, charges are filed by grand jury indictment. Other times, a complaint is filed and the case is indicted later if the defendant does not settle his or her case. The complaint is accompanied by an affidavit that outlines the evidence against the defendant.

According to the Bureau of Justice Statistics, federal prosecutors decline charges only about 15% of the time. The rest are forwarded to a grand jury. And, unlike in state court, federal grand juries overwhelmingly vote to advance the charges. In 2012, federal grand juries found "no true bill" or a lack of evidence for the prosecution's charges in only 11 cases, out of more than 160,000 that were presented.

INITIAL APPEARANCE

After a defendant is charged, federal agents arrest the defendant who is taken to appear in federal court. In Texas, this first appearance is typically in front a federal magistrate. These magistrates are appointed for a term of years and assist District Court judges who are appointed for life.

The prosecutor appearing for the U.S. government is called an "Assistant United States Attorney," or "AUSA." There are no District Attorneys (or "DAs") in federal court. In the first appearance before the magistrate, a defendant is informed of their rights and asked if they can afford counsel. If they are indigent, a lawyer will be appointed. If they can afford counsel, they will be asked how long it will take to hire a lawyer. If the defendant needs time to do this, the case will be reset for a short period for "determination of counsel."

Sometimes, the defendant has known they are under investigation, has had the good sense to hire a lawyer, and the lawyer is able to appear with the defendant at the initial appearance.

The magistrate informs the defendant of the charges and the statutory maximum sentence. The "statutory maximum" is the most prison time that a defendant can receive if convicted. However, it is rarely the actual sentence given for convictions. The magistrate then turns to the matter of bail or bond.

BAIL

At the initial court appearance, the prosecutor will ask for detention if they want the defendant to be held without bond. Bail in federal court is controlled by the Bail Reform Act, 18 USC § 3141. This statute outlines certain kinds of offenses, such as drug dealing, child sex offenses including child pornography, and bank robbery, in which the defendant is "presumed" not to be eligible for a bond. While a defendant would have a right to bond in a similar case in state court, no such right exists in federal court and they may be detained "on presumption." For other charges, the court may grant a bond.

One advantage of federal court is that, unlike in state court, most bonds do not require money or property to be posted. These "unsecured" bonds are often accompanied by certain conditions. Conditions can include reporting to United States Pretrial Services, undergoing drug testing and observing travel restrictions.

It is possible for a defense attorney to challenge conditions that unduly burden the defendant, such as not being allowed to work in a particular field (e.g., healthcare when there is a healthcare fraud allegation) or travel for work.

ARRAIGNMENT

If a defendant is being held in custody, they will go for arraignment within 10 days of their initial court appearance. Defendants not being held in custody will be arraigned within 20 days of their initial court appearance. At arraignment, the defendant is read the charges and will enter a plea.

In federal courts in Texas, this is when the court issues a "scheduling order," setting out the dates for the pre-trial conference, pre-trial motions and trial.

TRIAL

The phases of a jury trial are:

- **Jury Selection:** Both sides question a jury panel and look for jurors who are unqualified, potentially biased or unfavorable. The lawyers can strike these jurors.
- **Determination of Guilt or Innocence:** The prosecution tries to prove the defendant's guilt beyond a reasonable doubt. The prosecution presents evidence, such as witnesses, lab reports, audio/video, etc. The defense can cross-examine prosecution witnesses and present a case on the defendant's behalf, including calling defense witnesses to testify. Whether the defendant testifies is, like the decision to plead guilty, ultimately up to the defendant. If he or she does not testify, it cannot be held against him.
- **Sentencing:** If the defendant is convicted, the case is reset for sentencing. Unlike in state court, federal courts do not have jury sentencing. Instead, the judge does the sentencing. Judges consult the United States Sentencing Guidelines to see the recommended range of sentencing; however, they have discretion in setting the final sentence.

SENTENCING

Sometime after a defendant's conviction, a probation officer will interview them. The probation officer will prepare a "pre-sentence report" (or PSR) that is given to both the defense and the government before sentencing. Both parties can object to the PSR. The court does NOT receive a copy of the draft report — the goal is to resolve as many errors as possible before the PSR is given to the judge.

Before sentencing, the final PSR will be given to the judge. It explains the defendant's background, describes the offense and outlines federal sentencing guidelines. The PSR also lists any unresolved objections. Also, before sentencing, both parties must submit sentencing memoranda to the court arguing for their proposed sentences.

At the sentencing hearing, the district court judge must resolve any remaining objections included in the PSR, make factual findings and consider the key sentencing statute (18 USC § 3553(a)). The court must also consider the United States Sentencing Guidelines.

In addition to a custodial sentence (i.e., imprisonment), the court can also decide if restitution is owed and how much, and whether a criminal fine is appropriate.

The defense counsel plays a crucial role at sentencing, particularly since most federal cases are resolved through plea bargaining. The quality of counsel can determine whether a defendant receives a short or long sentence. We have frequently been successful in persuading judges to set sentences well below the U.S. Sentencing Guidelines range.

APPEALS AND WRITS OF CERTIORARI

If a defendant did not waive their right to appeal in a plea agreement, the defense may appeal both the conviction and the sentence imposed.

There is a short deadline for filing a notice of appeal. All appeals in federal courts in Texas go to the United States Court of Appeals for the Fifth Circuit, based in New Orleans, Louisiana. A panel of three judges is assigned the case and must issue a written opinion. A defendant wins on appeal if a majority of judges agree.

If a defendant does not win in the Fifth Circuit, they can file a petition for writ of certiorari to the United States Supreme Court. Unlike the federal appellate courts, the Supreme Court has discretion whether to accept a case and grants a review in less than 1% of all cases submitted.

DEFENDANT'S RIGHTS

A defendant has the right:

- To a reasonable bond
- To counsel
- To review the prosecution's evidence, offense report, and other required discovery
- To a speedy trial by an impartial jury
- To be presumed innocent unless the prosecution proves guilt beyond a reasonable doubt
- To effective assistance of counsel
- To remain silent, including not testifying at trial, and not have their silence held against them
- To cross-examine witnesses, call witnesses, and testify (or not) at trial
- To appeal if they lose at trial

Continue reading to learn about a defendant's constitutional rights.