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User Notes

This deskbook on *Administrative Proceedings (3rd ed. October 2021)* represents the Texas Justice Court Training Center's ongoing commitment to provide resources, information and assistance on issues of importance to Texas Justices of the Peace and Constables and their court personnel, and continues a long tradition of support for judicial education in the State of Texas by the Justices of the Peace and Constables Association of Texas, Inc. We hope you will find it to be a valuable resource in providing fair and impartial justice to the citizens of Texas.

This deskbook is intended to offer a practical and readily accessible source of information relating to issues you are likely to encounter in the various administrative proceedings in justice court. It is not intended to replace original sources of authority, such as the Texas Statutes or the Texas Rules of Civil Procedure. We strongly recommend that you refer to the applicable statutory provisions and rules when reviewing issues discussed in this book. Please note that all references to "Rule __" are to the Texas Rules of Civil Procedure.

Rather than including the citations to cases in the text of the Deskbook, we have listed only the case name in the text but have included the entire citation in the appendix of cases.

Special thanks to Tammy Jenkins, Chief Justice Court Clerk, Precinct 6, Chambers County, for several of the excellent flow charts included in the Deskbook!

Please do not hesitate to contact us should you have any questions or comments concerning any of the matters discussed in *Administrative Proceedings.*

Texas Justice Court Training Center
October 2021

Chapter 1: What is an Administrative Proceeding?

We often think of court cases in terms of civil or criminal. But there is also a third category of case. This type of case "is not an adversarial proceeding, a civil action, or a criminal prosecution … instead, it is **administrative** in nature." ***Wisser v. State***, quoting ***Morrissey v. Brewer***.

So, an administrative proceeding is neither criminal nor civil. Therefore, the rules of civil and criminal procedure do not generally apply to administrative proceedings. Instead, you will just follow the relevant statute and any attorney general opinions and case law that may exist for a particular proceeding.

Chapter 2: Dangerous Dogs

These types of proceedings are covered by Subchapters A & D of Ch. 822 of the Health and Safety Code.

A. What Is a Dangerous Dog Hearing?


KEY POINT

There are four different situations where a dangerous dog proceeding may arise in justice court:

1. When a dog has allegedly caused death or serious bodily injury to a person.

2 & 3. When the court must determine whether a dog is a "dangerous dog" after:

- An appeal of an animal control authority determination that a dog is a "dangerous dog;" **or**
- A report about a dog made directly to a justice court (only in certain counties).

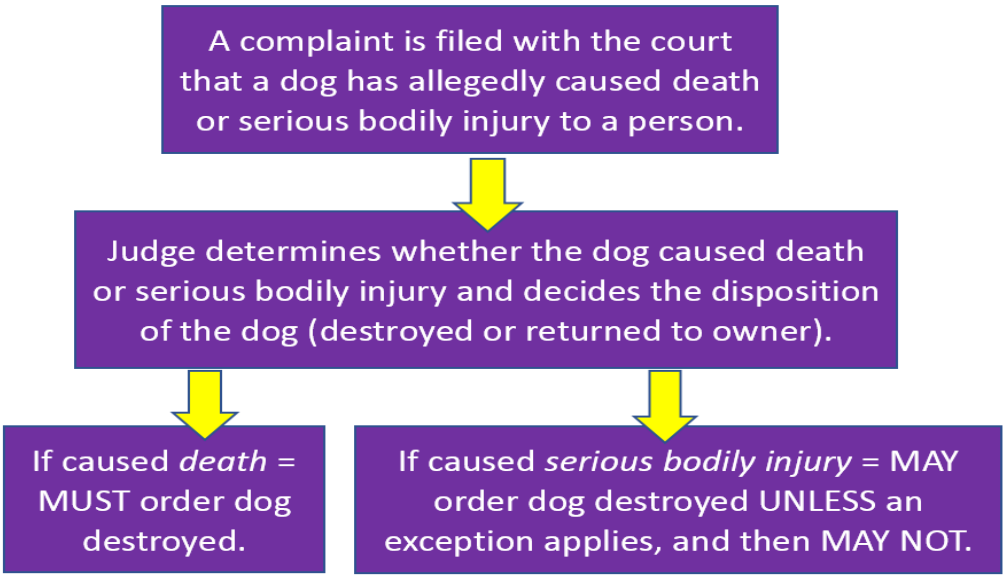
4. When an owner of a "dangerous dog" has allegedly failed to comply with the statutory requirements for a "dangerous dog" owner.

Separate from Any Criminal Proceedings

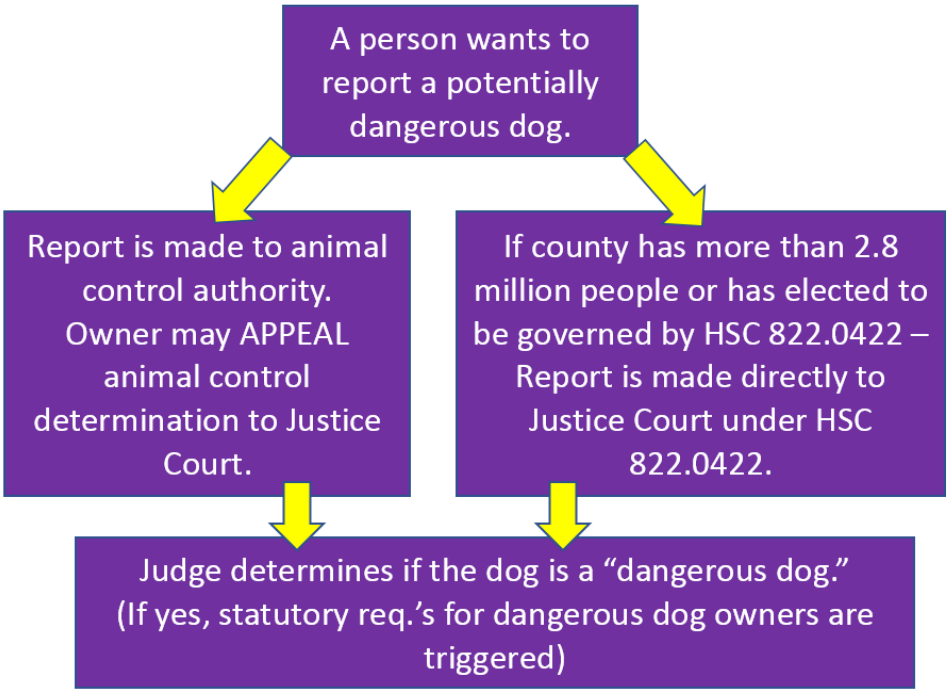
Dangerous dog hearings deal with the disposition of the dog or certain statutory requirements that the owner of a dangerous dog must follow. These proceedings are separate from any criminal case that may be pending.

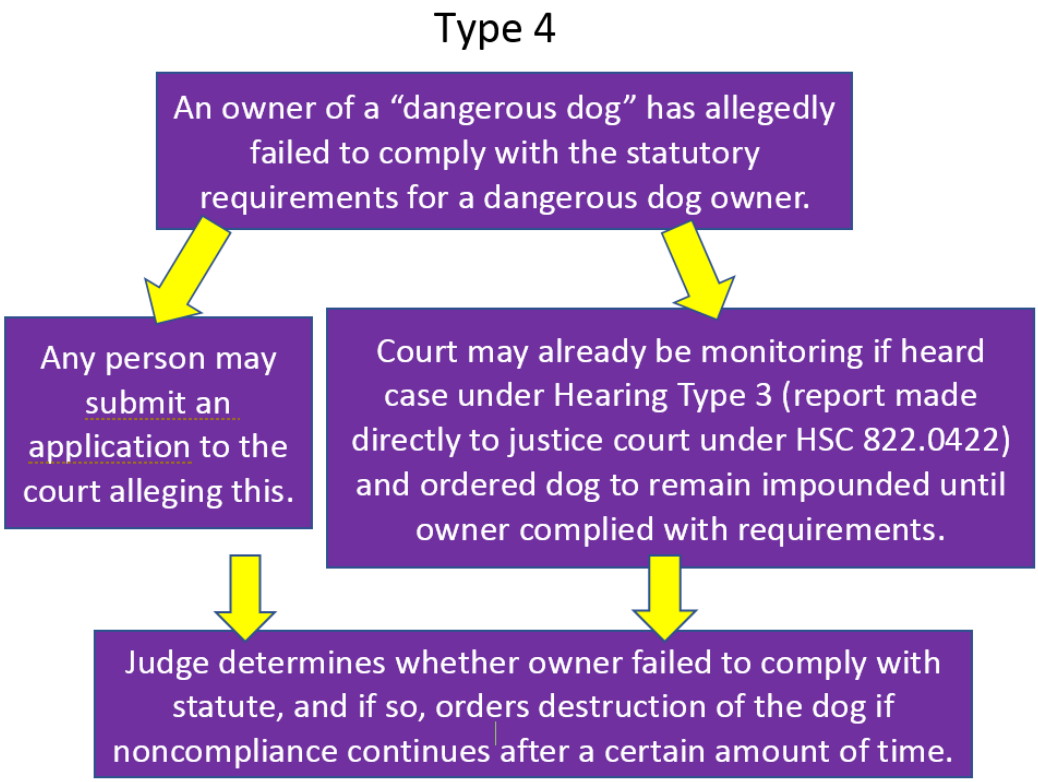
The charts below provide a general overview of the role of the court for each type of case ***(for more information on each case type, see Sections D-F, starting on page 8).***

Type 1



Types 2 & 3





B. Definitions

Animal Control Authority:

A municipal or county animal control office with authority over the area in which the dog is kept or the county sheriff in an area that does not have an animal control office. *Health and Safety Code § 822.001(1).*

KEY POINT

Dangerous Dog:

A dog should be classified as a dangerous dog if it:

- makes an **unprovoked attack** on a person that causes **bodily injury** and occurs in a **place other than an enclosure** in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own;
  or
- **commits unprovoked acts** in a **place other than an enclosure** in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts **cause a person to reasonably believe that the dog will attack and cause bodily injury** to **that** person.

Health and Safety Code § 822.041(2).

Dog: a domesticated animal that is a member of the canine family. *Health and Safety Code § 822.041(3).*

Owner: a person who owns or has custody or control of the dog. *Health and Safety Code § 822.041(5).*

Secure: to take steps that a reasonable person would take to ensure a dog remains on the owner's property, including confining the dog in an enclosure that is capable of preventing the escape or release of the dog. *Health and Safety Code § 822.001(4).*

Dangerous Dog or No?

A dog that slams against the fence of the secure enclosure where it is kept, and growls, barks, and snaps anytime anyone walks past. It kills any animals that make their way into the yard where it is kept.

➡ **NOT** a "dangerous dog." (Nothing has happened outside of its secure enclosure).

A dog escapes from its yard and charges towards a neighbor down the street. The dog knocks the neighbor down and growls at her. She gets away and there is no bodily injury, but it is reasonable for her to believe that the dog would cause her bodily injury.

➡ **IS** a "dangerous dog." (Even though no injury, it is an unprovoked act outside its secure enclosure that causes a person to reasonably believe it will attack and cause bodily injury to that person).

Secure Enclosure: a fenced area or structure that is:

- locked;
- capable of preventing the entry of the general public, including children;
- capable of preventing the escape or release of a dog;
- clearly marked as containing a dangerous dog; **and**

- in conformance with the requirements for enclosures established by the local animal control.

Health and Safety Code § 822.041(4).

Serious Bodily Injury: an injury characterized by severe bite wounds or severe ripping and tearing of muscle that would cause a reasonably prudent person to seek treatment from a medical professional and would require hospitalization without regard to whether the person actually sought medical treatment. *Health and Safety Code § 822.001(2).*

Destruction of a Dog: the humane euthanasia of a dog, which must be performed by:

- a licensed veterinarian;
- personnel of a recognized animal shelter or humane society who are trained in the humane destruction of animals; **or**
- personnel of a governmental agency responsible for animal control who are trained in the humane destruction of animals.

Health and Safety Code § 822.004.

C. Filing Fees

COMMON PITFALL

The law is unclear about whether a filing fee may be charged in Dangerous Dog cases.

An Attorney General's opinion has stated that filing fees should be charged in **ODL cases** because they are civil in nature. *Attorney General Opinion GA-1044 (2014).* Dangerous Dog proceedings are also considered "civil in nature" (***Timmons v. Pecorino***; ***In re: Loban***); but it is unclear whether that attorney general opinion applies only to ODL proceedings, or to other administrative proceedings that are considered civil in nature as well.

The conservative approach is to **not collect** a filing fee. If a court chooses to charge a filing fee, then it must be consistent and charge the fee in all Dangerous Dog cases. If possible, it is best for the policy to be consistent throughout all of the courts in the county.

If charged, the amount of the filing fee would be the same as for any civil case filed in the court. An applicant could also file a statement of inability to afford payment of costs in lieu of paying the fee as in any other civil case.

D. Procedure: Hearing Type 1 (When a Dog Has Allegedly Caused Death or Serious Bodily Injury to a Person)

1. Complaint

If a dog causes **death or serious bodily injury** by attacking, biting, or mauling a **person**, a sworn complaint may be filed with a justice court, county court, or municipal court by any person, including the county attorney, the city attorney, or a peace officer. *Health and Safety Code § 822.002.*

According to the Attorney General, the affiant of a sworn complaint stating that a dog has caused death or serious bodily harm is not required by the statute to have personal knowledge of that event. *Attorney General Opinion KP-0284 (2020).*

What is Serious Bodily Injury?

Serious bodily injury means an injury characterized by severe bite wounds or severe ripping and tearing of muscle that would cause a reasonably prudent person to seek treatment from a medical professional and would require hospitalization without regard to whether the person actually sought medical treatment. *Health and Safety Code § 822.001(2).*

2. Warrant for Seizure

KEY POINT

If the court finds that the complaint establishes **probable cause** that the dog caused death or serious bodily injury to a person, the court **shall** issue a warrant ordering the animal control authority to seize the dog.

The animal control authority shall seize the dog or order its seizure and shall provide for the impoundment of the dog in secure and humane conditions until the court orders the disposition of the dog (this just means until the court decides what will happen to the dog). *Health and Safety Code § 822.002.*

3. Hearing

Time

The court must hold a hearing not later than the **10th day** after a warrant is issued for the dog's seizure. However, the Attorney General has concluded that this 10-day deadline does not restrict the court's inherent authority to control its docket. The Attorney General has found that the plain language of Section 822.003, Health and Safety Code, requires that the case be called, and a hearing conducted within the 10-day statutory deadline, but it does not set a deadline by which the court must rule or otherwise limit the court's authority to postpone a hearing once called. The court **does not** lose jurisdiction if the hearing is held outside the ten-day period. *Attorney General Opinion KP-0284 (2020).*

Does this Apply to Other Dangerous Dog Hearings?

This AG Opinion only interprets the statute for this particular type of dangerous dog hearing. It is not clear whether it applies to the other kind of dangerous dog hearings discussed below. See ***page 11*** and ***page 14.***

Notice

Written notice of the time/place for the hearing must be given to:

- the dog's owner; **and**
- the person who made the complaint.

Evidence

Any interested party is entitled to present evidence at the hearing.

Determination

The judge must determine at the hearing whether the dog caused death or serious bodily injury to a person.

Depending on that determination, the court must then order the disposition of the dog (whether it should be destroyed or returned to its owner). The following section – "Orders" – explains when the court must order which disposition. *Health and Safety Code § 822.003(a)-(c).*

4. Orders

KEY POINT

When the Court *Must* Order the Dog Released

If the court finds that the dog did **not** cause the death or serious bodily injury of a person by attacking, biting, or mauling, the court **shall** order the dog released to:

- its owner;
- the person from whom the dog was seized; **or**
- any other person authorized to take possession of the dog.

Health and Safety Code § 822.003(d)(e).

When the Court *Must* Order the Dog Destroyed

If the court finds that the dog caused the **death** of a person by attacking, biting, or mauling the person, the court **shall** order the dog destroyed. None of the exceptions described below apply in this situation. *Health and Safety Code § 822.003(d).* The order of destruction must be stayed for 10 calendar days from the date of issuance, in order to give the person time to appeal. **If an appeal is filed, the court may not order the destruction of the dog.** *Health and Safety Code § 822.042 (e-1).*

The Attorney General has concluded that if a court finds a dog caused death or serious bodily injury to a person, the fact that the dog's attack was unprovoked is not an element a court must find before ordering the dog destroyed under Section 822.003. *Attorney General Opinion KP-0284 (2020).* This means that **even if** the dog was provoked, it **may** be destroyed if it caused serious bodily injury to a person (unless an exception applies), and it **must** be destroyed if it caused the death of a person.

When the Court *May* Order the Dog Destroyed

If the court finds that the dog caused **serious bodily injury** to a person by attacking, biting, or mauling the person, the court **may** order the dog destroyed **unless** one of the following exceptions applies (in which case the dog **may not** be destroyed):

- The dog was being *used for the protection* of a person or a person's property, the attack/bite/mauling occurred in an enclosure in which the dog was being kept, **and both** of the following:
  - the enclosure was reasonably certain to prevent the dog from escaping and warned of the presence of the dog; **and**
  - the injured person was at least eight years old and was trespassing in the enclosure at the time of the attack;

- The dog was **not** being used for the protection of a person or a person's property, the attack occurred in the dog's enclosure, and the injured person was at least eight years old and was trespassing in the enclosure at time of attack.
    - (**Note:** The difference between this and the one above is that there is no requirement that the enclosure be reasonably certain to prevent escape and warn of the dog's presence if the dog is not being used for protection);
- The attack occurred during an arrest/other action of a peace officer while using the dog for law enforcement purposes;
- The dog was defending a person from an assault, property damage, or theft committed by the injured person; **or**
- The injured person was under eight years old, the attack occurred in the dog's enclosure, and enclosure was reasonably certain to keep a person under eight years old from entering.

Health and Safety Code § 822.003(e)(f).

If the court does ***not*** order the dog destroyed, then the dog should be released to its owner.

At this point, if the circumstances of the attack meet the definition for a "dangerous dog" under Health and Safety Code § 822.041(2) ***(see the "Dangerous Dog" definition on page 6.)*** Then the owner **must** comply with the statutory requirements for an owner of a dangerous dog ***(more information on this can be found on page 14).*** *Health and Safety Code § 822.042(a), (g)(1).*

E. Procedure: Hearing Types 2 and 3 (Determination of Whether a Dog is a "Dangerous Dog" After an Appeal of an Animal Control Authority Determination OR a Direct Report to a Justice Court)

1. Appeal/Report to Justice Court (& Delivery/Seizure of Dog)

This type of case starts when a person reports a potentially dangerous dog. This can happen in one of two ways:

Type 2: Report Made to Animal Control Authority and Appealed to Justice Court
Usually, the report is made to the animal control authority. The animal control authority may then investigate and make a determination of whether the dog is a "dangerous dog." After receiving sworn statements of any witnesses, if the animal control authority determines the dog is a "dangerous dog," they shall notify the owner in writing of the determination. *Health and Safety Code § 822.0421(a).*

The case ends up in court if the owner then appeals the animal control authority determination to a justice court, county court, or municipal court. The owner must file a notice of appeal no later than the 15th day after the owner is notified of the determination. They must attach a copy of the determination and must serve a copy of the notice of appeal on the animal control authority by mail via USPS. *Health and Safety Code § 822.0421(b)(c).*

What is Section 822.0422 of the Health & Safety Code and How Do I Know if it Applies to My Court?

This section allows a report of a dangerous dog to be made directly to a justice court and sets out the procedures for when this happens. This automatically applies to Harris County. For all other counties, check with your commissioners court and/or city ordinances to see if this applies to your court.

Type 3: Report Made Directly to Justice Court
The report may be made directly to a justice court (or a county or municipal court) if:

- the incident occurred in a county with a population of more than 2,800,000 (Harris County only);
- the incident occurred in a county where the commissioners court has entered an order electing to be governed by Health & Safety Code *§* 822.0422; **or**
- the incident occurred in a municipality where the governing body has adopted an ordinance electing to be governed by Section 822.0422 of the Health & Safety Code.

Health and Safety Code § 822.0422(a)(b).

If a person makes a report of an incident directly to justice court, the court shall:

- Notify the owner that a report has been filed and order the owner to deliver the dog to the animal control authority within five days.

- If the owner **fails to deliver** the dog, issue a warrant authorizing the animal control authority to **seize** it (the owner pays any costs incurred in seizing the dog).

Health and Safety Code § 822.0422(b)(c).

2. Hearing

"Dangerous Dog" Determination

KEY POINT

The court must hold a hearing to determine whether the dog is a "dangerous dog." The way that the court does this is to decide if the circumstances of what happened with the dog fit the legal definition of "dangerous dog." ***(see page 6 for the legal definition of "dangerous dog" and some examples)***.

Hearing Requirements

- Time for hearing: 10 days from the date when the dog is seized or delivered.
- Written notice of time/place must be given to the dog's owner and the animal control authority.
- Any interested party must be allowed to present evidence.

Health and Safety Code § 822.0422(d), 822.0423.

BEST PRACTICE

In the case of an appeal from an animal control authority determination, the statute does not require that these requirements be followed, but the best practice is to follow them anyway and hold the hearing 10 days from the notice of the appeal.

3. Orders

If the court determines that the dog **is not a "dangerous dog,"** the dog should be **released** to its owner.

If the court determines that the dog **is a "dangerous dog"**:

- The owner's obligation to comply with the statutory requirements for dangerous dog owners is triggered ***(more information on this can be found on page 14)***. *Health and Safety Code § 822.042(g).*
- If it is a case where the dog has been reported directly to justice court (Type 3 hearing) and not an appeal from an animal control authority determination (Type 2

hearing), then the court **may** order the animal control authority to continue to impound the dog until the owner:

- complies with the statutory requirements for a dangerous dog owner and has the dog returned to them; **or**
- fails to comply and the dog is destroyed.

Health and Safety Code § 822.0422(e).

F. Procedure: Hearing Type 4: (When an Owner of a "Dangerous Dog" has Allegedly Failed to Comply with the Statutory Requirements for a "Dangerous Dog" Owner)

1. What Are the Statutory Requirements that a "Dangerous Dog" Owner Must Follow?

- Register the dangerous dog with the animal control authority for the area in which the dog is kept;
- Restrain the dangerous dog at all times on a leash in the immediate control of a person or in a secure enclosure;
- Obtain liability insurance coverage or show financial responsibility (at least $100,000) to cover damages resulting from an attack and provide proof to the animal control authority; **and**
- Comply with any applicable municipal or county regulation, requirement, or restriction on dangerous dogs.

Health and Safety Code § 822.042(a).

2. When is the Obligation to Follow the Statutory Requirements Triggered?

KEY POINT

An owner must comply with the above statutory requirements or deliver the dog to the animal control authority within **30 days** after the owner learns that they are the owner of a "dangerous dog" in one of the following ways:

- The owner knows of an attack where the circumstances meet the definition for a "dangerous dog" under Health and Safety Code § 822.041(2) ***(see the "Dangerous Dog" definition on page 6)***;
- The owner receives notice that a justice/county/municipal court has found the dog to be a "dangerous dog;" **or**

- The owner is informed by the animal control authority that the dog has been determined to be a "dangerous dog."

Health and Safety Code § 822.042(a), (b), (g).

3. How Does the Court Get Involved?

There are two ways an owner's alleged failure to follow statutory requirements may come to the court's attention:

- Any person may submit an "application" to a justice court, county court, or municipal court stating that the owner of a dangerous dog has failed to comply with the statutory requirements for owners of dangerous dogs. *Health and Safety Code § 822.042(c).*
- The court may already be monitoring the situation if it heard the case under Hearing Type 3 (a report made directly to justice court for a "dangerous dog" determination) and ordered the dog to remain impounded until the owner complied with the statutory requirements.

4. Hearing

Determination

The court must hold a hearing to determine whether the dog's owner failed to comply with the statutory requirements for dangerous dog owners. *Health and Safety Code § 822.042(c), 822.0423.*

Time for Hearing

COMMON PITFALL

Health and Safety Code § 822.0423(a) states that the hearing must be held "not later than the 10th day after the dog is "**seized or delivered**." However, no seizure is authorized prior to this type of hearing if the case is based on an application. Also, if the dog has already been seized and is still impounded as part of a case after a Type 3 hearing (where a report was made directly to justice court for a "dangerous dog" determination), then it will be well past 10 days from the date of seizure/delivery by the time the dog has been determined to be a "dangerous dog" and the 30 day deadline for the owner to comply with the statutory requirements has passed.

BEST PRACTICE

TJCTC recommends

- If an application was submitted alleging the owner's failure to follow the statutory requirements, hold the hearing within **10 days** of when the application is filed.
- If the court was keeping the dog impounded until the person complied with the requirements (after a Type 3 hearing where a report was made directly to justice court for a "dangerous dog" determination), hold the hearing within **10 days** of the 30 day deadline to comply with the statutory requirements if the owner has not presented evidence of compliance to the court).

Notice

Written notice of the time/place for the hearing must be given to:

- the dog's owner; **and**
- the person who made the complaint (if any).

Health and Safety Code § 822.0423(b).

Evidence

Any interested party is entitled to present evidence at the hearing. *Health and Safety Code § 822.0423(c).*

5. Orders

If Court Finds Owner Failed to Comply

The court **shall** order the animal control authority to seize the dog and **shall** issue a warrant authorizing the seizure (unless the dog was already seized and has remained impounded after a Type 3 hearing where a report was made directly to justice court for a "dangerous dog" determination). *Health and Safety Code § 822.042(c).*

The authority **shall** seize the dog or order its seizure and shall provide for the impoundment of the dog in secure and humane conditions (the owner pays any fees/costs). *Health and Safety Code § 822.042(c), (d).*

If Owner Continues to Not Comply

- **If the dog is seized after the hearing**: The court **shall** order animal control to humanely destroy the dog if the owner has not complied before the **11th day after the dog was seized**.

BEST PRACTICE

- **If the dog had already been seized and remained impounded after a Type 3 hearing** (where a report was made directly to justice court for a "dangerous dog" determination): TJCTC recommends that the court order animal control to humanely destroy the dog if the owner has not complied before the **11th day after the hearing** where the court found that the owner did not comply.

Health and Safety Code § 822.042(d),(e).

KEY POINT

Note: An order to destroy a dog is automatically stayed for a period of 10 calendar days from the date the order is issued during which period the dog's owner may file a notice of appeal. *Health and Safety Code § 822.042(e-1).*

KEY POINT

The owner must pay any costs/fees for the destruction of the dog. Note however, that the court **may not** order the destruction of a dog if an appeal is pending.

If the Owner Complies

If the owner complies before the 11th day as described above, the court shall order animal control to return the dog to the owner. *Health and Safety Code § 822.042(e)*

If the Owner Can't Be Found

- **If the dog is seized after the hearing:** The court ***may*** order the humane destruction of the dog if the owner has not been located before the **15th day after the seizure** and impoundment of the dog.

COMMON PITFALL

- **If the dog had already been seized and remained impounded after a Type 3 hearing** (where a report was made directly to justice court for a "dangerous dog" determination): TJCTC recommends that the court ***may*** order the humane destruction of the dog if the owner has not been located before the **15th day after the hearing** where the court found that the owner did not comply.

Health and Safety Code § 822.042(f).

G. Appeal

KEY POINT

Any order to destroy a dog is stayed for a period of 10 calendar days from the date the order is issued, during which period the dog 's owner may file a notice of appeal. No dog may be destroyed pending appeal. *Health and Safety Code § 822.042(e-1); 822.0421(d); 822.0424; 822.0423(c-1), (d).*

What Happens to the Animal While an Appeal is Pending?

If the case is appealed, the court must pull back any orders destroying dangerous dogs or destroying or selling cruelly treated animals.

KEY POINT

Death/Serious Bodily Injury cases

No appeal procedure is provided in the statute for this type of hearing (Hearing Type 1). However, two courts of appeals have recently held that the appeal procedure for the other hearings (Hearing Types 2 – 4) apply to this type of hearing as well, despite the fact that the statute does not explicitly say so. ***City of Dallas v. Dallas Pets Alive***; ***Hays v. State***. Therefore, if a party wants to appeal the court's decision ordering a dog destroyed, we suggest allowing the party to do so following the appeal procedures discussed below.

Who May Appeal

- An owner may appeal the result of a Type 2 hearing (where the owner has appealed an animal control authority determination that their dog is a "dangerous dog").
- Any party may appeal the result of a Type 3 hearing (where a report was made directly to justice court for a "dangerous dog" determination) or of a Type 4 hearing (where an owner has allegedly failed to comply with the statutory requirements for a dangerous dog owner).

How Appeal is Perfected

- By filing a notice of appeal and, if applicable, an appeal bond as determined by the court.
- Deadline: within 10 days after the date the decision was issued.

KEY POINT

Since no filing fee is required for dangerous dog hearings, the requirement, effective January 1, 2022, to pay a filing fee when appealing civil cases **does not** apply to dangerous dog cases.

Appeal Bond

If the dog has been seized, the court shall determine the estimated costs to house and care for the impounded dog during the appeal process and shall set the appeal bond at an amount that will cover those costs.

H. Dangerous Dog Hearing Type Flowcharts

The following flowcharts cover each of the four types of hearings discussed above.

Click Here to Open the Dangerous Dog Hearing Type 1 Flowchart

Click Here to Open the Dangerous Dog Hearing Type 2 & 3 Flowchart

Click Here to Open the Dangerous Dog Hearing Type 4 Flowchart

Chapter 3: Dangerous Wild Animals

This type of proceeding is covered by Subchapter E of Chapter 822 of the Health and Safety Code.

A. What is a Dangerous Wild Animal Proceeding?

KEY POINT

Generally, a person needs a certificate of registration from a local animal registration agency to own a "dangerous wild animal" (see Section B below to see what animals are included). If a certificate of registration is denied or revoked by an animal registration agency, then the person can appeal the denial/revocation to a justice court or municipal court. *Health and Safety Code § 822.105(c).*

B. Definitions

Animal registration agency: the municipal or county animal control office with authority over the area where a dangerous wild animal is kept or a county sheriff in an area that does not have an animal control office. *Health and Safety Code § 822.101(1).*

Dangerous wild animal: a lion, tiger, ocelot, cougar, leopard, cheetah, jaguar, bobcat, lynx, serval, caracal, hyena, bear, coyote, jackal, baboon, chimpanzee, orangutan, gorilla, or any hybrid of an animal listed. *Health and Safety Code § 822.101(4).*

What is an Ocelot?

Owner: any person who owns, harbors, or has custody or control of a dangerous wild animal. *Health and Safety Code § 822.101(5).*

Person: an individual, partnership, corporation, trust, estate, joint stock company, foundation, or association of individuals. *Health and Safety Code § 822.101(6).*

Primary enclosure: any structure used to immediately restrict an animal to a limited amount of space, including a cage, pen, run, room, compartment, or hutch. *Health and Safety Code § 822.101(7).*

C. When Do the Statutes in this Chapter Not Apply?

The statutes discussed in this chapter do not apply to:

- a county, municipality, or agency of the state or an agency of the United States or an agent or official of a county, municipality, or agency acting in an official capacity;
- a research facility (as defined by Section 2(e), Animal Welfare Act (*7 U.S.C. Section 2132*)), that is licensed by the secretary of agriculture of the United States under that Act;
- an organization that is an accredited member of the Association of Zoos and Aquariums;
- an injured, infirm, orphaned, or abandoned dangerous wild animal while being transported for care or treatment;
- an injured, infirm, orphaned, or abandoned dangerous wild animal while being rehabilitated, treated, or cared for by a licensed veterinarian, an incorporated humane society or animal shelter, or a person who holds a rehabilitation permit issued under Subchapter C, Chapter 43, Parks and Wildlife Code;
- a dangerous wild animal owned by and in the custody and control of a transient circus company that is not based in Texas if:
    - the animal is used as an integral part of the circus performances; **and**
    - the animal is kept within Texas only during the time the circus is performing in Texas or for a period not to exceed 30 days while the circus is performing outside the United States;

What is a Caracal?

- a dangerous wild animal while in the temporary custody or control of a television or motion picture production company during the filming of a television or motion picture production in Texas;
- a dangerous wild animal owned by and in the possession, custody, or control of a college or university solely as a mascot for the college or university;
- a dangerous wild animal while being transported in interstate commerce through the state in compliance with the Animal Welfare Act (*7 U.S.C. Section 2131 et seq.*);
- a nonhuman primate owned by and in the control and custody of a person whose only business is supplying nonhuman primates directly and exclusively to biomedical research facilities and who holds a Class "A" or Class "B" dealer's license issued by the secretary of agriculture of the United States under the Animal Welfare Act (*7 U.S.C. Section 2131 et seq.*);
- a dangerous wild animal that is:
    - owned by/in the possession, control, or custody of a person who is a participant in a species survival plan of the Association of Zoos and Aquariums for that species; **and**
    - an integral part of that species survival plan; **and**
- in a county west of the Pecos River that has a population of less than 25,000, a cougar, bobcat, or coyote in the possession, custody, or control of a person that has trapped the cougar, bobcat, or coyote as part of a predator or depredation control activity.

What is a Serval?

Health and Safety Code § 822.102(a)

D. Filing Fees

There is no authority for charging a filing fee at any stage of these proceedings.

E. Filing the Appeal in Justice Court


KEY POINT

An appeal of the denial or revocation of a certificate of registration must be filed in the justice court for the precinct where the dangerous animal is located (or the municipal court in the municipality where the animal is located) not later than the **15th day** after the date the certificate of registration is denied or revoked.

The filing of an appeal stays the denial or revocation until the court rules on the appeal. *Health and Safety Code § 822.105(c)(d).*

F. Notice and Hearing

The statute does not specify the amount of time that must pass before a hearing is scheduled or held. In the interest of providing due process, the court should give reasonable notice of the date, time, and location of the hearing.

G. Determination

The court will need to determine if the certificate of registration should have been denied or revoked.


KEY POINT

Reasons an animal registration agency should have denied or revoked a certificate of registration:

- If the agency found that an original or renewal certificate of registration did not meet the requirements of Section 822.104, Health and Safety Code (more details below);
- If, after inspection, the agency found that a registered owner provided false information in or in connection with the application; **or**
- If, after inspection, the agency found that the applicant or registered owner has not complied with Subchapter E, Chapter 822, Health and Safety Code (more details below).

Health and Safety Code § 822.105(a), (b).

Requirements of Health and Safety Code Section 822.104

If all of the following requirements are not met, it is cause for a certificate to be denied (see above):

- All applications must be filed with an animal registration agency on a form provided by the animal registration agency.

- All applications must include:
    - the name, address, and telephone number of the applicant;
    - a complete identification of each animal, including species, sex, age, if known, and any distinguishing marks or coloration that would aid in the identification of the animal;
    - the exact location where each animal is to be kept;
    - a sworn statement that:
        - all information in the application is complete and accurate; and
        - the applicant has read Subchapter E of Ch. 822 of the Health and Safety Code and that all facilities used by the applicant to confine or enclose the animal comply with the requirements of the subchapter; **and**
    - any other information the animal registration agency may require.

- All applicants shall include with each application:
    - the nonrefundable fee (the agency may charge a fee not to exceed $50 for each animal registered and not to exceed $500 for each person registering animals, regardless of the number of animals owned by that person. *Health and Safety Code § 822.103.)*
    - proof, in a form acceptable by the animal registration agency, that the applicant has liability insurance (as required by Section 822.107, Health and Safety Code);
    - a color photograph of each animal being registered taken not earlier than the 30th day before the date the application is filed;
    - a photograph and a statement of the dimensions of the primary enclosure in which each animal is to be kept and a scale diagram of the premises where each animal will be kept, including the location of any perimeter fencing and any residence on the premises; **and**

- if an applicant holds a Class "A" or Class "B" dealer's license or Class "C" exhibitor's license issued by the secretary of agriculture of the United States under the Animal Welfare Act (*7 U.S.C. Section 2131 et seq.*), a clear and legible photocopy of the license.

- In addition to the items required above, an application for **renewal** must also include a statement signed by a veterinarian licensed to practice in this state stating that the veterinarian:
  - inspected each animal being registered not earlier than the 30th day before the date of the filing of the renewal application; **and**
  - finds that the care and treatment of each animal by the owner meets or exceeds the standards prescribed under this subchapter.

Compliance with Health and Safety Code, Subchapter E, Chapter 822

If an applicant or registered owner is not in compliance with all of the following provisions of Subchapter E, it is cause for a certificate to be denied or revoked (see above)

- Prominently display certificate at the premises where each registered animal is kept and file a copy of the certificate with the Department of State Health Services. *Health and Safety Code § 822.106.*
- Maintain liability insurance coverage of not less than $100,000 for each occurrence for damages related to destruction of/damage to property and death/bodily injury to a person caused by the animal. *Health and Safety Code § 822.107.*
- Allow the animal registration agency or its staff/agents/designated licensed veterinarians to enter the premises where the animal is kept (at all reasonable times) to inspect the animal, primary enclosure for the animal, and records relating to the animal to ensure compliance with Subchapter E. *Health and Safety Code § 822.108.*
- Notify the animal registration agency in writing
  - before any permanent relocation of the animal and provide the exact location and all information required by Section 822.104 for the new location.
  - within 10 days of the death, sale, or other disposition of the animal. *Health and Safety Code § 822.109.*
- Notify the animal registration agency of any attack of a human by the animal within 48 hours of the attack. Notify the animal registration agency and the local

law enforcement agency immediately of any escape of the animal. *Health and Safety Code § 822.110.*

- Keep and confine the animal in accordance with the Caging Requirements and Standards for Dangerous Wild Animals established by the executive commissioner of the Health and Human Services Commission (unless the animal registration agency has approved a deviation pursuant to Section 822.111(c), Health and Safety Code). *Health and Safety Code § 822.111.*
    - The Requirements and Standards are listed in *25 TAC 169.131*, and can be found at the following link: ***Requirements & Standards***

CLICK HERE

- Comply with all applicable standards of the Animal Welfare Act (*7 U.S.C. Section 2131 et seq.*) and all regulations adopted under the Act relating to transportation, facilities and operations, animal health and husbandry, and veterinary care. Maintain a separate written log for each animal documenting the animal's veterinary care and make the log available to the animal registration agency or its agent on request. The log must identify the animal treated, provide the date of treatment, describe the type or nature of treatment, and provide the name of the attending veterinarian, if applicable. *Health and Safety Code § 822.112.*
    - A person is exempt from the requirements of this section if the person is caring for, treating, or transporting an animal for which the person holds a Class "A" or Class "B" dealer's license or a Class "C" exhibitor's license issued by the secretary of agriculture of the United States under the Animal Welfare Act.

H. Appeal of Justice Court Decision

Either party may appeal the decision of the justice (or municipal court) to the county court or county court at law in the county in which the justice or municipal court is located. *Health and Safety Code § 822.105(c).*

KEY POINT

Since no filing fee is required for these hearings, the requirement, effective January 1, 2022, to pay a filing fee when appealing civil cases **does not** apply to these cases.

Chapter 4: Disposition of Cruelly Treated Animals

This type of proceeding is covered by Subchapter B of Chapter 821 of the Health and Safety Code.

A. What is a Disposition of Cruelly Treated Animal Proceeding?

The purpose of this proceeding is to determine if an animal has been cruelly treated by their owner, and if so, to take the animal away from the owner and remove their ownership rights.

Disposition of Cruelly Treated Animals vs. Criminal Cruelty to Animals

These are completely different proceedings.

Criminal Case: What happens to a **person** found guilty of cruelty to animals.

Disposition of a Cruelly Treated Animal Case: What happens to the **animal** and the owner's ownership rights of that animal.

B. Definition of "Cruelly Treated"

KEY POINT

An animal is cruelly treated if it is:

- tortured;
- seriously overworked;
- unreasonably abandoned;
- unreasonably deprived of necessary food, care, or shelter;
- cruelly confined; **or**
- caused to fight with another animal.

Health and Safety Code § 821.021.

C. Filing Fees

COMMON PITFALL

A Disposition of Cruelly Treated Animal case is initiated by the filing of a request for a warrant by a peace officer or animal control officer. Therefore, no filing fee is required in this type of case.

D. Application for Warrant to Seize Animal

Who Can Apply?

Any peace officer or animal control officer who has reason to believe that an animal has been or is being cruelly treated may apply for a warrant to seize the animal.

Where Can They Apply?

A peace officer or animal control officer may apply for a warrant with the justice court or magistrate in the county, or a municipal court in the municipality where the animal is located. *Health and Safety Code § 821.022(a).*

E. Warrant for Seizure of Animal and Setting Hearing

Upon receiving an application for a warrant, the judge/magistrate must determine whether probable cause exists to believe the animal has been or is being cruelly treated.

If the judge/magistrate determines probable cause exists, then they shall:

- issue the warrant; **and**
- set a time within 10 calendar days of when the warrant is issued for a hearing to determine whether the animal has been cruelly treated.

The officer executing the warrant shall cause the animal to be impounded and give written notice to the owner of the animal of the time and place for the hearing. *Health and Safety Code § 821.022(b),(c)*

F. Owner Entitled to Trial by Jury Upon Request

A person whose animal has been seized under Chapter 821 is entitled to trial by jury upon request. ***Granger v. Folk.***

G. Hearing

At the hearing, the county attorney typically represents the state. Each interested party is entitled to an opportunity to present evidence. *Health and Safety Code § 821.023(c).*

If the owner has been found guilty in a criminal case of either of the following offenses, it is *prima facie evidence* that the animal in question has been cruelly treated (this means that just this information is enough to find that the animal has been cruelly treated, unless evidence is provided to the contrary):

- the offense of cruelty to animals under Section 42.09 or 42.092, Penal Code, **involving the animal in question.**
- the offense of bestiality under Section 21.09, Penal Code, **involving *any* animal regardless of whether the animal in question was involved**.

Health and Safety Code § 821.023(a)(a-1).

H. Orders

If No Finding of Cruel Treatment

If the court does not find that the owner has cruelly treated the animal, the court must order the animal returned to the owner. *Health and Safety Code § 821.023(g).*

If Finding of Cruel Treatment

KEY POINT

If the court finds that the animal's owner has cruelly treated the animal, the owner shall be divested of ownership of the animal (which just means they will no longer have any ownership rights to that animal), and the court shall:

- order a public sale of the animal by auction;
- order the animal given to a municipal or county animal shelter or a nonprofit animal welfare organization; **or**
- order the animal humanely destroyed if the court decides that the best interests of the animal or the public health and safety would be served by doing so.

Health and Safety Code § 821.023(d).

If the court proceeds under one of the first two options, the court may also order that the animal be spayed or neutered at the cost of the party receiving the animal. *Health and Safety Code § 821.023(f).*

Court Costs

A court that finds that an animal's owner has cruelly treated the animal shall order the owner to pay all court costs, including:

- Administrative costs of:

    - Investigation;
    - Expert witnesses; **and**
    - Conducting any public sale ordered by the court; **and**
- Costs incurred by a municipal or county animal shelter or a nonprofit animal welfare organization in:
    - Housing/caring for the animal during impoundment; **and**
    - Humanely destroying the animal if so ordered.

Health and Safety Code § 821.023(e).

I. Sale of Animal

Notice

If the court orders a public sale of the animal by auction, notice of the auction must be posted on a public bulletin board where other public notices are posted for the municipality or county. *Health and Safety Code § 821.024(a).*

Bid by Former Owner

A bid by the former owner of the animal or a representative of the former owner may not be accepted at the auction. *Health and Safety Code § 821.024(a).*

Proceeds of Sale

KEY POINT

Proceeds from the sale of the animal shall be applied first to any costs owed by the former owner under Section 821.023(e) (in "Court Costs" section above).

The officer conducting the auction shall pay any excess proceeds to the court ordering the auction and the court shall then return the excess proceeds to the former owner of the animal. *Health and Safety Code § 821.024(b).*

If Unable to Sell Animal

If the officer is unable to sell the animal at auction, the officer may have the animal humanely destroyed or give the animal to a municipal or county animal shelter or a nonprofit animal welfare organization. *Health and Safety Code § 821.024(c).*

J. Appeal

If the court divests an owner of their ownership rights to an animal, the owner may appeal the order to a county court or county court at law in the county in which the justice or municipal court is located. *Health and Safety Code § 821.025(a).*

KEY POINT

While the appeal is pending, the animal may not be:

- sold or given away; **or**
- destroyed, unless it is necessary in order to prevent the undue pain or suffering of the animal.

Health and Safety Code § 821.025(h).

Perfecting Appeal

In order to perfect an appeal, the owner must, not later than the 10th calendar day after the date the order is issued:

- file a notice of appeal; **and**
- file a cash or surety appeal bond in the amount set by the court.

Health and Safety Code § 821.025(b).

KEY POINT

Since no filing fee is required for these hearings, the requirement, effective January 1, 2022, to pay a filing fee when appealing civil cases **does not** apply to these cases.

Setting Appeal Bond Amount

The court shall set the appeal bond in the amount of:

- the costs charged to the owner under Health and Safety Code 821.023(e) (in "Court Costs" section of section H above); **plus**
- the estimated costs likely to be incurred by a municipal or county animal shelter or a nonprofit animal welfare organization to house and care for the impounded animal during the appeal process.

Health and Safety Code § 821.023(e-1),(e-2), (e-3).

Sending Appeal Up

The justice court shall send the case record up to the county court or county court at law not later than the **fifth calendar day** after the notice of appeal and appeal bond is filed. *Health and Safety Code § 821.025(c).*

K. Cruelly Treated Animals Flowchart

Click Here to Open the Cruelly Treated Animals Flowchart

Chapter 5: Disposition of Property

These proceedings are covered by Chapter 47 of the Code of Criminal Procedure.

A. What is Covered Under this Chapter?

In this chapter, we discuss four different types of proceedings that involve personal property:

- Disposition of Stolen Property
- Disposition of Seized Weapons
- Disposition of Gambling Paraphernalia, Prohibited Weapons, Criminal Instruments, and Other Contraband
- Disposition of Abandoned or Unclaimed Property Under Art. 18.17, Code of Criminal Procedure

B. Filing Fees

There is no authority for charging a filing fee at any stage of any of these proceedings.

C. Disposition of Stolen Property

1. What is a Disposition of Stolen Property Proceeding?

The purpose of these proceedings is to provide a court order stating what should be done with personal property when:

- the property has been seized by law enforcement;
- the property is alleged to have been stolen or acquired in any illegal way; **and**

The Property is Worth $30k! Do I Still Have Jurisdiction?

Yes! Jurisdiction is based solely on the court's jurisdiction as a criminal magistrate and not as a civil court; so, the value of the property does not matter.

- law enforcement is not allowed to release the property without a court order. *Code of Criminal Procedure Ch. 47; Art. 47.11.*

2. When is a Peace Officer Not Allowed to Release the Property without a Court Order?


KEY POINT

If a peace officer recovers personal property alleged to be stolen or acquired illegally, then there must be a court order before the peace officer may return it to the owner ***if***:

- the ownership of the property is contested or disputed; **or**
- the property was recovered from a pawn shop, regardless of whether the ownership of the property is contested or disputed.

Code of Criminal Procedure Art. 47.01.

3. Who May Hear the Proceeding?

a. If a Criminal Action Relating to the Property is Not Pending

Upon the petition of an interested person, a county, a city, or the state, any of the following may hear the proceeding:

A district judge, county court judge, statutory county court judge, justice of the peace, or municipal judge having jurisdiction as a magistrate in the county or municipality in which the property:

- is held,
- was seized, **or**
- was alleged to have been stolen.

Venue may be transferred if requested by an interested party. *Code of Criminal Procedure Art. 47.01a(a).*

b. If a Criminal Action is Pending

Any criminal magistrate (including a JP) in the county where the criminal action is pending may hear the proceeding, but only:

- with the written consent of the prosecuting attorney; **and**
- following an order described by Code of Criminal Procedure Art. 47.02(a).

Is a JP a Criminal Magistrate?

Yes! Justices of the peace are criminal magistrates. For more information on who are magistrates, see Chapter 1 of the *Magistration Deskbook.*

"An order described by Art. 47.02(a), Code of Criminal Procedure" is an order from the trial court trying the criminal action which orders that the property be restored to the person "appearing by the proof to be the owner of the property."

There may be some cases where this order will be issued but will not specifically identify the owner of the property. In this case, once the order has been issued and the prosecuting attorney has provided written consent, then the criminal magistrate in the county may hold a hearing on the disposition of the stolen property. *Code of Criminal Procedure Art. 47.02.*

4. Peace Officer Must File Schedule of Property with Court

When a peace officer seizes property alleged to have been stolen or acquired illegally, he must immediately file a schedule (like an inventory) of the property, and its value, with the court having jurisdiction of the case, certifying that the property has been seized by him, and the reason that it was seized.

The peace officer shall also notify the court of the names and addresses of each party that he knows of who has a claim to possession of the seized property. *Code of Criminal Procedure Art. 47.03.*

5. Notice and Timeframe for Hearing

COMMON PITFALL

There is nothing in the statute that provides guidance for the method of notice or for when the hearing should be held.

BEST PRACTICE

Best practices:

- The court should notify all parties who have a claim to possession.
- The hearing should be held promptly but the court should allow enough time for adequate notice and for a prosecutor to file any pre-hearing motions.

6. Possible Outcomes of the Hearing

a. If No Criminal Action is Pending and the Owner of the Property is Known

KEY POINT

The court may choose one of the following options:

- order the property delivered to whoever has the superior right to possession, without any conditions;
- order the property delivered to whoever has the superior right to possession, subject to the condition that the property be made available to a prosecutor if and when it is needed in future prosecutions (only if the prosecutor has filed a written motion before trial requesting this); **or**
- order the property awarded to the custody of the peace officer, pending resolution of criminal investigations regarding the property.

Code of Criminal Procedure Art. 47.01a(a).

Note: At a hearing in this situation, any interested person may present evidence showing that the property was not acquired by theft or another offense or that the person is entitled to possess the property. At the hearing, hearsay evidence is admissible. *Code of Criminal Procedure Art. 47.01a(c).*

b. If No Criminal Action is Pending, Probable Cause Exists to Believe that the Property Was Acquired by Theft or Another Offense, and the Identity of the Owner Cannot be Determined


KEY POINT

If it is shown in a hearing that probable cause exists to believe that the property was acquired by theft or another offense and that the identity of the actual owner of the property cannot be determined, the court shall order the peace officer to:

- deliver the property to a government agency for official purposes;
- deliver the property to a person authorized by Article 18.17 of the Code of Criminal Procedure to receive and dispose of the property (like a county purchasing agent); **or**
- destroy the property.

Code of Criminal Procedure Art. 47.01a(b).

c. If a Criminal Action is Pending


KEY POINT

The court may, by written order, direct the property to be restored to a certain person **if**:

- it is proved to the satisfaction of the magistrate that that person is the true owner of the property; **and**
- the property is under the control of a peace officer.

Code of Criminal Procedure Art. 47.02(b).

7. If the Court Has Doubts About Ownership/When a Bond Can Be Required Prior to Delivery of the Property

Regardless of whether a criminal trial is pending or not, if the court has any doubt as to the ownership of the property, the court may:

- require a bond of the person claiming ownership in case it is later determined that they are not the true owner; **or**
- have the sheriff hold the property until further orders are made regarding possession.

The bond must have sufficient sureties and be equal to the value of the property at issue. It shall be payable to and approved by the county judge of the county in which the

property is in custody; and filed in the office of the county clerk of that county. *Code of Criminal Procedure Art. 47.05.*

8. Storage and Transportation Costs

Storage Costs


COMMON PITFALL

Before a person is entitled to receive the property awarded to them by the court, they must first pay all reasonable storage costs (if any) from the time the property was in custody. The amount of the costs must be provided in an affidavit by the peace officer and approved by the court. *Code of Criminal Procedure Art. 47.09.*

If the costs are not paid, the property must be sold in the same way as with an execution. The county judge is responsible for determining the amount to be paid from the proceeds of the sale for the storage costs and the costs of the sale. Once these costs are paid, any amount that is left over must be paid to the owner of the property. *Code of Criminal Procedure Art. 47.10.*

Transportation Costs

The person awarded the property by the court is responsible for any transportation necessary to have the property delivered to them. *Code of Criminal Procedure Art. 47.01a(e), 47.02(c).*

9. Appeal


KEY POINT

Who May Appeal and Method of Appeal:

Only an interested person who appears at the hearing may appeal. In order to appeal, the person must:

- give an oral notice of appeal at the conclusion of the hearing; **and**
- post an appeal bond by the end of the next business day (not counting Saturdays, Sundays, and legal holidays).

Code of Criminal Procedure Art. 47.12(c).


KEY POINT

Since no filing fee is required for these hearings, the requirement, effective January 1, 2022, to pay a filing fee when appealing civil cases **does not** apply to these cases.

Amount and Form of Appeal Bond

The appeal bond should be in an amount determined appropriate by the court, but not to exceed twice the value of the property.

The bond shall be:

- made payable to the party who was awarded possession at the hearing;
- secured by sufficient sureties approved by the court; **and**
- conditioned that the appellant will prosecute his appeal to conclusion.

Code of Criminal Procedure Art. 47.12(d).

Rules Governing Appeal

Appeals shall be heard by a county court or statutory county court. The appeal is governed by the applicable rules of procedure for appeals for civil cases in justice court to a county court or statutory county court. *Code of Criminal Procedure Art. 47.12(b).*

10. If Property Is Not Claimed

If the property is not claimed within 30 days from the conviction of the person accused of illegally acquiring it, the procedure set out in Art. 18.17 of the Code of Criminal Procedure shall be followed concerning its disposition. The justice of the peace will no longer be involved in the case at this point. *Code of Criminal Procedure Art. 47.06.*

11. Disposition of Stolen Property Flowchart

Click Here to Open the Disposition of Stolen Property Flowchart

D. Disposition of Seized Weapons

These proceedings are covered by Art. 18.19 and Art. 18.191 of the Code of Criminal Procedure.

1. What is a Disposition of Seized Weapons Proceeding?

When a weapon has been seized by law enforcement in connection with an offense involving the use of the weapon or an offense under Chapter 46 of the Penal Code (offenses involving possession, sale, smuggling, etc. of weapons), the law enforcement agency is required to hold the weapon until a court orders the disposition of the weapon (this just means until the court orders what should be done with the weapon).


KEY POINT

Generally, the court will determine the disposition of a seized weapon according to the provisions of Art. 18.19 or 18.191, Code of Criminal Procedure (which are covered in this section). However, there are a couple of situations in which different statutes will apply:

- If the weapon is alleged to be stolen, the disposition of the weapon is controlled by Chapter 47 of the Code of Criminal Procedure ***(see page 33)***; **or**
- If the weapon is a "prohibited weapon" under Chapter 46, Code of Criminal Procedure, the disposition of the weapon is controlled by Art. 18.18 of the Code of Criminal Procedure ***(see page 43).***

Code of Criminal Procedure Art. 18.19(a).

2. Inventory of Seized Weapons

If a weapon is seized and the seizure is not pursuant to a search or arrest warrant, then the person seizing it must prepare and deliver to a magistrate an inventory of each weapon seized. *Code of Criminal Procedure Art. 18.19(b).*

3. If No Prosecution or Conviction for an Offense Involving the Weapon Seized

Magistrate to Send Notice


KEY POINT

If there is no prosecution or conviction for an offense involving the weapon that was seized, then the magistrate to whom the seizure was reported must notify the person who was in possession of the weapon that they are entitled to get the weapon back upon written request to the magistrate.

The magistrate has to send this notice before the 61st day after the magistrate knows that there will be no prosecution or conviction.

Order to Have Weapon Returned

If the owner of the weapon makes a written request after being notified by the magistrate that they are entitled to get the weapon back, the magistrate must order the weapon returned to the person before the 61st day after the date the magistrate receives the request.

If the Return of the Weapon is Not Requested

If the weapon is not requested before the 61st day after the date of notification, then the magistrate shall, before the 121st day after the date of notification, order:

- the destruction of the weapon;
- sale at public sale by the law enforcement agency holding the weapon or by an auctioneer licensed under Chapter 1802, Occupations Code; **or**
- forfeiture to the state for use by the law enforcement agency holding the weapon or by a county forensic laboratory designated by the court.

If the magistrate does not order the return, destruction, sale, or forfeiture of the weapon within the time periods above, then the law enforcement agency holding the weapon may request an order of destruction, sale, or forfeiture from the magistrate. *Code of Criminal Procedure Art. 18.19(c).*

4. If the Person from Whom the Weapon Was Seized is Convicted of or Receives Deferred Adjudication for an Offense Under Chapter 46, Penal Code

A person who is convicted of or receives deferred adjudication for an offense under Chapter 46 of the Penal Code (offenses involving possession, sale, smuggling, etc. of weapons) is entitled to have the seized weapon returned **upon request to the court in which the person was convicted or placed on deferred adjudication**.

However, under many circumstances the court entering the judgment **may not** return the weapon and **must** instead order:

- the destruction of the weapon;
- sale at public sale by the law enforcement agency holding the weapon or by an auctioneer licensed under Chapter 1802, Occupations Code; **or**
- forfeiture to the state for use by the law enforcement agency holding the weapon or by a county forensic laboratory designated by the court.

The court **must** order the weapon destroyed, sold by auction, or forfeited to the state **if:**

- the person does not request the weapon before the 61st day after the date of the judgment of conviction or the order of deferred adjudication;
- the person has been previously convicted under Chapter 46, Penal Code;
- the offense for which the person is convicted or receives deferred adjudication was committed in or on the premises of a playground, school, video arcade facility, or youth center; **or**
- the court determines based on the prior criminal history of the defendant or based on the circumstances surrounding the commission of the offense that possession of the seized weapon would pose a threat to the community or one or more individuals.

Code of Criminal Procedure Art. 18.19(d).

5. If the Person from Whom the Weapon Was Seized is Convicted of an Offense Involving the Use of the Weapon (Other than an Offense Under Chapter 46, Penal Code)

If the person found in possession of a weapon is convicted of an offense involving the use of the weapon (other than an offense under Ch. 46, Penal Code), the **convicting court** shall, before the 61st day after the date of conviction, order:

- the destruction of the weapon;
- sale at public sale by the law enforcement agency holding the weapon or by an auctioneer licensed under Chapter 1802, Occupations Code; **or**
- forfeiture to the state for use by the law enforcement agency holding the weapon or by a county forensic laboratory designated by the court.


KEY POINT

If the court entering judgment of conviction does not order the destruction, sale, or forfeiture of the weapon within the required time period, the law enforcement agency holding the weapon may request an order of destruction, sale, or forfeiture of the weapon from a **magistrate**. *Code of Criminal Procedure Art. 18.19(e).*

6. Procedure for the Sale of a Weapon in Any of the Above Situations

Only a firearms dealer licensed under 18 U.S.C. Section 923 may purchase a weapon at a public sale ordered in any of the situations described above.

The proceeds from the sale of the seized weapon shall be transferred to the law enforcement agency holding the weapon, after:

- first, the deduction of court costs to which a district court clerk is entitled under Art. 59.05(f), Code of Criminal Procedure; **and**
- from what is remaining, the deduction of auction costs.

Code of Criminal Procedure Art. 18.19 (c), (d-1), (e).

7. Disposition of Firearms Seized from Certain Persons with Mental Illness

Different provisions apply to a person taken into custody under Health & Safety Code § 573.001 (emergency detention of a mentally ill person without a warrant), and not in connection with an offense involving the use of a weapon or an offense under Chapter 46 of the Penal Code.


KEY POINT

The law enforcement agency who seizes the weapons is responsible for carrying out the laws when these provisions apply. The court is not involved, other than to provide the law enforcement agency with certain information:

- The law enforcement agency must contact the court not later than the 30th day after the date the firearm is seized and request the disposition of the case.
- Not later than the 30th day after the law enforcement agency's request, the clerk of the court must inform the law enforcement agency whether the person was released or ordered to receive inpatient mental health services.

Code of Criminal Procedure Art. 18.191

E. Disposition of Gambling Paraphernalia, Prohibited Weapons, Criminal Instruments, and Other Contraband

These proceedings are covered by Art. 18.18 of the Code of Criminal Procedure.

1. Chart of What Property May be Seized

When any property listed in the below chart has been seized by law enforcement, a court has to rule on the disposition of that property (this just means the court has to order what should be done with the property).

Click Here to Open the Disposition of Seized Property Chart

2. If No Prosecution or Conviction Following Seizure


KEY POINT

Notice by Magistrate

The magistrate to whom the return was made shall send written notice to the person found in possession of the seized property to appear and show cause why the property should not be destroyed, or the proceeds forfeited. *Code of Criminal Procedure Art. 18.18(b)*

Contents of Notice

The above notice must contain:

- a detailed description of the property seized and the total amount of any alleged gambling proceeds;
- the name of the person found in possession;
- the address where the property or proceeds were seized; **and**
- the date and time of the seizure.

Code of Criminal Procedure Art. 18.18(c).

Method for Sending Notice

If the person in possession's address is known-

The magistrate shall send notice by registered or certified mail, return receipt requested, to the person found in possession at the address where the property or proceeds were seized. *Code of Criminal Procedure Art. 18.18(d).*

If no one was found in possession, or the possessor's address is unknown-
The magistrate shall post the notice on the courthouse door. *Code of Criminal Procedure Art. 18.18(d).*

Deadline to Appear Before Magistrate
Any person interested in seized property must appear before the magistrate on the 20th day following the date the notice was mailed or posted.

If the person fails to appear by the deadline, they forfeit any interest they may have in the seized property or proceeds and may not contest destruction or forfeiture of the property. *Code of Criminal Procedure Art. 18.18(e).*

Hearing
If a person timely appears to show cause why the property or proceeds should not be destroyed or forfeited, the magistrate shall hold a hearing on the issue and determine the nature of the property or proceeds and the person's interest in it.


KEY POINT

The court shall order the property/proceeds destroyed or forfeited in accordance with Code of Criminal Procedure Art. 18.18(a) **unless** the person proves by a preponderance of the evidence:

- that the property/proceeds is/are not gambling equipment, altered gambling equipment, gambling paraphernalia, gambling device, gambling proceeds, prohibited weapon, obscene device or material, child pornography, criminal instrument, scanning device or re-encoder, or dog-fighting equipment; **and**
- that he is entitled to possession of the property/proceeds.

Code of Criminal Procedure Art. 18.18(f).

Motion by Law Enforcement and Order in Case of Prohibited Weapon
The magistrate, on the motion of the law enforcement agency seizing a prohibited weapon, shall order the weapon destroyed or forfeited to the law enforcement agency seizing the weapon, unless a person shows cause as to why the prohibited weapon should not be destroyed or forfeited.

A law enforcement agency shall make the motion in a timely manner once the agency is informed in writing by the attorney representing the state that there will be no prosecution. *Code of Criminal Procedure Art. 18.18(b).*

3. After Conviction of an Offense Involving a Prohibited Weapon

Not later than the 30th day after the final conviction of a person for an offense involving a prohibited weapon, the **convicting court** shall order that the prohibited weapon be destroyed or forfeited to the law enforcement agency that initiated the complaint.

The order may be made on the court's own motion, on the motion of the prosecuting attorney in the case, or on the motion of the law enforcement agency initiating the complaint. The court must provide notice to the prosecutor if the prosecutor did not make the motion.


KEY POINT

If the court fails to enter the order within the timeframe required, any **magistrate** in the county in which the offense occurred may enter the order. *Code of Criminal Procedure Art. 18.18(a).*

Which Weapons are Prohibited?

Prohibited weapons are defined as: armor-piercing ammunition; a chemical dispensing device; a zip gun; a tire deflation device; or an improvised explosive device.

Unless registered with the ATF or classified as a curio or relic: an explosive weapon; a machine gun; a short-barrel firearm; or a firearm silencer.

F. Destruction of Controlled Substance Property

In some circumstances, a justice court may order forfeiture and destruction of controlled substance property, such as pipes, and controlled substance plants, such as marijuana plants. A justice court may only order the forfeiture and destruction if the court cannot determine that a person had lawful possession of the property or plant. If the court determines that a person had lawful possession of and title to the controlled substance property or plant before it was seized, the court **must** order the controlled substance property or plant returned to the person, if the person so desires. In addition, the court **may not** order the forfeiture if the property or plant has been destroyed under Health and Safety Code § 481.160. *Health and Safety Code § 481.159(h).*

A law enforcement agency is allowed to destroy controlled substance property or plants without a court order. The law enforcement agency may destroy the property or plant if the following criteria are met:

- At least five samples that can be used in discovery have been taken from the property or plant;
- Photographs of the property or plant have been taken; **and**
- The weight or volume of the property or plant has been determined.

Health and Safety Code § 481.160.

G. Disposition of Other Property

COMMON PITFALL

A justice of the peace cannot make orders regarding the disposition of property unless they have specific authorization to do so (like they do in the proceedings described in Sections C-E of this chapter).

Justices of the peace **do not** have jurisdiction over the disposition of abandoned or unclaimed property as described by Art. 18.17, Code of Criminal Procedure, and are not involved in carrying out the provisions in this article.

For example, if a law enforcement officer requests that a JP enter an order to destroy some unclaimed evidence that is no longer needed (and that is not the subject of one of the proceedings described in Sections C-E of this chapter), the JP **will not** have jurisdiction to do so.

Chapter 6: Driver's License Suspensions and Revocations

The general statutes for these proceedings are found in Subchapter N of Chapter 521 of the Transportation Code. The statutes for uninsured motorist suspensions are found in Subchapter F of Chapter 601 of the Transportation Code.

A. What is a Driver's License Suspension/Revocation Proceeding?

The Texas Department of Public Safety (DPS) is required to suspend or revoke a person's license to operate a motor vehicle in certain situations.

The person can then appeal DPS's decision to suspend or revoke their license to a justice or municipal court. The court's main role is to determine whether or not the license should in fact have been suspended or revoked; and in some situations, the court may probate a suspension (more info on this below).

B. Filing Fees

COMMON PITFALL

The law is unclear about whether a filing fee may be charged in a Driver's License Suspension/ Revocation case.

An Attorney General's opinion has stated that filing fees should be charged in **ODL cases** because they are civil in nature. *Attorney General Opinion GA-1044 (2014).* Driver's License Suspension/ Revocation proceedings are also considered "civil in nature" (*Transportation Code § 724.048; **Texas Department of Public Safety v. Styron***); but it is unclear whether that attorney general opinion

Fee for Presiding Officer?

A fee not to exceed $5 may be paid to a presiding officer if it is approved by the commissioners court. The fee would be paid from the county general revenue fund. *Transportation Code § 521.300(b).*

applies only to ODL proceedings, or to other administrative proceedings that are considered civil in nature as well.

The conservative approach is to **not collect** a filing fee. If a court chooses to charge a filing fee, then it must be consistent and charge the fee in all Driver's License Suspension / Revocation cases. If possible, it is best for the policy to be consistent throughout all of the courts in the county.

If charged, the amount of the filing fee would be the same as for any civil case filed in the court. An applicant could also file a statement of inability to afford payment of costs in lieu of paying the fee as in any other civil case.

What Makes a Person a 'Habitual Violator'?

A person can be found to be a habitual violator of traffic laws if the person has four or more convictions that arise out of different transactions in 12 consecutive months or seven or more convictions that arise out of different transactions in 24 months. The convictions are for moving violations of the traffic laws of any state, Canadian province, or political subdivision, other than a violation under: Section 621.101, 621.201, or 621.203-621.207 (offenses relating to weight and size limitations); Subchapter B or C, Chapter 623 (offenses relating to overweight/oversize vehicles); or Section 545.413 (safety belt offense).

C. General Procedures

1. When is DPS Required to *Suspend* a License?

KEY POINT

DPS shall **suspend** the person's license if it determines that **any one** of the following applies to the person:

- has operated a motor vehicle on a highway while the person's license was suspended, canceled, disqualified, or revoked, or without a license after an application for a license was denied;
- is a habitually reckless or negligent operator of a motor vehicle;
- is a habitual violator of the traffic laws;
- has permitted the unlawful or fraudulent use of the person's license;
- has committed an offense in another state or Canadian province that, if committed in this state, would be grounds for suspension;
- has been convicted of two or more separate offenses of a violation of a restriction imposed on the use of the license;

- has been responsible as a driver for any accident resulting in serious personal injury or serious property damage;
- is under 18 years of age and has been convicted of two or more moving violations committed within a 12-month period; **or**
- has committed an offense under Section 545.421 (fleeing or attempting to elude a police officer).

Transportation Code § 521.292.

2. When is DPS Required to *Revoke* a License?


KEY POINT

DPS shall **revoke** the person's license if it determines that **any one** of the following applies to the person:

- is incapable of safely operating a motor vehicle;
- has not complied with the terms of a citation issued by a jurisdiction that is a party to the Nonresident Violator Compact of 1977 for a traffic violation to which that compact applies;
- has failed to provide medical records or has failed to undergo medical or other examinations as required by a panel of the medical advisory board;
- has failed to pass an examination required by the public safety director under Ch. 521 of the Transportation Code; **or**
- has committed an offense in another state or Canadian province that, if committed in this state, would be grounds for revocation.

Transportation Code § 521.294.

3. Notice of DPS Determination and Right to Hearing

DPS must send notice of a suspension or revocation under Transportation Code § 521.292 or 521.294, by:

- first class mail to the person's address in the records of the department; **or**
- e-mail if the person has provided an e-mail address to the department and has elected to receive notice electronically.

The notice must include:

- the reason and statutory grounds for the suspension or revocation;
- the effective date of the suspension or revocation;

- the right of the person to a hearing;
- how to request a hearing; **and**
- the period in which the person must request a hearing.

Transportation Code § 521.295, 521.296.

4. Hearing Request

A person whose license has been suspended or revoked is entitled to a hearing, but only if they request the hearing.


KEY POINT

The request must be made no later than the 15th day after the date on which the person is considered to have received notice of the suspension/revocation from DPS, which is the fifth day after the date the notice was sent. So basically, the request must be made no later than the 20th day after the notice was sent.

Stay of Suspension/Revocation

A request for a hearing stays the suspension or revocation of a person's license until a final decision is made in the proceeding. The stay remains in place until there is a final decision even if the hearing is continued. *Transportation Code § 521.299(c), 521.303*

The request should be sent to DPS at its headquarters in Austin, in writing (which can include fax), or by another manner allowed by DPS. *Transportation Code § 521.298, 521.295(b).*

5. Hearing

Hearing Date/Continuances

The hearing must be set for the earliest practical date, but not earlier than the 11th day after the date that the person requesting the hearing is given notice of the hearing.

A hearing may be continued:

- on a motion of the person requesting the hearing, DPS, or both parties; or
- as necessary to accommodate the docket of the presiding officer (the judge).

Transportation Code § 521.299.

Hearing Location and Presiding Officer

The hearing shall be conducted in a municipal court or a justice court in the county in which the person resides. The judge of the municipal court or the justice is designated as the presiding officer. *Transportation Code § 521.300(a).*

The hearing may be conducted by telephone or video conference call if the presiding officer provides notice to the affected parties. *Transportation Code § 521.300(a-1).*

The presiding officer may administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant books and documents. *Transportation Code § 521.300(c).*

Failure to Appear at Hearing

A person who requests a hearing and fails to appear without just cause waives the right to a hearing and DPS's determination of suspension or revocation is final. *Transportation Code § 521.302.*

Issue at Hearing

KEY POINT

The issue that must be proved at the hearing by a preponderance of the evidence is whether the grounds for suspension or revocation stated in the notice are true. *Transportation Code § 521.301(a).*

6. Order

If the presiding officer finds that the grounds stated in the notice are true

KEY POINT

The suspension or revocation is sustained; and the department shall suspend the person's license for the period specified by the presiding officer, which may not be less than 30 days or more than one year. *Transportation Code § 521.301(b)(c).*

If the presiding officer finds that the grounds stated in the notice are *not* true

The department may not suspend or revoke the person's license. *Transportation Code § 521.301(d).*

When Order is Final and Takes Effect

The decision of the presiding officer is final when it is issued and signed. *Transportation Code § 521.301(e).*

The order of suspension or probation takes effect on the 11th day after the date on which the order is rendered. *Transportation Code § 521.311.*

7. Order: Probation of Suspension

If the presiding officer sustains a suspension, they may recommend that the suspension be probated (meaning the suspension will not go into effect as long as the person successfully follows any terms and conditions for a set period of time) if it appears that justice and the best interests of the public and the person will be served by the probation. DPS must then follow the recommendation and probate the suspension. *Transportation Code §521.309(a), (d).*

Can I Probate a License Revocation?

No! Probation is only an option for suspensions. Revocations may **not** be probated. *Transportation Code § 521.309(b).*

The presiding officer may set any terms and conditions of probation that they consider necessary or proper; and must include those terms and conditions in the report of the results of the hearing that is sent to DPS. *Transportation Code §521.309(a), (c).*

The period of probation must be for a term of not less than 90 days and not more than two years. *Transportation Code §521.309(e).*

8. Must Report Results of Hearing to DPS

The court is required to report the results of the hearing to DPS. *Transportation Code § 521.309(c).*

9. Appeal

Who May Appeal

KEY POINT

Only a person whose driver's license suspension or revocation has been sustained by a presiding officer may appeal the decision of the presiding officer. DPS may not appeal. *Transportation Code § 521.308(a).*

How to Appeal

COMMON PITFALL

The person must file a petition (not a notice of appeal):

- Not later than the 30th day after the date on which the order was entered.
- In the **county court at law** of the county in which the person resides, or, if there is no county court at law, in the **county court**.

KEY POINT

Since the appeal is filed in the county court (or county court at law), there is no requirement to pay a filing fee to the justice court in order to appeal.

The person must also send a file-stamped copy of the petition, certified by the clerk of the court in which the petition is filed, to DPS by certified mail. *Transportation Code § 521.308(b).*

Stay of Suspension/Revocation

The filing of a petition of appeal stays an order of suspension, probated suspension, or revocation until the earlier of:

- the 91st day after the date the appeal petition is filed; **or**
- the date the trial is completed and final judgment is rendered.

Transportation Code § 521.308(f).

10. Probation Violation

Notice by DPS

If DPS believes that a person who has been placed on probation under Transportation Code § 521.309 has violated a term or condition of the probation, DPS shall notify the person and summon the person to appear at a hearing before the presiding officer who recommended that the person be placed on probation. *Transportation Code § 521.310(a).*

KEY POINT

Hearing, Order, and Reporting to DPS

The issue at the hearing under this section is whether a term or condition of the probation has been violated.

The presiding officer shall report his/her finding to DPS.

If the finding is that a term or condition of the probation has been violated, DPS shall suspend the license as it would have after the original hearing if the suspension had not been probated at that time. *Transportation Code § 521.310(b).* The order of suspension takes effect on the 11th day after the date on which the order is rendered. *Transportation Code § 521.311.*

11. Driver's License Suspension/Revocation Flowchart

Click Here to Open the Driver's License Suspension/Revocation Flowchart

D. Procedures for Uninsured Motorist Suspensions

1. License Suspension Following Accident

KEY POINT

When DPS Must Suspend

DPS shall **suspend** an owner/operators driver's license and vehicle registrations (or nonresident operating privilege) if **all** of the following are true:

- the owner/operator's vehicle was involved in any manner in an accident;
- the accident resulted in the bodily injury or death of another person or in damage to the property of another person of at least $1,000.00;
- the vehicle (at the time of the accident) was **not** legally parked or legally stopped at a traffic signal;
- the vehicle (at the time of the accident) was **not** operated or parked by someone who did not have the owner's express or implied permission to operate the vehicle;
- the owner/operator failed to provide evidence of financial responsibility as required by Transportation Code Chapter 601;

- DPS finds that there is a reasonable probability that a judgment will be rendered against the person as a result of the accident; **and**
- the owner/operator has **not** done ***both*** of the following:
    - deposited security with DPS in an amount determined to be sufficient by DPS (under § 601.154) or by the judge (under § 601.157), as applicable; **and**
    - filed evidence of financial responsibility as required by Chapter 601.

If evidence of financial responsibility is done by filing evidence of motor vehicle liability insurance, the owner/operator must file a certificate of insurance for a policy that has a period of at least six months and for which the premium for the entire policy is paid in full. The policy may not be canceled unless:

- the person no longer owns the vehicle;
- the person dies;
- the person has a permanent incapacity that renders them unable to drive; **or**
- the person surrenders their driver's license and registration to DPS.

Transportation Code § 601.151, 601.152, 601.153.

2. Notice of DPS Determination and Request for Hearing

DPS shall notify the affected person of a determination of a probability of liability by:

- personal service;
- first class mail to the person's last known address as shown by DPS records; **or**
- e-mail if the person has provided an e-mail address to the department and has elected to receive notice electronically.

Notice is presumed to be received if the notice was sent to the person's last known address or e-mail address, as shown by the department's records.

The notice must state:

- That the person's driver's license and vehicle registration (or nonresident's operating privilege) will be suspended unless the person,

Suspension Stayed Pending Hearing and Appeal

The department may not suspend a driver's license, vehicle registration, or nonresident's operating privilege pending the outcome of a hearing and any appeal. *Transportation Code § 601.160.*

not later than the 20th day after the date the notice was personally served or sent, establishes that:

- this subchapter does not apply to the person, and the person has previously provided this information to DPS; **or**
- there is no reasonable probability that a judgment will be rendered against the person as a result of the accident.

- That the person is entitled to a hearing under this subchapter if a written request for a hearing is delivered or mailed to DPS not later than the 20th day after the date the notice was personally served or sent.

Transportation Code § 601.155.

3. Hearing

Notice and Hearing Procedures

A hearing is subject to the notice and hearing procedures of Transportation Code § 521.295-521.303, which are set out in the general procedures above.

A party is **not** entitled to a jury.

The court shall set a date for the hearing and it must be held at the earliest practical time after notice is given to the person requesting the hearing.

DPS shall summon the person requesting the hearing to appear at the hearing. Notice under this subsection:

- shall be:
  - delivered through personal service;
  - mailed by first class mail to the person's last known address, as shown by the department's records; **or**
  - sent by e-mail if the person has provided an e-mail address to the department and has elected to receive notice electronically; **and**
- must include written charges issued by DPS.

Transportation Code § 601.156.

KEY POINT

Issue at Hearing, Order, and Reporting to DPS

The issue at the hearing is whether there is a reasonable probability that a judgment will be rendered against the person requesting the hearing as a result of the accident.

If the judge finds that there is **not** a reasonable probability, then DPS may not suspend the person's license.

If the judge finds that there is a reasonable probability that a judgment will be rendered, the judge must determine the amount of security sufficient to satisfy any judgment for damages resulting from the accident. The amount of security may not be less than $1,000. If the person deposits the security with DPS, then DPS may not suspend their license.

Determination is Not Admissible as Evidence in a Civil Suit

A determination that there is a reasonable probability that a judgment will be rendered against a person as a result of an accident may not be introduced into evidence in a civil suit for damages arising from that accident.

The judge shall report the judge's determination at the hearing to DPS. *Transportation Code § 601.157, 601.154(b)(1).*

Form of Security

If the person deposits the required security, it must be made:

- by cash deposit;
- through a bond that complies with Transportation Code § 601.168; **or**
- in another form as required by DPS.

Transportation Code § 601.163.

4. Appeal

Who May Appeal?

KEY POINT

If the judge determines that there is a reasonable probability that a judgment will be rendered against the person requesting the hearing as a result of the accident, the person may appeal the determination. DPS may not appeal. *Transportation Code § 601.158(a).*

COMMON PITFALL

How to Appeal

The person must file a petition (not a notice of appeal):

- Not later than the 30th day after the date on which the judge made the determination.

- In the **county court at law** of the county in which the person resides, or, if there is no county court at law, in the **county court**.

KEY POINT

Since the appeal is filed in the county court (or county court at law), there is no requirement to pay a filing fee to the justice court in order to appeal.

The person must also send a file-stamped copy of the petition, certified by the clerk of the court in which the petition is filed, by certified mail to DPS at its headquarters in Austin. *Transportation Code § 601.158(b), (c).*

Stay of Suspension/Revocation

The filing of a petition of appeal stays an order of suspension until the earlier of:

- the 91st day after the date the appeal petition is filed; **or**
- the date the trial is completed and final judgment is rendered.

Transportation Code § 601.158(d).

Chapter 7: Environmental/Public Nuisance Hearings

These proceedings are covered by Chapter 343 of the Health and Safety Code.

A. What is an Environmental or Public Nuisance Hearing?

There are certain actions/situations that are considered public nuisances. In some circumstances, a county may **abate** (eliminate or remedy) a public nuisance if it adopts and follows abatement procedures that are in line with Chapter 343 of the Health and Safety Code.

KEY POINT

Before a county may abate a nuisance, however, it must generally provide a hearing if one is requested. A justice of the peace is one of the people who might be able to preside over such a hearing. The role of the court in this hearing is to determine whether a nuisance has occurred and whether the county has the authority to abate the nuisance; and if so, to assess certain costs/fees in favor of the county. *Health and Safety Code § 343.021(a), 343.022, 343.023.*

Wait! Is this injunctive relief? I thought justice courts couldn't order injunctive relief…

No – there is no injunctive relief in these proceedings! Instead, the court is only making certain findings and assessing costs/fees. It is not ordering any party to do or not do something.

B. What is Considered a Public Nuisance?

The following list describes all of the public nuisances that may be abated by a county under Chapter 343 of the Health and Safety Code.

COMMON PITFALL

This list only applies in unincorporated areas of a county. In addition, it does not apply to:

- a site or facility that is:
  - permitted and regulated by a state agency for the activity described; **or**

- a solid waste facility licensed or permitted under Chapter 361 of the Health and Safety Code for the activity described; **or**

- agricultural land (land that qualifies for tax appraisal under Subchapter C or D, Chapter 23, Tax Code.)

Health and Safety Code § 343.011(a), (d).

1. List of Public Nuisances Chart and Definitions

Click Here to Open the List of Public Nuisances Chart and Definitions

C. Filing Fees

There is no authority for charging a filing fee at any stage of these proceedings.

D. Notice of Nuisance to Offender

Written notice of the existence of a public nuisance must be given to:

- the owner, lessee, occupant, agent, or person in charge of the premises; **and**
- the person responsible for causing a public nuisance on the premises when:
  - that person is not the owner, lessee, occupant, agent, or person in charge of the premises; **and**
  - the person responsible can be identified.

Health and Safety Code § 343.022(b).

KEY POINT

Contents of Notice

The notice must state:

- the specific condition that constitutes a nuisance;
- that the person receiving notice shall abate the nuisance before the:
  - 31st day after the date on which the notice is served, if the person has not previously received a notice regarding a nuisance on the premises; **or**
  - 10th business day after the date on which the notice is served, if the person has previously received a notice regarding a nuisance on the premises;
- that failure to abate the nuisance may result in:

    - abatement by the county;
    - assessment of costs to the person responsible for causing the nuisance when that person can be identified; **and**
    - a lien against the property on which the nuisance exists, if the person responsible for causing the nuisance has an interest in the property;
- that the county may prohibit or control access to the premises to prevent a continued or future nuisance described by Section 343.011(c)(1), (6), (9), or (10) of the Health and Safety Code ***(#1, 6, 9, and 10 in the List of Public Nuisances on page 61)***; **and**
- that the person receiving notice is entitled to submit a written request for a hearing before the:
    - 31st day after the date on which the notice is served, if the person has not previously received a notice regarding a nuisance on the premises; **or**
    - 10th business day after the date on which the notice is served, if the person has previously received a notice regarding a nuisance on the premises.

Health and Safety Code § 343.022(c).

Method of Service

The notice must be provided in one of the following ways:

- In person or by registered or certified mail, return receipt requested; **or**
- if personal service cannot be obtained or the address of the person to be notified is unknown, by:
    - posting a copy of the notice on the premises on which the nuisance exists; **and**
    - publishing the notice in a newspaper with general circulation in the county two times within 10 consecutive days.

Health and Safety Code § 343.022(d).

What if the Person Just Ignores the Notice and Does Not Request a Hearing or Abate the Nuisance?

In that case, a criminal complaint may be filed against the person seeking a fine of up to $200 per day for each day of the offense and potentially an order from the court to abate the nuisance. See Chapter 11 of the *Criminal Deskbook*.

Notice is typically provided by a county environmental health official, or another county employee employed to address public nuisances.

E. Hearing

Hearing Requirement

Generally, the county must provide a hearing (if requested) **before** the county abates a nuisance.

However, a county may abate the nuisance first and then hold the hearing afterwards if it is a nuisance under Health and Safety Code § 343.011(c)(6) (maintaining a swimming pool on abandoned/unoccupied property without a proper fence and cover). In this case, the nuisance may be abated by:

- prohibiting or controlling access to the premises on which the nuisance is located; **and**
- installing a cover that cannot be opened by a child over the entire swimming pool.

Health and Safety Code § 343.022(e), (f).

Who Hears the Hearing?

KEY POINT

Hearings may be conducted before the commissioners court or any board, commission, or official (including a justice of the peace) designated by the commissioners court. If a justice of the peace has not been designated to conduct these hearings, then they may not do so. *Health and Safety Code § 343.022(e).*

Issue at the Hearing

The official designated to conduct the hearing (which may be a justice of the peace) must determine:

- whether a public nuisance exists; and if so,
- whether the county has the authority to abate the nuisance.
    - (Has the county adopted procedures in line with Chapter 343 of the Health and Safety Code and followed the required procedures, including providing notice and hearing, as outlined in this chapter?)

Health and Safety Code § 343.023(b), (e).

F. Order

KEY POINT

If a justice court is designated to conduct the hearing and the court finds that a public nuisance exists and the county has the authority to abate the nuisance, the court may assess:

- the cost of abating the nuisance, including management, remediation, storage, transportation, and disposal costs, and damages and other expenses incurred by the county;
- the cost of legal notification by publication (if any); **and**
- an administrative fee of not more than $100 on the person receiving notice under Health and Safety Code § 343.022.

Health and Safety Code § 343.023(a).

G. Appeal

There is no procedure for appeal.

H. Environmental/Public Nuisance Hearings Chart

Click Here to Open the Environmental/Public Nuisance Hearings Chart

Chapter 8: Handgun License Denial/Suspension/Revocation Proceedings

These proceedings are governed by Subchapter H of Chapter 411 of the Government Code.

A. What is a Handgun License Denial / Suspension / Revocation Proceeding?

KEY POINT

A person's license to carry a handgun can be denied, suspended, or revoked by DPS. If this occurs, the person may request a hearing. A justice of the peace will conduct the hearing and either affirm the denial/suspension/revocation or order the license issued or returned.

Wait, Didn't Handgun Licenses Go Away?

Effective September 1, 2021, a handgun license is no longer required for nearly all instances of carrying a holstered handgun in Texas. However, handgun licenses are still available, and the procedures described in this chapter were not changed by the new legislation. For an example of a reason why a person may still want a license, it could be required to carry in other states which have reciprocity arrangements with Texas.

B. Filing Fees

There is no authority for charging a filing fee at any stage of these proceedings.

C. Notice by DPS of Denial/ Suspension / Revocation of License

DPS shall give an applicant/licensee written notice of any denial, suspension, or revocation of a license to carry a handgun. *Government Code § 411.180(a).*

D. Reasons for Denial of a License

A license to carry a handgun may be denied for **any** of the following reasons:

- If the applicant did not submit all of the application materials required under Government Code § 411.174. *Government Code § 411.177(a).*
- If a qualified handgun instructor submits a written recommendation for disapproval of the application and an affidavit under Government Code § 411.188(k), recommending denial because the instructor believes the applicant does not possess the required handgun proficiency.
    - DPS may use a written recommendation submitted under this subsection as the basis for denial only if DPS determines that the recommendation is made in good faith and is supported by a preponderance of the evidence.
- If the applicant had a license to carry a handgun previously revoked for a reason listed in Government Code § 411.186(a)(1)-(4), **and**
    - it has been less than two years since the date of the revocation;
    - the cause for the revocation still exists; **or**
    - the cause for revocation still existed on the second anniversary after the date of revocation, and it has not been two years since the cause has ceased to exist.
- If the applicant had a license to carry a handgun previously revoked for a reason listed in Government Code § 411.186 (a)(5), and the application fee and dishonored payment charge of $25 has not been paid by cashier's check or money order made payable to the "Department of Public Safety of the State of Texas."
- On the grounds that the applicant failed to qualify under the eligibility criteria listed in Government Code § 411.172 (see below for more information).

Government Code § 411.177(b)(2), 411.186(c), (d).

KEY POINT

Government Code § 411.172 states that a person is eligible for a license to carry a handgun if:

- The person is a legal resident of this state for the six-month period preceding the date of application or is eligible for a nonresident license under Government Code § 411.173(a);
- The person is at least 21 years of age **or** is at least 18 years of age and:
    - is protected under an active protective order (including an EPO issued by a magistrate) and is otherwise eligible for a handgun license; **or**
    - is a member or veteran of the United States armed forces, including a member or veteran of the reserves or national guard, was discharged under

honorable conditions (if discharged), **and** is otherwise eligible for a handgun license;

- The person has **not** been convicted of a felony;
- The person is **not** charged under an information or indictment with the commission of a:
    - Class A or Class B misdemeanor or equivalent offense,
    - an offense under Penal Code § 42.01 (disorderly conduct), or equivalent offense, **or**
    - a felony;
- The person is **not** a fugitive from justice for a felony or a Class A or Class B misdemeanor or equivalent offense;
- The person is **not** a chemically dependent person as shown by:
    - having been convicted two times within the 10-year period preceding the date of the application of a Class B misdemeanor or greater offense that involves the use of alcohol or a controlled substance as a statutory element of the offense, **or**
    - other evidence that exists to show that the person is a chemically dependent person;
- The person is **not** incapable of exercising sound judgment with respect to the proper use and storage of a handgun (see below at the end of this list for an explanation of when a person is considered incapable of this);
- The person has **not**, in the five years preceding the date of application, been convicted of:
    - a Class A or Class B misdemeanor or equivalent offense, **or**
    - an offense under Penal Code § 42.01 (disorderly conduct) or equivalent offense;
- The person is fully qualified under applicable federal and state law to purchase a handgun;
- The person has **not** been finally determined to be delinquent in making a child support payment administered or collected by the attorney general;
- The person has **not** been finally determined to be delinquent in the payment of a tax or other money collected by the comptroller, the tax collector of a political subdivision of the state, or any agency or subdivision of the state;

- The person is **not** currently restricted under a court protective order or subject to a restraining order affecting the spousal relationship (other than a restraining order solely affecting property interests);
- The person has **not**, in the 10 years preceding the date of application, been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony; **and**
- The person has **not** made any material misrepresentation or failed to disclose any material fact in the application.

Incapability of Exercising Sound Judgment with Respect to the Proper Use and Storage of a Handgun

A person is considered incapable of exercising sound judgment with respect to the proper use and storage of a handgun if **any** of the following are true (unless the person provides DPS with a certificate from a licensed physician whose primary practice is in the field of psychiatry stating that the psychiatric disorder or condition described below is in remission and is not reasonably likely to develop at a future time):

- The person has been diagnosed by a licensed physician, determined by a review board or similar authority, or declared by a court to be incompetent to manage the person's own affairs.
- The person has entered a plea of not guilty by reason of insanity in a criminal proceeding.
- The person has been diagnosed by a licensed physician as suffering from a psychiatric disorder or condition that causes or is likely to cause substantial impairment in judgment, mood, perception, impulse control, or intellectual ability.
    - This still applies if the disorder/condition is in remission but is reasonably likely to redevelop at a future time or requires continuous medical treatment to avoid redevelopment.
    - The following count as evidence that a person has a disorder or condition:
        - psychiatric hospitalization (voluntary or involuntary);
        - inpatient or residential substance abuse treatment in the preceding five-year period;
        - diagnosis in the preceding five-year period by a licensed physician that the person is dependent on alcohol, a controlled substance, or a similar substance; **or**

- diagnosis at any time by a licensed physician that the person suffers or has suffered from a psychiatric disorder or condition consisting of or relating to: schizophrenia or delusional disorder; bipolar disorder; chronic dementia; dissociative identity disorder; intermittent explosive disorder; or antisocial personality disorder.

E. Reasons for Suspension of a License


KEY POINT

DPS **must** suspend a license if **any** of the following are true:

- The license holder is charged under an information or indictment with the commission of:
  - a Class A or Class B misdemeanor or equivalent offense;
  - an offense under Penal Code § 42.01 (disorderly conduct), or equivalent offense; **or**
  - a felony.
- The license holder fails to notify DPS of a change of address, name, or status as required by Government Code § 411.181.
- The license holder commits an act of family violence and is the subject of an active protective order rendered under Title 4 of the Family Code.
- The license holder is arrested for an offense involving family violence or an offense under Penal Code § 42.072 (stalking), and is the subject of an order for emergency protection issued under Code of Criminal Procedure Art. 17.292.

Government Code § 411.187.

F. Reasons for Revocation of a License


KEY POINT

DPS **must** revoke a license if **any** of the following are true:

- The license holder was not entitled to the license at the time it was issued.
- The license holder made a material misrepresentation or failed to disclose a material fact in the application.
- The license holder subsequently becomes ineligible for a license under Government Code § 411.172 ***(see page 66).***
  - **Unless** the sole reason for the ineligibility is that the license holder is charged under an information or indictment with the commission of a Class

A or Class B misdemeanor, an offense under Penal Code § 42.01 (disorderly conduct), or a felony: If this happens, then DPS must suspend and not revoke (see Section E above).

- The license holder is determined by DPS to have engaged in conduct requiring license suspension (see Section E above) after the person's license has been previously suspended twice for the same reason.
- The license holder submits an application fee that is dishonored or reversed and fails to:
    - submit a cashier's check or money order made payable to the "Department of Public Safety of the State of Texas"
    - for the amount of the fee plus a dishonored payment charge of $25,
    - within 30 days of being notified by the department that the fee was dishonored or reversed.

Government Code § 411.186.

G. Request and Petition for Hearing

When a person's handgun license application is denied, or when a person's handgun license is suspended or revoked, the person may request a hearing.

The applicant **must** make a written request for the hearing addressed to DPS at its Austin address. The request for hearing must reach the department in Austin prior to the **30th day** after the date of receipt of the written notice of the denial/suspension/revocation.

If an applicant or a license holder does not request a hearing, a denial becomes final, and a revocation or suspension takes effect on the 30th day after receipt of written notice.

KEY POINT

Upon receiving the hearing request, DPS must promptly file a petition for a hearing with a justice court in the applicant's/licensee's county of residence, and is

No Review/Hearing for Suspensions Due to PO or EPO

If a person's license is suspended as a result of a protective order (Family Code § 85.022) or a magistrate's emergency protective order (Code of Criminal Procedure Art. 17.292), the license holder may not request a hearing on the matter under Government Code Chapter 411 and a justice of the peace **may not** review or rule on the suspension.

required to send a copy of the petition to the applicant/licensee. *Government Code § 411.180(a), (b), (g).*

H. Timeframe for Hearing


KEY POINT

The hearing must be **scheduled** (set on a docket) within **30 days** of DPS receiving the person's request for a hearing.

The hearing must be **held** "expeditiously," but no later than **60 days** after the request for a hearing.

Either party, or the court, may move for a continuance, as long as the 60-day deadline is met. *Government Code § 411.180(b).*

I. Hearing


KEY POINT

The justice court shall conduct a hearing to review the denial, revocation, or suspension of the license and determine if it is supported by a preponderance of the evidence.

A district attorney or county attorney, the attorney general, or a designated member of DPS may represent DPS. Both the applicant or license holder and DPS may present evidence.

DPS may use and introduce into evidence certified copies of governmental records to establish the existence of certain events, including:

- records regarding convictions;
- judicial findings regarding mental competency;
- judicial findings regarding chemical dependency; **or**
- other matters that may be established by governmental records that have been properly authenticated.

Government Code § 411.180(a), (c), (h).

J. Order


KEY POINT

Options for Court's Ruling

If the court determines that denial, revocation, or suspension is supported by a preponderance of the evidence: the court shall affirm the denial, revocation, or suspension.

If the court determines that the denial, revocation, or suspension is Not supported by a preponderance of the evidence: the court shall order the department to immediately issue a license or return the license to the applicant or license holder. *Government Code § 411.180(c).*

No Probation

A suspension or revocation of a handgun license may **not** be probated. *Government Code § 411.180(f).*

Surrender of License

If a suspension or revocation is affirmed, the license holder shall surrender the license on the date that the court enters its order. *Government Code § 411.186 (b), 411.187(b).*

Notification to DPS

DPS may be notified of an order suspending a handgun license by email to ***rsd.ltc.compliance@dps.texas.gov*** (using a pdf formatted file only).

K. Fees, Expenses, and Attorney's Fees

A handgun license denial/suspension/revocation proceeding is subject to Chapter 105 of the Civil Practice and Remedies Code, relating to fees, expenses, and attorney's fees. *Government Code § 411.180(d).*

Chapter 105 of the Civil Practice and Remedies Code addresses frivolous claims by a state agency.


COMMON PITFALL

The applicant/license holder is entitled to recover fees, expenses, and reasonable attorney's fees incurred in the case if:

- the applicant/license holder files a written motion:

- alleging and setting forth supporting facts that the agency's claim is frivolous, unreasonable, or without foundation; **and**
- stating that if judgment is awarded to the applicant/license holder, they intend to submit a motion to recover fees/expenses/reasonable attorney's fees;

- the court finds that the action is frivolous, unreasonable, or without foundation; **and**
- judgment is awarded to the applicant/license holder.

"Fees and other expenses" means:

- the reasonable expenses of witnesses incurred in preparing to testify or in attending or testifying;
- a reasonable fee for the professional services of an expert witness; **and**
- the reasonable costs of a study, analysis, engineering report, test, or other project the court finds to be necessary for the preparation of the party's case.

Civil Practice and Remedies Code § 105.001, 105.002, 105.003.

L. Appeal

Who May Appeal?

Either party may appeal the court's ruling.

How to Appeal

COMMON PITFALL

The party must file a petition (not a notice of appeal):

- Within **30 days** after the ruling.
- In the **county court at law** of the county in which the applicant/license holder resides, or, if there is no county court at law, in the **county court**.

KEY POINT

Since the appeal is filed in the county court (or county court at law), there is no requirement to pay a filing fee to the justice court in order to appeal.

The person must also send a file-stamped copy of the petition, certified by the clerk of the court in which the petition is filed, by certified mail to the appropriate division of DPS at its Austin headquarters. *Government Code § 411.180(e).*

Chapter 9: Occupational Driver's Licenses

These proceedings are covered by Subchapter L of Chapter 521 of the Transportation Code.

A. What is an Occupational Driver's License (ODL)?

When a person's driver's license or privilege is suspended, that person might qualify for a special license that allows them to drive during the period of the suspension. This license is called an occupational driver's license (ODL).

- An ODL serves as a valid license for the period that the person's regular license is suspended.
- An ODL has restrictions that a regular license does not have.
- An ODL may **not** be used to operate a commercial motor vehicle (CMV), but someone who holds a commercial driver's license (CDL) could get an ODL to drive a vehicle that is not a CMV.

B. What is an ODL Proceeding?

A person whose license has been suspended may be able to file an application for an ODL in a justice court. Whether or not they may do so depends upon the reason for the suspension (discussed below).

If the application may be filed in a justice court, then the justice of the peace must determine whether or not to issue an order granting the ODL and what terms and conditions should be included in the order. If an order granting an ODL is entered and all other DPS requirements are met ***(see page 90)***, DPS will issue an ODL to the applicant.

C. Filing Fees

KEY POINT

An Attorney General's opinion has stated that filing fees **should be charged** in ODL cases:

"[An occupational license] proceeding is a civil matter. ***Curry v. Gilfeather***. Consequently, section 118.122 of the Local Government Code authorizes a justice court to charge a fee for filing a petition to apply for an occupational driver's license." *Attorney General Opinion GA-1044 (2014).*

The amount of the filing fee should be the same as for any civil case filed in the court. An applicant could file a Statement of Inability to Afford Payment of Court Costs as in any other civil case.

It is unclear whether this decision applies only to ODL proceedings, or to other administrative proceedings that are considered civil in nature as well. As such, we have said in the chapters for other "civil" administrative hearings that the law is unclear about whether filing fees should be charged.

D. Who Is Eligible for an ODL and Where Do They File the Application?

1. Do They Have a License That Has Been Suspended?

To be eligible for an ODL a person must have a license that has been **suspended (so they can't just go to the DMV and get a license)**. "License" means:

- a driver's license;
- the privilege to operate a motor vehicle regardless of whether the person holds a driver's license (for example, they had a license but it expired or they hold a permit); **or**
- A nonresident's operating privilege (for example, they have a license from another state).

Transportation Code § 521.001(a)(6).

KEY POINT

If the person's driver's license, privilege, or nonresident's operating privilege has not been **suspended**, then the person is **not** eligible for an ODL. *Transportation Code § 521.242.*

Please note with respect to child support: If a person fails to pay child support, their license may be **revoked** (not suspended). A person whose license has been revoked due to


CLICK HERE

non-payment of child support is **not eligible** for an ODL. See ***https://www.dps.texas.gov/DriverLicense/DelinquentChildSupportRevocation.htm***

2. What is the Reason for the Suspension?

Whether a person is eligible for an ODL and where they must file the application depends on the reason for the suspension. *Transportation Code § 521.242.*

Suspension Due to Physical or Mental Disability or Impairment
A license or privilege may be suspended due to a **physical or mental disability or impairment**. In that case, the person is **not** eligible for an ODL.

Automatic Suspension Upon Conviction
A license or privilege may be **automatically** suspended **upon conviction of an offense** (these are listed in Subchapters O and P of Chapter 521 of the Transportation Code). In that case, the person **is** eligible for an ODL but they must apply for it in the **convicting court** which will in effect never be a justice court.

- Examples of automatic suspension where a higher court will determine whether to grant an ODL include: DWI, DWI with Child Passenger; Intoxication Assault; Intoxication Manslaughter; Evading Arrest or Detention (with a vehicle).

Administrative Suspension by DPS
A license or privilege may be suspended **administratively** by DPS on its own or as a result of a court order (so not an automatic suspension upon conviction of an offense). In that case, the person **is** eligible for an ODL and **may apply to any justice, county, or district court in the county in which the person resides or the offense occurred for which the license was suspended**. If they apply to a justice court, they can apply to any precinct in the county. *Transportation Code § 521.242(a).* These suspensions include:

- Refusal to submit to a breath or blood test following a DWI (or other alcohol-related driving offense) (Chapter 724 of the Transportation Code);
- Failing a breath or blood test (i.e., BAC over .08) following a DWI (or other alcohol offense) stop (Chapter 524 of the Transportation Code);

- Any cause for suspension listed in Section 521.292, Transportation Code. (These are listed on ***page 49*** of this volume; for example, DWLI (Driving With License Invalid), habitual violator of traffic laws).

3. Common Eligibility Questions

What if a Person Never Had a License or it Expired, and They Are Not Subject to a Suspension?

If a person never had a driver's license, or they had one but it expired, **and** there is no suspension that makes them ineligible to get a license, then they are **not** eligible for an ODL. There has been no suspension of either their driver's license or their "privilege" to drive; they can just go to DMV and get a license.

What if a Person Never Had a License but is Subject to a Suspension?

KEY POINT

If a person never had a license and now can't get one because they committed an offense that would trigger a suspension, a literal reading of the statute would say that they are not eligible for an ODL since they had neither a license nor a "privilege" that was suspended. But DPS takes the position that it will accept an ODL in this situation. It is up to each judge to decide whether to follow a literal interpretation of the statute or DPS's position, but a judge should be consistent in their decisions.

What if a Person's License Expired, but They Are Subject to a Suspension?

Sometimes a person's license expires, and they continue to drive without a valid license. If they commit an offense that would trigger a suspension (for example, DWLI), then they may not be able to renew their license during that suspension period. Here it is their "privilege" to drive, not their license, which has been suspended. Because their "privilege" to drive has been suspended, they **are** eligible for an ODL even though their driver's license has expired.

What if the License Has Been Expired for More than Two Years?

COMMON PITFALL

If the driver's license has been expired for more than 2 years, the court **may** enter the order, **but** the person will still have to take a driving test and complete any other requirements before DPS will issue the ODL. ***See page 90 of this volume.*** However, they will be able to drive using the order granting the ODL for 45 days before being issued the

occupational license by DPS (presumably after taking the test and completing any other requirements).

What if a Person is in OMNI?

If a person is in OMNI, then they are not able to get their license renewed when it expires. This is not a suspension; it is a non-renewal. Therefore, they are **not** eligible for an ODL. In order to be able to get their license renewed, they have to get released from Omni. See Chapters 3 and 8 of the *Criminal Deskbook*.

COMMON PITFALL

What if DWI charges are pending in another court?

Even if DWI charges are pending in a county court at law or district court, the person **may** file a petition for an ODL in justice court (if they are otherwise eligible to do so) because there has *not yet been a conviction*.

An example of when this might come up is if a person's license has been suspended after a DWI stop because they failed to provide a breath/blood sample or because they failed an intoxication test (ex: providing a breath sample with a BAC of over .08). In this case, the person may have a DWI case pending in another court, but they can seek an ODL in justice court because the current suspension is not an automatic suspension upon conviction of an offense.

What if the Applicant is a Minor?

If the applicant is a minor and otherwise eligible, then they are eligible for an ODL subject to the limitations described in *Transportation Code § 524.022(d)*. Here are those limitations:

- A minor (under 21) whose driver's license is suspended under Chapter 524 (Failure to Pass Test for Intoxication) is **not** eligible for an ODL for:
    - the first **30 days** of the suspension if the minor has **no prior** conviction of an offense under:
        - Alcoholic Beverage Code § 106.041 (DUI by a Minor);
        - Penal Code § 49.04 (DWI), § 49.045 (DWI w/ Child Passenger), or § 49.06 (Boating While Intoxicated); **or**
        - Penal Code § 49.07 (Intoxication Assault) or § 49.08 (Intoxication Manslaughter) involving the operation of a motor vehicle or a watercraft;

- the first **90 days** if the minor has **one prior** conviction of any of the above offenses; **and**
- the **entire** period of the suspension if the minor has **two or more** convictions of any of the above offenses.

Note: an order of deferred adjudication for any of the above offenses or an adjudication in a juvenile court that the minor engaged in conduct that would constitute any of these offenses **are** considered convictions for the purposes of this statute.

What if the ODL Has Been Suspended?

A person is **not** eligible for a new occupational license during a period when their current ODL has been suspended for not attending counseling ordered by the court under Transportation Code § 521.245. *Transportation Code § 521.245(g).*

4. ODL Eligibility Chart

Click Here to Open the ODL Eligibility Chart

E. Application Requirements

The applicant **must** file a verified petition and:

- Describe in detail and provide any documentation of their essential need to operate a motor vehicle ***(discussed on page 80 of this volume)***;
- Provide evidence of financial responsibility ***(see page 81)***; **and**
- Provide a certified abstract of their driving record.

Transportation Code § 521.242(a),(c).

F. Deciding Whether to Enter an Order Granting an ODL

1. Is a Hearing Needed?

The judge may decide whether or not to hold a live hearing. A prosecutor may be notified and attend, but this is not required. The hearing may be held *ex parte* (with only the applicant present).

BEST PRACTICE

TJCTC recommends holding a live hearing if the applicant fails to include information needed by the court in order to decide whether to issue the order, what should be included in the order, and/or when the order will take effect.

A hearing is not required if a petition is filed in a justice court when it was required to be filed in the convicting court because the license suspension was imposed automatically upon conviction. *Transportation Code § 521.243, 521.244.* ***See discussion at page 76 of this volume.***

2. Determine Whether the Applicant is Eligible and if the Application was Filed Properly

The court should determine if the person is eligible for an ODL and if the application has been filed in the proper court. ***See pages 75 – 77 of this volume.***

If the person is not eligible or if they have filed their application in the wrong court, the court should deny the application.

3. Determine if the Applicant Has Demonstrated Essential Need and Evidence of Financial Responsibility

Before a court may grant an application for an ODL, the judge must first determine whether the applicant has demonstrated an "**essential need**" for the ODL and evidence of financial responsibility.

"Essential need" means a person needs to drive for:


KEY POINT

- the performance of an occupation or trade or for transportation to and from the place at which the person practices the person's occupation or trade (we believe that needing to drive to go to job interviews counts under this category even if the person does not currently have a job);
- transportation to and from an educational facility in which the person is enrolled; **and/or**
- the performance of essential household duties (such as grocery shopping, medical appointments, children's school/activities, etc.).

The judge shall consider the applicant's driving record when deciding if an essential need exists.


KEY POINT

If the judge finds that there is an essential need, the judge shall also:

- determine the actual need of the applicant to operate a motor vehicle (days/hours/locations/reason); **and**
- require the applicant to provide evidence of financial responsibility in accordance with Chapter 601 of the Transportation Code (this is most often, but not always, an SR-22 form).

The judge may access the Financial Responsibility Verification Program to determine if the applicant has financial responsibility. *Transportation Code § 601.455*. The program is called TexasSure. ***TexasSure program website.*** For more information on evidence of financial responsibility, see:


CLICK HERE

DPS Alcohol Related Offenses Page

DPS SR22 Insurance Certificates Page

If the applicant is unable to demonstrate an essential need to drive or does not provide evidence of financial responsibility, the application should be denied. *Transportation Code § 521.241(1), 521.244(b), (c).*

4. Checklist Before Granting Order for an ODL

- ☐ Was the license or privilege suspended for a reason other than a physical or mental disability or impairment?
- ☐ Was the petition filed in the proper court?
- ☐ Has the petitioner shown an essential need?
- ☐ Has the petitioner shown evidence of financial responsibility?

What is an SR-22?

An SR-22 is a certificate that shows that the person is meeting the minimum insurance requirements and will continue to do so for a set amount of time. While an SR-22 is a valid means of proving financial responsibility, it is not the only means of doing so and an applicant may meet this requirement by producing other evidence of financial responsibility, such as a valid insurance policy.

KEY POINT

If any of these are not present, then the application for an ODL must be denied.

G. Contents of Order

1. Travel Limits

The court must order the following travel limits in the ODL order and should base the specifics of the limits on the person's demonstrated need to operate a vehicle:

- The hours/days when the person may operate a vehicle.
    - This should be based on work hours and/or the times for other obligations

Has a Person Made a "Showing of Necessity"?

The statute does not say what a "showing of necessity" means. It will be up to the court to decide whether this requirement has been met.

that the person has an essential need to drive to.

- The applicant **may not** operate a motor vehicle for **more than four hours** in any 24-hour period.
  - **Except:** On a showing of necessity, the court **may** allow the person to drive for any period determined by the court that does not exceed **12 hours in any 24-hour period.**

- The reasons that the applicant may operate a vehicle.
  - This should be tailored to the specific reasons the person provided when demonstrating an essential need to drive (for example, to go to work).

- The areas or routes of travel permitted.
  - This should be tailored to the specific areas that the person said they need to drive to when they were demonstrating an essential need to drive.
  - This could be a specific county or group of counties or a particular route or routes.
  - Out of state? The court may include in an order that the person may travel in another state or states, but the person (and not the court) is responsible for determining whether the other state(s) will honor the ODL or not.

COMMON PITFALL

May the Court Require a Log?

Yes. The court may order the person to maintain a detailed log of all of their driving and to keep the log in their car. This may be a good practice, for example, if the applicant has a job where their shift changes every two weeks, or they don't know their exact route or time of travel. The court could order them not to drive more than four hours a day and to maintain a log of all the driving they do, including time of travel and point to point. *Transportation Code § 521.248.*

What if the Days/Hours or Areas Where a Person Needs to Drive are Uncertain or Inconsistent?

The judge could be very specific in the order about the reasons that a person is allowed to drive and the specific reasons for which they can leave their county of residence.

In this case, it would be a good idea to require them to keep a detailed log.

Exception

COMMON PITFALL

A person who is restricted to the operation of a motor vehicle equipped with an ignition interlock device **may not** be subject to any time of travel, reason for travel, or location of travel restrictions. *Transportation Code § 521.248(d).*

2. Ignition Interlock

When must the court include a requirement in the order that the person may only drive a vehicle with an ignition interlock installed?

KEY POINT

A justice court order granting an occupational driver's license **must** require the person to have an ignition interlock device if a court order already exists requiring the person to install an ignition interlock device on any vehicle they operate. *Transportation Code § 521.248(a)(4).* This situation could arise in one of three ways:

- If a bond condition has been imposed requiring the installation of an ignition interlock device on any vehicle that the person operates. *Code of Criminal Procedure Art. 17.441.*
- If an ignition interlock device was required after a DWI conviction suspension has ended, but then the license is suspended again for an unrelated reason. *Penal Code § 49.09(h).*
- If a condition of community supervision has been imposed after a conviction of an offense under Sections 49.04-49.08, Penal Code, requiring the installation of an ignition interlock device on any vehicle that the person operates. *Code of Criminal Procedure Art. 42A.408.*
    - **Note on why this could be filed in a justice court:** When a person is subject to community supervision, their license will not always be *automatically* suspended even though they have been convicted of an offense under Penal Code § 49.04-49.08. If a person's license has not been suspended due to a conviction under Penal Code § 49.04-49.08, but for an unrelated reason (for example, as a habitual violator of traffic laws), then a justice of the peace may enter an order for an ODL here if the applicant is otherwise eligible.

In any of these three situations (the most common one by far will be where an ignition interlock was required as a bond condition), a justice of the peace must include a requirement that the person have an ignition interlock in an order granting an ODL.

May a justice of the peace order an ignition interlock as a condition of the order granting the ODL over the applicant's objection when they are not subject to an existing order or condition of community service requiring an ignition interlock?

No, a court cannot order an ignition interlock as a condition of an ODL over the applicant's objection unless it falls within one of the situations discussed above. **Deleon v. State.**

But what if the applicant says they will voluntarily install an ignition interlock and asks the court to order it as a condition of the order granting the ODL?

COMMON PITFALL

If a person's license has been suspended under Chapters 524 or 724 of the Transportation Code (BAC over .08 or they refused to take the breath or blood test), **and** the person **voluntarily** submits proof that they have an ignition interlock device installed on each vehicle they own or operate, then the court may include the ignition interlock requirement in the order granting the ODL. *Transportation Code § 521.248(a)(4).* In other words, the court may not **force** a person to install an ignition interlock device as a condition of the ODL if there is not already a court order in place requiring an ignition interlock device, but the applicant may *voluntarily* install it if their license was suspended for refusing to take the test or failing the test, and in that case the court may include this requirement as part of the order.

What if an ignition interlock device should have been required as a bond condition but was not and the applicant does not voluntarily request the condition in the order granting the ODL?

In that case, the magistrate who ordered the bond conditions or the court with jurisdiction of the offense could modify the conditions to add the requirement, but unless and until that happens, there is no statutory authority to require an ignition interlock device as a condition of the order granting the ODL.

So, when should an ignition interlock device be ordered as a bond condition during magistration?

A magistrate is required to do this when a defendant has been charged with an offense under Penal Code Sections 49.045, 49.07 or 49.08, or with a subsequent offense under Penal Code Sections 49.04, 49.05, and 49.06, unless the magistrate finds that to do so would not be in the best interest of justice. *Code of Criminal Procedure Art. 17.441*.

However, even if it is not required, the magistrate may still choose to add the requirement as a bond condition in a case where it would be a reasonable condition related to the safety of a victim of the alleged offense or to the safety of the community under Article 17.40, Code of Criminal Procedure. For example, if a defendant is arrested for the first time for an offense under Penal Code Section 49.04, (Driving While Intoxicated), the magistrate is not required to impose an ignition interlock device as a bond condition under Article 17.441, but may choose to do so as a reasonable condition related to the safety of the community under Article 17.40. See Chapter 2 of the *Magistration Deskbook.*


KEY POINT

What changes if a court enters an order granting an ODL that includes an ignition interlock requirement?

If the order granting an ODL restricts the person to the operation of a motor vehicle equipped with an ignition interlock device, then:

- The person **may not** be subject to **any** time of travel/reason for travel/location of travel restrictions. *Transportation Code § 521.248(d).*
- The ODL is effective **immediately**. *Transportation Code § 521.251(d-1).* ***See page 88.***
- The person **may not** be ordered to submit to the supervision of the local community supervision and corrections department under Transportation Code Section 521.2462, or a personal bond office established under Art. 17.42 of the Code of Criminal Procedures, **unless** the order is entered by a court of record, which will never be a justice court.

Transportation Code § 521.251(d-1).

What if the Person Removes the Ignition Interlock Device After Getting an ODL?

The court must revoke its order granting an ODL. *Transportation Code § 521.251(d-1).* ***See pages 84 – 85 of this volume.***

3. Alcohol Counseling Program

Requirement

The court **shall** include in the ODL order that the applicant is required to attend a program designed to provide counseling and rehabilitative services to persons for alcohol dependence if the applicant's license has been suspended for:

- failure to pass an intoxication test under Chapter 524 of the Transportation Code (for example: providing a breath sample with a BAC of over .08); **or**
- refusal to submit a breath or blood specimen under Chapter 724 of the Transportation Code.

Transportation Code § 521.245(a).

Monitoring Compliance and Revocation/Suspension of Order

The court **may** require the person to report periodically to the court to verify that the person is attending the alcohol counseling program. If the court learns that the person is not attending the program, the court may revoke the order granting the occupational license. ***See page 92 of this volume.***

On receipt of the order revoking the ODL, DPS must suspend the ODL for:

- 60 days if the original suspension was under Chapter 524 (Failure to Pass Test of Intoxication).
- 90 days if the original suspension was under Chapter 724 (Refusal to Submit Breath or Blood Specimen).

A person **is not** eligible for a new occupational license during this period of suspension.
Transportation Code § 521.245(d), (e), (f).

4. Testing for Alcohol/Drugs

The court **may** include in the ODL order a requirement that the applicant submit to periodic testing for alcohol or controlled substances if the applicant's license has been suspended for:

- failure to pass an intoxication test under Ch. 524 of the Transportation Code (for example: providing a breath sample with a BAC of over .08); **or**
- refusal to submit a breath or blood specimen under Ch. 724 of the Transportation Code.

Transportation Code § 521.2461.

5. Supervision by an Outside Entity

The court may order the person receiving the occupational license to submit to supervision by an outside entity to verify compliance with the conditions specified in the order granting the license, including the travel limits.

There are two options for the entity that would conduct the supervision:

- the local Community Supervision and Corrections Department, in which case the court **must** assess a $25 - $60 administrative fee to be paid to CSCD; **or**

- a personal bond office established under Art. 17.42 of the Code of Criminal Procedure, in which case the office **may** collect a $25 - $60 fee.

The court may order the supervision to continue until the end of the suspension period and may modify or terminate the supervision for good cause. *Transportation Code § 521.2462; Government Code § 76.015(a-1).*

Exception

KEY POINT

If the court issues an occupational license to a person who submits proof that they have an ignition interlock on each motor vehicle they own or operate (if applicable), then the person may **not** be ordered to submit to the supervision of the local CSCD or a personal bond office established under Art. 17.42 of the Code of Criminal Procedure. *Transportation Code § 521.251(d-1).*

H. Effective Dates of Order

If the applicant's license was suspended for any reason ***other than*** **a suspension under Chapter 524 or 724** of the Transportation Code ***(see page 76)*****,** an order granting an occupational license is **effective *immediately*.**

KEY POINT

If the applicant's license ***was*** **suspended under Chapter 524 or 724** of the Transportation Code, there are **three** possible effective dates for an order granting an occupational license:

- Immediately

- **91 days** after the effective date of the current suspension
- **181 days** after the effective date of the current suspension

BEST PRACTICE

Which date applies depends on the applicant's criminal history and whether they have an ignition interlock device. If the petition fails to provide this information, TJCTC recommends holding a live hearing.

Effective Immediately:

- If neither of the following delays apply; **or**
- If the person submits proof that they have an ignition interlock device installed on each motor vehicle owned or operated by the person.

Transportation Code § 521.251(d-1).

Effective 91 Days After Effective Date of Current Suspension

If the person's license has been previously suspended under Chapter 524 or 724 of the Transportation Code in the five years before the date of the person's current arrest, and they are not subject to an ignition interlock device requirement. *Transportation Code § 521.251(b).*

What About the One Year Effective Date?

There is an effective date of one year if the person's license has been suspended as a result of a second or subsequent **conviction** under Penal Code §§ 49.04-49.08 committed within five years of the date on which the most recent preceding offense was committed. *Transportation Code § 521.251(d).* However, this will **not** apply in justice court because the suspension occurs only upon a conviction, so the application has to be filed in the convicting court.

Effective 181 Days After Effective Date of Current Suspension

If the person's license has been previously suspended as a result of a **conviction** under Penal Code § 49.04 - 49.08 (DWI and other intoxication offenses) in the five years before the date of the person's current arrest, and they are not subject to an ignition interlock device requirement. *Transportation Code § 521.251(c).*

I. Issuance of License and Requirement to Have Order When Driving

DPS will issue an ODL to the person:

- once the order granting the ODL is effective (discussed in the previous section);
- after compliance with Chapter 601 of the Transportation Code regarding financial responsibility; **and**
- after payment of the required fee.
    - The fee for issuance or renewal of an occupational license is $10 per year.
    - There may be reinstatement fees as well.


KEY POINT

The order granting the ODL serves as the person's actual license until the 45th day after the date on which the order takes effect. At that point, they will need to have the ODL that is issued by DPS. *Transportation Code § 521.249, 521.421.*

Who Gets the Fee?

The fee is paid to DPS. Some courts collect the fee and forward it to DPS with the paperwork but this is a courtesy on the part of the court and is not a requirement for the court.

ODL Holder Must Have Order in Their Possession While Driving

The person **must** have a certified copy of the court's order granting the occupational license in the person's possession while operating a motor vehicle (along with the ODL issued by DPS) and allow a peace officer to examine the order on request. *Transportation Code § 521.250.*

J. Duration of Order


KEY POINT

A court order granting an ODL is valid until the end of the period of suspension of the person's regular license unless the court specifically designates a different end date in the order. The person may need to renew the ODL issued by DPS but will not need a new order from the court to do this.

K. Appeal

KEY POINT

There is no procedure for appeal.

However, there is nothing prohibiting an applicant from filing a new application for an ODL with a justice court in another precinct in the same county or with any other court that has jurisdiction to issue an ODL.

L. Modification of Order

There is no explicit authority in Chapter 521 to modify an order granting an occupational license.

However, TJCTC believes the court does have authority to modify an order under Government Code § 21.001 ("A court has all powers necessary for enforcement of its lawful orders . . . .").

A court may modify an order at any point as long as the order is still valid. No filing fees are required for a modification since the person is not filing a new petition, but another licensing fee may be required by DPS if the modification is changing information that is included on the actual ODL and the person needs DPS to issue a new one.

Duration of Order vs. 45 Days that Court Order Serves as Actual License

An ODL court **order** will last for as long as the regular license suspension lasts. This is different from the 45-day period (from the effective date of the order) when the order serves as the actual ODL. For the first 45 days that the order is effective, the person only needs to have the order with them. For the rest of the suspension period, the order stays valid the whole time, but the person has to have both the order and the ODL issued by DPS.

Why Would a Court Modify an Order?

If the person's essential needs change. For example, if a person changes jobs, the hours that they need to be able to drive could change to a time outside of what their original order allows.

M. Violation and Revocation of ODL Order

1. Revocation Following Conviction for a Violation

A person who holds an occupational license commits a Class B misdemeanor if the person:

- operates a motor vehicle in violation of a restriction imposed on the license; **or**
- fails to have in the person's possession a certified copy of the court's order granting the license.

Upon conviction of this offense, the ODL and the order granting the ODL are revoked. *Transportation Code § 521.253.*

BEST PRACTICE

DPS has advised TJCTC, however, that they do not revoke an ODL upon conviction but only upon receiving an order from a court revoking the ODL. In light of this DPS policy, we suggest the court issue an order revoking an ODL if the court becomes aware of a conviction of this offense. If the court has any questions about the status of the conviction (for example, was there an appeal), it may hold a hearing.

2. When the Court *Must* Revoke the Order Granting an ODL

The court must revoke its order granting an ODL and reinstate the suspension of the person's driver's license if the court becomes aware that the person has failed to maintain an installed ignition interlock device on each motor vehicle owned or operated by the person. *Transportation Code § 521.251(d-1).* ***See pages 84 – 85 of this volume.***

3. When the Court *May* Revoke the Order Granting the ODL

KEY POINT

A court may issue an order revoking an ODL that it has granted at any time for good cause. What counts as "good cause" is up to the judge to decide. For example, if the person is not complying with the travel restrictions or is not keeping a driving log.

A court may also revoke an order granting an ODL if it finds that the person is not attending an alcohol counseling program as required by the order. The court shall send a certified copy of the order revoking the ODL to DPS. *Transportation Code § 521.245(d).*

N. Notifying DPS

KEY POINT

The Court Must Send DPS Certified Copies of:

- The petition and order (if an ODL is granted);
- Any order modifying an ODL order; **and**
- Any order revoking an ODL order.

Transportation Code § 521.245, 521.249, 521.251(d-1), 521.253(c).

COMMON PITFALL

Note: The court (and not the applicant) is required by statute to send the certified copies. The court must also pay any postage and may not charge any additional fee to the applicant for this purpose.

Contact Info for DPS Division in Charge of ODLs

If mailing only the petition/order:

Enforcement and Compliance Service
Attn: ECA
PO BOX 4087
Austin, TX 78773

If mailing defendant's payment along with the petition/order:

Texas DPS Central Cash Receiving
PO Box 15999
Austin, Texas 78761-5999

Fax: 512.424.2848
Email: ***Driver.Improvement@dps.texas.gov***

CLICK HERE

DPS Occupational Driver License page

TJCTC also has a phone number for the division that is for **court use only**. Please contact April Williams at TJCTC and ask for the "Helpful Contact Information" document. The phone number is listed on that document in the DPS section under "Occupational Driver's License Orders." April's email address is ***adw167@txstate.edu***. If April is unavailable, call TJCTC and press 1 for a legal question, and the Legal Department will assist you.

O. Forms

Forms for ODL proceedings can be found under the “Administrative Proceedings” category in the forms section of the TJCTC website.

P. ODL Flowcharts

Click Here to Open the ODL Flowcharts

Chapter 10: Tow Hearings

These proceedings are covered by Chapter 2308 of the Occupations Code

A. What is a Tow Hearing?

A tow hearing is a hearing in justice court requested by an owner or operator whose vehicle was towed or booted without their consent. The purpose of the hearing is to determine whether the vehicle should have been towed or booted and whether either party owes the other any money.

B. Filing Fees

KEY POINT

Effective January 1, 2022, the standard civil filing fee should be charged for filing a tow hearing case. Tow hearings filed before January 1, 2022, require a $20 filing fee, along with other additional fees required for civil cases filed before January 1, 2022. *Occupations Code § 2308.457.* See Chapter 3 of the *Fines, Fees, and Costs Deskbook* for more information.

C. Key Terms in Towing Cases

Who is an Owner or Operator?

A vehicle owner is a person:

- named as the purchaser or transferee in the certificate of title;
- in whose name the vehicle is registered, or a member of the person's immediate family;
- who holds the vehicle through a lease agreement;
- who is an unrecorded lienholder entitled to possess the vehicle under a chattel mortgage (like a bank); **or**
- who is a lienholder holding an affidavit of repossession and entitled to repossess the vehicle.

Occupations Code § 2308.002(15).

Although the term “operator” is not specifically defined in Chapter 2308 of the Occupations Code, it presumably means anyone who operates a vehicle.

What is a Consent Tow?

A consent tow is a tow of a motor vehicle in which the tow truck is summoned **by the owner or operator** of the vehicle or by a person who has possession, custody, or control of the vehicle. *Occupations Code § 2308.002(3).*

What is a Non-consent Tow?

A "non-consent tow" means any tow of a motor vehicle that is **not a consent tow**, including:

- an incident management tow; **and**
- a private property tow.

Occupations Code § 2308.002(6).

What is an Incident Management Tow?

An incident management tow is any tow of a vehicle in which the tow truck is summoned to the scene of a traffic accident or to an incident, including the removal of a vehicle, commercial cargo, and commercial debris from an accident or incident scene. *Occupations Code § 2208.002(5-a)*.

What is a Private Property Tow?

A private property tow means any tow of a vehicle authorized by a parking facility owner without the consent of the owner or operator of the vehicle. *Occupations Code § 2208.002(8-a).*

What is a Parking Facility?

A parking facility is public or private property used, wholly or partly, for restricted or paid vehicle parking. This includes:

- A restricted space on a portion of an otherwise unrestricted parking facility; **and**
- A commercial parking lot, a parking garage, and a parking area serving or adjacent to a business, church, school or home that charges a fee for parking, apartment

complex, property governed by a property owners' association, or government-owned property leased to a private person.

Occupations Code § 2308.002(7).

What is a Boot?

A boot is a lockable road wheel clamp or similar vehicle immobilization device that is designed to immobilize a parked vehicle and prevent its movement until the device is unlocked or removed. *Occupations Code § 2308.002(1-a).*

D. When is a Vehicle Subject to Being Towed or Booted Without the Consent of the Owner or Operator?

The owner or operator of a vehicle (other than a government emergency vehicle) may not leave unattended in a parking facility a vehicle that:

- is in or obstructs a vehicular traffic aisle, entry, or exit of the parking facility;
- prevents a vehicle from exiting a parking space in the facility;
- is in or obstructs a fire lane
    - If a government regulation governing the marking of a fire lane applies to a parking facility, a fire lane in the facility must be marked as provided by the regulation. Otherwise, all curbs of fire lanes must be painted red and be conspicuously and legibly marked with the warning "FIRE LANE--TOW AWAY ZONE" in white letters at least three inches tall, at intervals not exceeding 50 feet;
- does not display the special license plates issued under Section 504.201, Transportation Code, or the disabled parking placard issued under Chapter 681, Transportation Code, for a vehicle transporting a disabled person and is in a parking space that is designated for the exclusive use of a vehicle transporting a disabled person; **or**
- is leaking a fluid that presents a hazard or threat to persons or property.

Occupations Code § 2308.251.

Vehicles Parked at an Apartment Complex

In addition to the rules above, the owner or operator of a vehicle may not leave unattended on a parking facility or real property **serving or adjacent to an apartment complex** (consisting of one or more residential apartment units) a vehicle that:

- obstructs a gate that is designed or intended for the use of pedestrians **or** vehicles;
- obstructs pedestrian or vehicular access to an area that is used for the placement of a garbage or refuse receptacle used in common by residents of the apartment complex;
- is in or obstructs a restricted parking area or parking space (that is marked with compliant signs as described in Section E below), including a space designated for the use of employees or maintenance personnel of the parking facility or apartment complex;
- is in a tow away zone that is brightly painted and is conspicuously and legibly marked with the warning "TOW AWAY ZONE" in contrasting letters at least three inches tall;
- is a semitrailer, trailer, or truck-tractor, as defined by Chapter 502, Transportation Code, unless the owner or operator of the vehicle is permitted under the terms of a rental or lease agreement with the apartment complex to leave the unattended vehicle on the parking facility; **or**
- is leaking a fluid that presents a hazard or threat to persons or property.

An apartment complex may **not** tow vehicles for not displaying unexpired plates/registration **unless**:

- the contract provision authorizing such a tow requires the owner or operator of the vehicle to be given at least 10 days' written notice that the vehicle will be towed from the facility at the vehicle owner's or operator's expense if it is not removed from the parking facility. The notice must be:
    - delivered in person to the owner or operator of the vehicle;
    - sent by certified mail, return receipt requested, to that owner or operator; **or**
    - attached:
        - to the vehicle's front windshield;
        - to the vehicle's driver's side window; **or**
        - if the vehicle has no front windshield or driver's side window, to a conspicuous part of the vehicle.

Occupations Code § 2308.253.

E. When May a Parking Facility Owner Order a Non-Consent Tow?

KEY POINT

A parking facility owner may cause a vehicle that has been left in a manner described in Section D above to be removed and stored without the consent of the vehicle's owner or operator and at their expense if:

- **compliant signs** prohibiting unauthorized vehicles are located on the parking facility at the time of towing and for the preceding 24 hours;
- the owner or operator receives **actual notice** from the parking facility owner that the vehicle will be towed if it is in or not removed from an unauthorized space (for example, the parking facility owner tells the owner or operator their vehicle will be towed at the time they park there);
- the parking facility owner attaches a notice to the windshield, and also sends it by certified mail to the last registered owner; **or**
- the parking facility owner provides (on request) to the owner or operator of the vehicle the name of the towing company and storage facility if:
    - the vehicle obstructs traffic, a fire lane or is in a disabled parking space without a tag; **or**
    - the vehicle is in or adjacent to an apartment complex and is obstructing a gate or a restricted parking space or is in a tow away zone.

Occupations Code § 2308.252(a)(b).

A towing company may only initiate the tow upon request by a parking facility owner or peace officer, or by standing agreement with a parking facility owner. If the tow is requested by a parking facility owner, they **must** provide written verification that the required signs were posted or notice was provided to the vehicle owner as described in this section. *Occupations Code § 2303.151, 2308.255.*

When is a Sign Compliant?

For a sign to be "compliant," it must:

- be visible and conspicuous;
- be at each entrance, or if not possible, must be within 25 feet of each entrance;
- have a bottom edge greater than five and less than 8 feet off the ground; **and**
- meet the following requirements:

- be made of weather-resistant material;
- be at least 18 inches wide and 24 inches tall;
- contain a statement describing who may park in the parking facility and prohibiting all others; and the words, as applicable:
    - "Unauthorized Vehicles Will Be Towed or Booted at Owner's or Operator's Expense,"
    - "Unauthorized Vehicles Will Be Towed at Owner's or Operator's Expense," **or**
    - "Unauthorized Vehicles Will Be Booted at Owner's or Operator's Expense;"
- contain a statement of the days and hours of towing and booting enforcement;
- contain a number, including the area code, of a telephone that is answered 24 hours a day to enable an owner or operator of a vehicle to locate a towed vehicle or to arrange for removal of a boot from a vehicle;
- have a bright red international towing symbol, which is a solid silhouette of a tow truck towing a vehicle on a generally rectangular white background, at least four inches in height, on the uppermost portion of the sign or on a separate sign placed immediately above the sign;
- have “Towing and Booting Enforced," "Towing Enforced," or "Booting Enforced," (as applicable), with white lettering at least two inches in height on a bright red background, on the portion of the sign immediately below the international towing symbol;

Example of a Compliant Sign

Example of a Non-Compliant Sign

- except for the phone number information, have the remaining required information displayed in bright red letters at least one inch in height on a white background; **and**
- have the required telephone numbers on the bottommost portion of the sign, in white lettering at least one inch in height on a bright red background, (and may include the name and address of the storage facility to which an unauthorized vehicle will be removed).

Occupations Code Chapter 2308, Subchapter G.

Notice Posted on the Windshield

A notice posted on a vehicle must:

- state that the vehicle is in a parking space in which the vehicle is not authorized to be parked;
- describe all other unauthorized areas in the parking facility;
- state that the vehicle will be towed at the expense of the owner or operator of the vehicle if it remains in an unauthorized area of the parking facility; **and**
- provide a telephone number that is answered 24 hours a day to enable the owner or operator of the vehicle to locate the vehicle.

Occupations Code § 2308.252(b).

Notice Sent Certified Mail

A notice sent by certified mail must:

- state that the vehicle is in a space in which the vehicle is not authorized to park;
- describe all other unauthorized areas in the parking facility;
- contain a warning that the unauthorized vehicle will be towed at the expense of the owner or operator of the vehicle if it is not removed from the parking facility before the 15th day after the postmark date of the notice; **and**
- state a telephone number that is answered 24 hours a day to enable the owner or operator to locate the vehicle.

Occupations Code § 2308.252(c).

This notice is **not** required again if the owner moves the vehicle to another prohibited area after notice was posted to the vehicle. *Occupations Code § 2308.252(d).*

F. When May a Parking Facility Owner Order Booting?

If a vehicle is left in a manner described in Section D above, a parking facility owner may initiate booting if the procedures described in this chapter are followed.


KEY POINT

Prior to and at Time of Booting

The facility owner and the boot operator must comply with the following when initiating and installing a boot:

- signs that comply with Subchapter G of Chapter 2308 prohibiting unauthorized vehicles ***(see pages 99-101 of this volume)*** must be located on the parking facility at the time of the booting and for the preceding 24 hours and remain installed at the time of the booting; **and**
- a boot operator that installs a boot on a vehicle must affix a conspicuous notice to the vehicle's front windshield or driver's side window stating:
    - that the vehicle has been booted and damage may occur if the vehicle is moved;
    - the date and time the boot was installed;
    - the name, address, and telephone number of the booting company;
    - a telephone number that is answered 24 hours a day to enable the owner or operator of the vehicle to arrange for removal of the boot;
    - the amount of the fee for removal of the boot and any associated parking fees; **and**
    - notice of a vehicle owner or vehicle operator rights under Chapter 2308 of the Occupations Code, including their right to a hearing.

Occupations Code § 2308.257(b).

Boot Removal

The following rules must be followed regarding boot removal:

- a booting company responsible for the installation of a boot on a vehicle shall remove the boot not later than one hour after the time the owner or operator of the vehicle contacts the company to request removal of the boot
    - (a booting company shall waive the amount of the fee for removal of a boot, excluding any associated parking fees, if the company fails to have the boot removed on time);

- a booting company responsible for the installation of more than one boot on a vehicle may not charge a total amount for the removal of the boots that is greater than the amount of the fee for the removal of a single boot;
- the boot operator must accept e-check, debit and credit cards for payment of boot removal fees (if they are unequipped to do so, they must remove the boot without charging the fee); **and**
- on removal of a boot, the boot operator shall provide a receipt to the vehicle owner or operator stating:
    - the name of the person who removed the boot;
    - the date and time the boot was removed;
    - the name of the person to whom the vehicle was released;
    - the amount of fees paid for removal of the boot and any associated parking fees; **and**
    - the person's rights under Chapter 2308 of the Occupations Code, including the right of the vehicle owner or operator to a hearing.

Occupations Code § 2308.257, 2308.258, 2308.454(c),(d).

G. Notice of Rights, Including the Right to a Hearing

Booting

Notice of the person's rights, including their right to a hearing must be included in the notice at the time a boot is installed and at the time a boot is removed.

Tow

When a storage facility receives a vehicle, it must provide notice to the owner and lienholder of the vehicle pursuant to Chapter 2303, Subchapter D of the Occupations Code. This notice must also include notice of the person's rights under Chapter 2308 of the Occupations Code, including their right to a hearing.

The notice must include:

- a statement of:
    - the person's right to submit a request within 14 days for a court hearing to determine whether probable cause existed to remove, or install a boot on, the vehicle;
    - the information that a request for a hearing must contain;

    - any filing fee for the hearing; **and**
    - the person's right to request a hearing in any justice court in the county in which the vehicle was parked.
- the name, address, and telephone number of the towing company that removed the vehicle or the booting company that booted the vehicle;
- the name, address, telephone number, and county of the vehicle storage facility in which the vehicle was placed;
- the name, street address including city, state, and zip code, and telephone number of the person, parking facility owner, or law enforcement agency that authorized the removal of the vehicle; **and**
- the name, address, and telephone number of each justice court in the county from which the vehicle was towed or, for booted vehicles, the county in which the parking facility is located, or the address of an Internet website maintained by OCA that contains the name, address, and telephone number of each justice court in that county.

Occupations Code §§ 2308.454, 2308.455.

H. Where is the Hearing Held?

The hearing shall be held in **any** justice court in:

- the **county** from which the motor vehicle was towed; **or**
- for booted vehicles, the **county** in which the parking facility is located.

KEY POINT

Wherever the vehicle was parked is the county where the hearing will be held. Also note that the hearing can be anywhere in the county, regardless of precinct. *Occupations Code § 2308.453.*

I. Hearing Request

Generally, the person whose car was towed or booted must request a hearing within **14 business days** of the towing or booting, or they waive their right to a hearing.

However:

- the 14-day period for requesting a hearing does not begin until the date on which the towing company or vehicle storage facility provides to the vehicle owner or

operator the information necessary for the vehicle owner or operator to complete the required material for the request for hearing; **and**

- if the towing company has not given the person notice of their rights as required by Occupations Code § 2308.454 and Chapter 2303, Subchapter D, there is no hearing request deadline.

A request for a hearing must contain:

- the name, address, and telephone number of the owner or operator of the vehicle;
- the location from which the vehicle was removed or in which the vehicle was booted;
- the date when the vehicle was removed or booted;
- the name, address, and telephone number of the person or law enforcement agency that authorized the removal or booting;
- the name, address, and telephone number of the vehicle storage facility in which the vehicle was placed;
- the name, address, and telephone number of the towing company that removed the vehicle or of the booting company that installed a boot on the vehicle;
- a copy of any receipt or notification that the owner or operator received from the towing company, the booting company, or the vehicle storage facility; **and**
- if the vehicle was removed from or booted in a parking facility:
    - one or more photographs that show the location and text of any sign posted at the facility restricting parking of vehicles; **or**
    - a statement that no sign restricting parking was posted at the parking facility.

Occupations Code § 2308.456

J. Hearing Timeframe and Notice

A hearing must be held within **21 calendar days** of the justice court's receipt of the hearing request.

The court shall send a copy of the hearing request and notice of the date, time, and place of the hearing to the following parties:

- the person who requested the hearing for a towed or booted vehicle;

- the parking facility owner or law enforcement agency that authorized the removal of the vehicle or the parking facility in which the vehicle was booted;
- the towing or booting company; **and**
- the vehicle storage facility in which the vehicle was placed (if vehicle was towed).

Occupations Code § 2308.458(a), (b), (b-2).

K. Hearing

At the hearing, the burden of proof is on the person who requested the hearing and hearsay evidence is admissible if it is considered otherwise reliable by the justice of the peace.


KEY POINT

The court will consider the following issues (as applicable) and **must** make written findings of fact and a conclusion of law:

- Was there probable cause for the non-consent tow/booting?
  - Vehicle parked in a restricted area?
  - Correct signage posted?
  - Proper notice given?
- Was the correct amount charged for towing/booting/storage?
  - State-wide rates are set by the Texas Department of Licensing and Regulation (TDLR) as authorized by the Occupations Code. These rates can be found at the following link: ***https://www.tdlr.texas.gov/towing/consumerinfo.htm***
  - A county may set its own rates, but the rates **may not** exceed those set by TDLR.
  - If the notice required by Occupations Code § 2303.151 (the notice that a storage facility is required to send to an owner/lienholder when they receive their car) is not timely sent, then no storage fees may be charged until 24 hours after the notice has been sent.


CLICK HERE

Occupations Code § 2303.151(f); § 2308.458(b-1), (c), (c-1), (d); ***Badaiki v. Miller dba Classic Towing***

There is a right to a jury in a tow hearing. ***Manderscheid v LAZ Parking.***

L. Possible Outcomes and Order

KEY POINT

If the court finds that there *was not probable cause* for the non-consent tow or booting
The person who authorized the removal or booting shall:

- pay the costs of the removal/storage or of the booting/any related parking fees; **or**
- reimburse the owner or operator for the cost of the removal/storage or booting/any related parking fees paid by the owner or operator.

Note: The towing company or vehicle storage facility is liable if they failed to provide the identity of the owner/agency requesting the tow.

If the court finds that there *was probable cause* for the non-consent tow or booting
The court shall order the person who requested the hearing to pay the costs of the removal and storage or the costs of the booting (but the costs must not exceed the amount allowed as described in Section K above).

If the court finds that there was probable cause for a non-consent tow or booting, but the charges collected *exceeded the amount allowed* (as described above in Section K)
The court shall order the towing company to reimburse the owner or operator of the vehicle for however much they paid that was over the allowed amount.

Attorney's fees/costs
In addition to the possible outcomes above, the court may award:

- court costs and attorney's fees to the prevailing party; **and**
- reasonable cost of photographs submitted as part of a hearing request ***(see page 105),***

to a vehicle owner or operator who is the prevailing party. *Occupations Code § 2308.458(e).*

Other Damages Only Recoverable in Separate Small Claims Case

COMMON PITFALL

There is no option for a person to be awarded damages in a tow hearing other than what is described above. For example, damages such as damage to a vehicle or "actual damages" suffered because of not having a car could not be included in this type of proceeding. ***Badaiki v. Miller dba Classic Towing***

However, a towing company, booting company or parking facility owner who violates Chapter 2308 of the Occupations Code is liable to the owner or operator of the vehicle for damages arising from the removal, storage or booting and if the violation is intentional, knowing or reckless, they may be liable for $1,000 plus three times the amount of the fees assessed. *Occupations Code § 2308.404.*

An owner or operator could file a small claims case to recover these damages. *Occupations Code § 2308.451, 2308.458(e).*

M. Appeal

Appeals are governed by the Texas Rules of Civil Procedure, except that **no appeal bond may be required**. *Occupations Code § 2308.459.* Since a filing fee is charged in these cases, a new filing fee **is** required upon filing the appeal, unless a Statement of Inability has been filed either with the petition or with the appeal. See Chapter 3 of the *Fines, Fees, and Costs Deskbook* for additional information.

N. Enforcement of Judgment

A judgment may be enforced by any means available for the enforcement of a monetary civil judgment.

In addition, the owner or operator of the vehicle is required to submit a certified copy of the final judgment to the Texas Department of Licensing and Regulation (TDLR), which **shall**:

- suspend a license holder's license on the license holder's failure to pay a final judgment awarded to an owner or operator of a vehicle before the 60th day after the date of the final judgment (TDLR must provide notice of the suspension to the license holder at least 30 days before the date the license is to be suspended); **and**
- on receipt of the certified copy of the unpaid final judgment, disqualify a person from renewing a license or permit or deny the person the opportunity of taking a licensing examination on the grounds that the person, towing company, or vehicle storage facility has not paid a final judgment awarded to an owner or operator of a vehicle.

TDLR shall reinstate the license on submission of evidence satisfactory to the department of payment of the final judgment by the person, towing company, or vehicle storage facility. *Occupations Code § 2308.460.*

O. Tow Hearing Flowchart

Click Here to Open the Tow Hearing Flowchart

Appendix of Cases

Badaiki v. Miller dba Classic Towing, 2019 WL 922289 (Tex. App.—Houston [14th Dist. Feb. 26, 2019).
City of Dallas v. Dallas Pets Alive, 566 S.W.3d 914, 918 (Tex. App.—Dallas 2018, pet. filed)
Curry v. Gilfeather, 937 S.W.2d 46, 50 (Tex. App.—Fort Worth 1996, orig. proceeding)
Deleon v. State, 284 S.W.3d 894 (Tex. App.—Dallas 2009, no pet.)
Granger v. Folk, 931 S.W.2d 390 (Tex. App.—Beaumont 1996)
Hays v. State, 518 S.W.3d 585, 590 (Tex. App.—Tyler 2017, no pet.)
In re: Loban, 243 S.W.3d 827 (Tex. App.—Fort Worth 2008)
Manderscheid v LAZ Parking. [506 SW3d 521 (Tex App 2016).]
Morrissey v. Brewer, 408 U.S. 471, 480 (1972)
Texas Department of Public Safety v. Styron, 226 S.W.3d 576 (Tex. App.—Houston [1st Dist.] 2007)
Timmons v. Pecorino, 977 S.W.2d 603 (Tex. Crim. App. 1998, *en banc*)
Wisser v. State, 350 S.W.3d 161 (Tex. App.—San Antonio 2011)
Wood v. Texas Dept. of Public Safety, 331 S.W.3d. 78 (Tex. App.—Fort Worth 2010, no pet.)