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TEXAS MISDEMEANOR CASE PROCEDURE GENERAL OUTLINE

Thank you for choosing me to assist you with your legal needs. I take the position that you are retaining me to work and worry over your case so that you are less burdened with anxiety and even fear for your future. I will work hard to provide you with aggressive, effective legal representation but I will need your help developing your defense, marshaling your evidence and communicating with your witnesses. Please provide me the name, address, phone number, e-mail address and an outline of the expected testimony of all your potential witnesses (including character witnesses).

I hope the following outline will assist your understanding of the process involved in your defense. A criminal prosecution begins with an arrest. The arresting officer will produce a written report, which is referred to by different names, such as factual narrative, arrest report, offense report, or police report. This report is presented to the District Attorney's Office, and if all the necessary paperwork is submitted, the case is considered filed, and will be assigned to one of the county courts.

The District Attorney's Office will assign a prosecutor to pursue the State's case against you. The next step in the process is for the prosecutor assigned to your case to read through the file, contact witnesses, and make a plea bargain offer. This is done in every case, and I am required to inform you of every plea bargain offer that is made by the State. You are the only person who can accept or reject a plea bargain offer. I cannot accept or reject an offer on your behalf, which is why I will notify you of each plea bargain offer, even if you have advised me that you do not intend to accept any plea bargain. We will not agree to any offer until we are provided review of all of the evidence the law requires them to disclose to us, including but not limited to police reports, forensic reports, videotapes, photographs, witness statements, etc… **The plea bargain negotiation phase can last only a few court settings, or for several months,**

depending upon the diligence and reasonableness of the individual prosecutor assigned to your case. There is no way to change prosecutors or courts, so we must do the best we can with whomever the District Attorney's Office has assigned to your case.

At some point, the plea bargain negotiations will come to an end, either because we have reached an agreement, or because the prosecutor has made the best offer we can extract and continued negotiations would be fruitless. At this point, you will be required to make a decision about your case.

The ***first option*** is to **accept the *best* plea offer** that has been made by the prosecutor.

The *second option* is to begin the process of an **open plea**, (assuming the prosecutor is willing to waive a jury trial) which means that you reject the state's offer on a plea bargain. You admit guilt and ask the Judge to decide the punishment.

An open plea is done in two phases.

The first phase is the entering of a plea of guilty to the charge.

Once the plea is completed, the case is immediately ready for the second phase, a punishment hearing before the Judge. The Judge will consider the proper punishment and you will be given an opportunity to testify if we decide that you do so. We will go over any questions that I will ask you during this hearing. The State does have an opportunity to cross-examine you during this hearing, and the Judge can also ask questions of you. You can present evidence and have punishment and character witnesses testify for you and the prosecutor can present their evidence and witnesses. After all testimony and evidence has been presented, the Judge will make a decision as to the appropriate punishment for you. There is a very limited right to appeal the Judge's decision from an open plea, which usually means the decision is final.

The ***third option*** available is to **set the case for a trial.** You have a right to have a jury decide the case, or have a judge decide the case (assuming the prosecutor is willing to waive a jury trial).

Trials are conducted in two phases. The first phase is referred to as the guilt/innocence phase, where the State will call any witnesses they have and offer any additional evidence in an effort to convince the jury or judge of guilt beyond a reasonable doubt. Evidence can be in the form of physical evidence collected by the police, testimony of witnesses (including police officers), expert witness testimony for any forensic evidence collected, and testimony from any other witness that is allowed by the Court.

At the end of the guilt/innocence phase of the trial, if there is a finding of guilty, then the second phase will be conducted, which is the punishment phase. This phase of trial is similar to the punishment hearing conducted at the end of an open plea. If a jury is selected to assess

punishment, no probation report is prepared, so the only information the jury will have is testimony and evidence offered during the punishment phase of trial. If the Judge is elected to assess punishment, then a probation report can sometimes (not often in most counties) be prepared and supplemented with any additional testimony and evidence that is offered by either side.

It is possible to have a jury hear the guilt/innocence phase of a trial and then have the Judge assess punishment. It is also possible to have the jury decide both phases of the trial. However, if you elect the Judge to hear the guilt/innocence phase of the trial, then the Judge will also hear the punishment phase.

There is a ***fourth option***, which isn't used often, but it is available. It is generally referred to as a **slow plea**. A slow plea is where an accused pleads guilty to the crime, but elects the jury to assess punishment. This most often is done in situations where the particular Judge presiding is not expected to be the better choice.

Additional information that you should be aware of while your case is pending is that **criminal cases tend to move slowly.** There are long periods of time where there isn't much happening. These time periods are generally followed by relatively short periods of time where there is flurry of activity. This generally occurs because all scheduling is subject to the Court's calendar, and we are limited to when we can fit into the court's existing, voluminous docket. This is most noticeable when scheduling a case for a hearing or a trial. The Court advises me of the available dates and I must choose one. Sometimes, the first available dates are months away and we have very little input. It is difficult for a trial to commence on its first trial setting. **Trial reset dates** are measured in months and not weeks.

I am limited in what I can discuss with your family members, and your family doesn't always understand the need for this, but let me assure you that it is done for your protection. Remember that what you say to me is protected by law under the Attorney/Client privilege. However, what you say to your family, friends, and co-defendants, or fellow inmates is not protected. Jail phone conservations are recorded and fellow inmates can be called to testify to your alleged admissions in the jail. Some prosecutors (or their investigators) actually listen to recordings of your non-Attorney/Client recorded phone calls. This is almost unbelievable but it is allowed and true.

I advise you not to discuss the facts of the charges against you with anyone but me. There is very little to be gained by discussing your case with others, and a great deal at risk. Avoid discussing facts of your case in letters written to family or friends because these letters can be read by and seized by the jail staff. If you are out on bond, do not discuss the facts of your case in e-mails, text messages, voice mails, letters or social media.

If a police officer or prosecutor attempts to discuss anything with you, do not agree to do so unless I have told you it is allowed. Law enforcement personnel, whether police officers, investigators, or prosecutors are supposed to advise me first before making an effort to discuss something with you, but they may fail to do so. Unless I direct you otherwise, do not discuss anything with them and tell them that you will not discuss anything with them until you have spoken to me.

A number of judges are strict regarding **courtroom decorum**. You, your family and your witnesses should be attired in a manner respecting the dignity of the court. All persons entering the courtroom need to be dressed in clean, modest and appropriate attire. Unacceptable attire includes: shorts, cut-offs, sandals, flip-flop style shoes, t-shirts, muscle shirts, tube tops, halter tops, athletic/gymnasium attire, tank tops, open shirts, hats, drooping/saggy pants, clothing indicating illegal drug use, gang affiliation or containing offensive, vulgar, racist, sexist, or obscene language, and shirts that are not tucked in. Food, beverages, water bottles, and chewing gum are not allowed in the courtroom. Cellular telephones, pagers, cameras, laptop computers, i-Pads, recorders, or any other device that may cause a distraction to the court are also not allowed in the courtroom. They are subject to seizure and you are subject to contempt of court sanctions.

I hope this general outline is helpful to you. There are exceptions to many of the foregoing general outline statements. I can advise you of those exceptions which specifically apply to you as we move through the stages of your defense.

Once again, thank you. I appreciate your confidence in me and I look forward to working with you toward the best possible conclusion on this serious undertaking.

Please contact me if any concern or question arises. I am often in court, so it is easier to reach me in late afternoons or early evenings. Please contact me with any specific questions that may arise.

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DAVID R. SCOGGINS

TEXAS AND FEDERAL CRIMINAL DEFENSE

FOR OVER 35 YEARS

Disclaimer: The legal information presented herein should not be construed to be formal legal advice nor the formation of a lawyer/client relationship. General advice should always be tested by the particular case. Legal advice is almost always case specific. Statues, ordinances, legal procedures, case law and rules of evidence are often revised. If you have a specific question, give me a call.