

**PROTECT YOUR FUTURE
KNOW YOUR RIGHTS**

**What Plea Lawyers
Won't Tell You: *the* Real
Consequences
of a
Texas Drug
Conviction**



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By the Texas Board of Legal Specialization

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PROTECT YOUR FUTURE ★ KNOW YOUR RIGHTS™

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*If you have been arrested and would like a free
consultation, contact us at the numbers listed above.*

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Preface

While this book is not designed to be a do-it-yourself, get-out-of-jail-free defense manual for drug arrests, it does contain virtually everything you need to know if you or someone you love is arrested for possession of drugs in Texas.

This book serves as a companion guide to *A Citizen's Guide to a Drug Arrest in Texas* and contains more detailed information concerning drug "schedules" (how drugs are classified by the State of Texas) and penalty groups (drugs listed by penalty severity).

It also explains the various minimum and maximum sentences for many of the more common drug offenses, including information on the various aggravating circumstances that can ramp up a charge or penalty to a higher degree.

It is designed to be a helpful supplement in terms of what you need to know if you or someone you love is arrested for possession of drugs in Texas.

We believe you are entitled to know EVERYTHING about what you're facing and how to assemble the best defense possible, whether or not you are a client.

EVERYONE is entitled to a strong and passionate defense. That includes you.

It is our hope that you'll never find yourself in need of either *A Citizen's Guide to a Drug Arrest in Texas* or this companion book. But because our considerable legal experience has shown us that an ounce of prevention is well worth a pound

of cure, we urge you to take the time to read this and see how it pertains to your particular case. It's always a good idea to know what may lie ahead.

Trust us: forewarned really is forearmed.

Meet the Team at Hamilton, Hull & Rogers

Author Stephen L. Hamilton is the founding partner and lead trial attorney at Hamilton, Hull & Rogers. Stephen has been awarded the highest possible AVVO rating (10) and his counsel is highly esteemed by his peers. Stephen also ranks among the fewer than 1% of practicing criminal attorneys across Texas who have demonstrated mastery of the law by achieving coveted board certification in criminal law by the Texas Board of Legal Specialization.



Stephen L. Hamilton

Stephen is trained under the National Highway Safety Administration (NHTSA) guidelines to administer the Standardized Field Sobriety Tests (SFST) and subsequently completed training as an instructor. He also completed the training as a breath test operator of the Intoxilyzer 5000 breath test machine and is a certified breath test instructor and maintenance technician of the unit. He has attended the Robert F. Borkenstein course on Alcohol and Highway Safety: Testing, Research and Litigation taught at Indiana University, the same course that Texas prosecutors' Intoxilyzer experts

attend. In addition, Stephen has completed the Blood Testing Gas Chromatograph training in Chicago, and is skilled in the operation and use of the machine that Texas uses to test a person's blood for alcohol and or drugs. Stephen has also completed the solid state drug testing class in Chicago, the training that lab techs in Texas undergo to test drugs, both illegal and legal. He is a founding member of the DUI Defense Lawyers Association and a member of the National College for DUI Defense, National Association of Criminal Defense Attorneys, the Texas Criminal Defense Lawyers Association, and several regional associations. He has tried over 100 cases to a jury and has obtained not guilty verdicts in cases ranging from traffic tickets to those carrying a punishment range of 25 years to life in prison. He wins cases through all available means: motions, negotiations, trials, and appeals.

Meghan Rogers

Born and raised in Floydada, Texas, Meghan Rogers earned her bachelor's and law degrees from Texas Tech University. Meghan previously worked in the Lubbock Criminal Defense Clinic, where she represented individuals charged with felony and misdemeanor criminal offenses. Co-author of the *Texas Administrative License Revocation Manual*, Meghan is a member of the Texas Criminal Defense Lawyers Association and a passionate believer in protecting the rights and freedoms of all individuals accused or convicted of a crime. A partner at Hamilton, Hull & Rogers, she now successfully practices criminal defense and criminal appeals.

Shane Byrd

A successful local businessman and owner of three bond companies, National Bonding of Lubbock, Lone Star Bail Bond, and Garcia Bail Bond, Shane has worked for more than three decades to assist clients and their families navigate their way through the criminal justice system, liaising with attorneys, judges, clerks, and the courts throughout Lubbock and most of Texas. He soon realized that his passion for helping his clients extended beyond helping them get bonded out of jail. With his undergraduate ~~degree from~~ Texas Tech University in criminal justice, he pursued his dream of becoming a criminal defense attorney and graduated with his J.D. from Charlotte School of Law, Charlotte, North Carolina. Returning home to Lubbock, he is now of counsel at Hamilton, Hull & Rogers and focuses his practice in the area of criminal defense. Shane's strong ties to the Lubbock community extend to ownership of a number of local businesses and the many events he has produced for Texas Tech students. As a business owner, he understands that good people make mistakes and is driven by his passion to protect the future of such persons and resolving their cases quickly and positively.

Tommy Hull

A former Texas prosecutor, Tommy Hull is a native Texan, raised in the Texas hill country, and attended the University of Texas at San Antonio. After graduation from Texas Tech Law School, he joined the Midland County District Attorney's Office as a misdemeanor prosecutor. In less than a year he was promoted to felony prosecutor and, within months of that, named trial team chief prosecutor for a Midland County district court. As a prosecutor, before becoming a partner at Hamilton, Hull & Rogers, he was responsible for supervising all aspects of preparing and trying misdemeanor and felony criminal cases.

Mary Moretti

Mary Moretti was born and raised in Houston. She graduated from Texas Tech with Highest Honors in 2006 and magna cum laude from Texas Tech Law School in 2012. While in law school, Mary earned the CALI and Jurisprudence awards multiple times, which are awarded to the student with the highest or second-highest grade in the class and was the Executive Managing Editor of one of Tech's prestigious law journals. After her first year of law school, Mary interned with the Harris County District Attorney's Office, in the Animal Cruelty Division, for ten weeks. During her final year of law school she was a student attorney in the Caprock Regional Public Defenders Clinic, representing the indigent against criminal charges and even winning a DWI acquittal in Armstrong County while still a student. Prior to coming to Hamilton, Hull & Rogers, Mary worked at the Kaufman County Public Defender's Office. As a public defender, Mary gained trial experience in all types of cases, including burglary, drug-related offenses, forgery, indecency with a child, and aggravated assault.

Brooke Hendricks-Green

Brooke Hendricks-Green is a native West Texan from Odessa, Texas. She attended McMurry University in Abilene, Texas, on numerous academic scholarships and graduated magna cum laude after three years with a B.A. in Political Science, completed an internship in Washington, D.C., with former Representative Henry Bonilla, and studied in Costa Rica. Brooke earned her J.D. from Texas Tech University School of Law, earning her 3rd year bar card which allowed her to begin practicing in court under supervision before she passed the bar. She interned with the Midland County District Attorney's Office and worked for the Legal Aid Society of Lubbock while in law school.

After graduation, Brooke was offered a job as the sole juvenile prosecutor for the Midland County District Attorney's Office. She was promoted in under a year to be a felony prosecutor in the 238th Judicial District Court. Two years later, she was promoted to Chief of the Misdemeanor division before accepting the position of felony prosecutor at the Ector County District Attorney's Office. She was subsequently promoted to Chief Deputy District Attorney. As a prosecutor, Brooke tried over 60 jury cases ranging from misdemeanor DWIs to felony Attempted Capital Murder and Murder. She is a member of the State Bar College of Texas, Texas Young Lawyers Association, the Midland County Bar Association, Ector County Bar Association, office holder in Midland County Young Lawyers Association, past President and current Vice President of Ector County Young Lawyers Association, Young Professionals of Midland, Kids in Court program, Junior Women's Association, Board Member for Red Cross of Southwest Texas and Midland Rape Crisis and Children's Advocacy Center, and volunteer judge for Midland Teen Court and Odessa Teen Court. She has received the Star Team Member award for the Midland RCCAC, TYLA 2014 Service to the Public Award for Small City Division for the ECYLA, and the 2014 Bob Black Leadership Award.

Mario Olivarez

Mario Olivarez was born and raised in McAllen, Texas, and graduated from Texas A&M University in 2009. Upon graduation Mario worked for the Scholarships & Financial Aid Department at Texas A&M University for a year before leaving to attend Texas Tech University School of Law. Mario was a member of the Texas Tech Administrative Law Journal and served as the journal's Executive Technology Editor during his final year. After his first year of law school, Mario interned with the Rio Grande Legal Aid office in Edinburg,

Texas, assisting in a range of legal areas. Mario interned for the State of Texas Attorney General the following summer. In his last year of law school, Mario participated in the Texas Tech Criminal Defense Clinic, representing clients in Lubbock, Texas.

Introduction

A drug charge in Texas can be, and typically is, a serious offense. It is not something to dismiss lightly. Defending yourself against a drug charge should never be attempted without the advice and guidance of a licensed criminal defense attorney.

Knowledge is power

This book has been written to provide you with both general and specific information that is easy to understand—information that will help you, both when it comes time to find the right attorney and when you sit down with your attorney to discuss and construct your case.

That's because the more you know, the more you can help to build the best, strongest case for your defense possible.

Never underestimate how important it is for you to understand what lies ahead for you. The more information you can gain by yourself, including what is in this book, the more time your attorney will have free to focus on your defense.

**Drug
defendants
in Texas can
receive life
sentences!**

This book explains the ins and outs of the many types of drug charges in Texas. It also covers some of the circumstances that can add to the seriousness of the charges and might incur you a stiffer penalty.

We also list for you the various classifications of controlled substances and the penalty groups in which they lie.

Being prosecuted for a Texas drug crime can damage your life, sometimes forever. Often unfairly. If not handled correctly from the start, a drug conviction can be a ball and chain you're forced to lug behind you for the rest of your life.

You might never be able to cut yourself loose.

It's always harder to make up lost ground than when you start out knowing in what direction to go, and how to navigate the road ahead. That's why we wrote this book: to act as your compass. To help you get out ahead of any error in judgment you may have made.

Staying out of the system

At Hamilton, Hull & Rogers, we work hard to divert drug clients away from the criminal justice system whenever possible. We mount aggressive defenses to help our clients hold onto their jobs, their licenses, and their freedom. Because, with a conviction or a guilty plea, you can lose all of them.

We are experienced lawyers, equipped to take a case to trial or negotiate it out of court, based on what our client wants. We make recommendations to our clients, based on our substantial legal experience with the Texas court system, but we always respect the right of our clients to choose which path they want to take.

But it doesn't stop there. If you are caught up in the cycle that traps many drug users—casual use that leads to dependence, which leads to selling drugs so you can afford

to buy more—prison is not the answer to your problems, no matter what Texas politicians might think. You need help, not a jail sentence.

The attorneys at Hamilton, Hull & Rogers know what resources are available to help you regain control of your life. Why is this important? Because clients who commit to stop using drugs tend to impress judges and prosecutors. And if you can impress the prosecutor and the judge, you're well on your way to receiving leniency.

Participation in drug counseling and treatment is often the first step to obtaining a favorable resolution of drug charges. And we know what to recommend in your particular situation. Another benefit of participating in counseling and treatment is that it is often the first step in putting your life back on track.

From the moment you are arrested or merely contacted by the police concerning a drug crime, **YOU ARE AT RISK**. The police and prosecutors possess an enormous amount of power that you, as a private citizen, do not have.

Having an experienced drug defense attorney on your side is the only way to empower you. An attorney who knows how to use the law to your advantage can give you a fighting chance in avoiding an unjust conviction or punishment.

The lawyers at Hamilton, Hull & Rogers are dedicated to helping our clients achieve the best results that the criminal justice system can provide.

If you're caught in possession of drugs in Texas, no matter how small the amount, you're in serious legal trouble. There's a lot you need to know.

Let's get started.

Zero Tolerance in Texas

The first thing you need to understand is precisely why a drug charge is such a serious issue in Texas. Let's take a quick look.

Texas has earned a reputation for being tough on drug crimes. Prison populations in Texas have jumped, thanks to the "zero tolerance" attitude that politicians take when it comes to drug offenses. Even the sale of marijuana carries the potential for a life sentence in Texas.

That's no joke.

Texas arrests more than 70,000 people a year just for crimes involving marijuana. The number of arrests for marijuana possession alone here *tripled* between 2001 and 2010. That is what zero tolerance does.

Typically, the penalties vary for controlled substances based on the specific quantities involved and the type of drug crime committed: possession (you're caught with drugs on your person), delivery (you've sold or even just given drugs to someone else for free), and manufacture (you're involved in farming or chemically producing a drug, whether for personal use or distribution). Certain controlled substances always include the charges of **Possession with Intent to Deliver** and **Manufacture**.

Now, the difference between misdemeanor and felony charges really boils down to whether jail time is involved

and just how much, based on the degree of seriousness of the crime you're charged with committing.

There are three classes of misdemeanor charges and only one, Class C, does not involve jail time. However, because drug charges are taken so seriously in Texas, it is highly unlikely that yours is going to be classed as a Class C misdemeanor. It's virtually always going to be *at least* a Class B, perhaps a Class A, which carries stiffer penalties. More than likely, however, it will be a felony charge.

For example, the possession of more than four ounces of marijuana (including "Spice" and other synthetic versions) IS A FELONY.

Most drug crimes in Texas are FELONIES, not misdemeanors

Most crimes involving drugs other than marijuana, regardless of how small the quantity, are felonies in Texas, even if possession is for personal use.

Drug possession convictions carry a host of consequences that can haunt you for the rest of your life—even if you somehow manage to avoid jail time.

We at Hamilton, Hull & Rogers believe you should never take chances with your future. You need a solid, experienced attorney with an established history of successful drug defense behind you now. Your rights are too precious to hand over to just anyone.

Criminal Charges Are Very Serious

Don't kid yourself. If you face criminal charges, you need an attorney. And not just any attorney.

You need an experienced attorney with resources.

You need an attorney who possesses in-depth knowledge of the intricacies of the drug laws in Texas.

You need an attorney who can and will fight skillfully in your defense.

You need an attorney who has an experienced private investigator available to dig up whatever they can that might help you.

One poor decision should not be permitted to damage the rest of your life. You have options.

At Hamilton, Hull & Rogers, we help our clients navigate the legal system. We make appropriate strategic decisions to ensure the criminal charges our clients face will have the least possible impact on the rest of their life.

You don't have to go it alone. You should never even consider going it alone.

What Are the Charges?

Following your remand or release on bond or bail, criminal charges are filed by the prosecutor, based upon the severity of the charges.

Possession of a controlled substance

Possession, in Texas, is defined as having care, custody, control, or management of a controlled substance, so that means that the drug does not have to be physically on you at the time you were arrested. If it's under your care, it's considered to be yours.

Stowing a drug in a storage locker to which you have access, for example, is also considered possession.

Informally, “simple possession” is a term that is frequently used to distinguish possession for one’s own personal use from possession with intent to deliver.

Texas law generally views the crime of possession to be less serious than that of possession with intent to deliver.

That said, just being in proximity to a drug does not mean you possessed the drug (although the police might feel otherwise). As one Texas court put it, “being where the action is” does not constitute the crime of possession.

So, hanging out with drug users who are using in your presence does not mean you possessed the drugs. But if you did in fact use the drug, you can be charged with possession.

Taking a single puff of a joint that belongs to someone else and is being passed around means you've possessed it, even if just for a few seconds.

**EVERYONE who partakes in a drug
can be charged with possessing that drug**

One of the things we focus on is that, to prove possession of a controlled substance, the prosecution must prove beyond a reasonable doubt that you *knowingly* or *intentionally* had it in your possession when you were not legally permitted to have it, either through lawful authority (you are a licensed pharmacist or doctor, for example) or without a valid prescription.

“Knowingly” refers to your state of mind. It means that you must be aware of what you are doing and that it is against the law.

The prosecution must prove that the possession was either knowing *or* intentional, but is not required to prove that it was both knowing *and* intentional. That's an important point, because all that's required is to show that you knew the drug in question was illegal to have, not that you necessarily intended to do anything with it.

On the other hand, if drugs were found in your car, if they were not in plain view, and if you were not the only person who drives that car, we would exploit how difficult it is for the prosecution to prove that you *knowingly* possessed the drugs.

The penalty for simple possession depends upon the controlled substance involved in the offense and upon the quantity possessed. Most controlled substances are assigned to a penalty group, with the exception of marijuana. (See chapter 12 for more information on each penalty group.)

If you are charged with possessing a drug that is not listed, contact us and we will explain to you what penalty is associated with possession of that drug.

Delivery of a controlled substance

The second most common drug crime in Texas is possession with intent to deliver a controlled substance.

Delivery is defined as transferring or offering to transfer a controlled substance to another person. The charge means that you intended to deliver drugs in your possession to someone else, *even if you had no specific buyer in mind*.

Deliveries can be **actual** (you physically hand drugs to another person) or **constructive** (you're in control of the drugs, such as if you're a manufacturer or supplier, but have someone else handle the actual delivery).

Actual Delivery

An actual delivery occurs when you literally hand over a drug to someone. And as far as Texas is concerned, intending to do it is considered to be the same as actually doing it. So, in Texas, just offering to sell someone a controlled substance is the same as your having given it to them. In these instances, one thing we zero in on is just how difficult it can be to prove your intent when drugs weren't handed over vs. having proof that a drug changed hands.

Constructive Delivery

Constructive delivery is when you own or control a drug and hand over that control to someone else without physically delivering the drug yourself. So, you could be charged with constructive delivery if you were handling the manufacture of a controlled substance and authorized someone else to sell it.

Depending on the circumstances, a constructive delivery can turn into an actual delivery. For instance, if you leave a drug in a storage locker and give the locker key to someone, that's constructive delivery. However, if that person then accesses the locker and picks up the drug, constructive delivery has now become actual delivery.

Whether you're selling drugs to make money or you take pity on a cancer patient struggling with the nausea that comes with chemotherapy and give them some marijuana to ease their symptoms, it's possession with intent to deliver.

Manufacture of a Controlled Substance

To manufacture means to produce or prepare a controlled substance, to propagate or cultivate a controlled substance that grows naturally (such as extracting opium from a poppy or refining it to produce a drug), or simply to package a controlled substance.

Although charges of manufacturing a controlled substance are far less common, the recent rise in methamphetamine production has led to a rise in prosecution for it. (Think of high school chemistry teacher turned meth manufacturer Walter White in the TV series *Breaking Bad*.)

The charge of manufacturing does not apply to marijuana, because marijuana is not listed in any penalty group. Growing marijuana simply comes under the charge of possession. (See chapter 4 for more on marijuana.) However, a manufacturing charge *can* apply to synthetic marijuana, as it is listed in Penalty Group 2-A.

Drug Paraphernalia: Delivery, Possession with Intent to Deliver, or Manufacture

If you knowingly or intentionally deliver, possess with intent to deliver, or manufacture with intent to deliver any drug paraphernalia to someone who does or will receive it in order to use it for drug-related use, that's a Class A misdemeanor. The exceptions to this, which amp up the charge, include if:

- You have a prior conviction of delivery, possession with intent to deliver, or manufacturing with intent to deliver drug paraphernalia; it then becomes punishable by a jail sentence of at least 90 days but not more than one year; or
- You are at least 18 years old and the drug paraphernalia is delivered to, or intended for delivery to, a person who is younger than 18 and at least 3 years younger than you; then it becomes a state jail felony.

Precursor chemicals

A precursor is a chemical is used to create another chemical compound. For example, ephedrine, a common ingredient in cold medication, can be used to make methamphetamine and so it is labeled a precursor chemical.

Transferring or receiving such chemicals illegally are also drug crimes under Texas law.

Misdemeanors vs. Felonies

Class C Misdemeanor

The most minor of all possible charges is a Class C misdemeanor, where a criminal complaint will be filed against you in municipal or justice of the peace court. However, this lowest possible charge is unlikely if you are arrested for a Texas controlled substance offense, since very, *very* few drug crimes are ever judged to be that minor.

Class A or B Misdemeanor

Class A and B misdemeanors are charged in a county court or a county criminal court and are subject to fines of \$2000 to \$4000 and sentences from 180 days up to an entire year in jail. In the event that you are charged with either of these misdemeanors, an additional document called an “information” will be filed, which details what crimes you are being charged with and the maximum penalties you face.

Felony

If you are charged with a felony, the complaint will be filed against you in the district court where the offense took place. Felony charges, depending on the degree, typically involve jail time of at least two years and, depending on the seriousness of the degree and the amount of drugs involved, can range up to 99 years or life behind bars. Accompanying fines run as high as \$10,000, with significantly higher fines for manufacture or possession with intent to deliver when significantly large quantities are involved.

- **State Jail Felony**

6 months to 2 years and up to a \$10,000 fine

- **Third Degree Felony**

2 to 10 years and up to a \$10,000 fine

- **Second Degree Felony**

2 to 20 years and up to a \$10,000 fine

- **First Degree Felony**

First degree felony, punishable by 5 to 99 years and up to a \$10,000 fine, with minimum jail sentences rising to 10 or even 15 years and fines rising anywhere from \$50,000 to \$250,000 in circumstances involving manufacture and possession with intent to deliver when significantly large quantities are involved.

Making a bad situation worse

When certain situations exist, an otherwise straightforward charge may be viewed far more seriously.

Being caught with drugs in a drug-free zone is one example. Drug-free zones are basically areas where children tend to cluster, such as a daycare or youth center, a school, or on a school bus. The fact that you might have been unaware that you were in a drug-free zone is not a valid defense.

What otherwise would be a misdemeanor becomes a state jail felony. A state jail felony offense would become a third

degree felony, a third degree felony become a second degree felony, and so on.

Drug-Free Zones

Each of these is legally a drug-free zone:

- Any location within 1000 feet of a public or private elementary or secondary school.
- Any location within 1000 feet of a public or private youth center, as defined above.
- Inside a school bus.

When Children Are Involved

When a child is involved in a drug-related crime, that also bumps up the severity of the charge, and the penalties increase. For example, if you deliver drugs to a minor, it's automatically considered to be a second degree felony.

The law also frowns upon using a child to commit a drug crime, such as if you asked a minor to sell or deliver drugs to someone. Or if you coerced or threatened them in order to get them to do it. If this is the case, you're automatically facing a first degree felony, no matter how minor the crime otherwise might be judged.

When Injury or Death Results

If somebody was seriously injured or killed as a result of taking a controlled substance that you delivered, the charge against you automatically rises to a first degree felony.

Indictment

An indictment is a formal document listing the felony charges that have been filed against you.

You can be indicted before or after you are arrested. If you have not yet been booked, the court can issue an arrest warrant, based on the indictment, which orders the police to arrest you and bring you to court. Alternatively, the court can issue a summons ordering you to appear in court. If you fail to appear at the appointed time as ordered, a warrant for your immediate arrest will be issued.

If you're being charged with a felony, in some cases we may advise you to waive your Fifth Amendment right to indictment by a grand jury if a good agreement can be reached with the prosecutor. This is not often the case but sometimes a pre-indictment agreement might be the best option. We would discuss the pros and cons of this agreement with you.

When you are served your charges, you will also be told when you need to appear in court for your arraignment.

Arraignment

An arraignment is when you appear in court to formally confirm that you are aware of the charges that have been brought against you and state for the record whether you are pleading not guilty or guilty. This is done in connection with all felony and Class A and B misdemeanor prosecutions.

Ideally, by the time of your arraignment, you will have long since retained an attorney to conduct an investigation and look at your case strategically before entering your plea.

If you have not yet arranged for an attorney to represent you, do so NOW. (See chapters 13 through 15 for tips on how to find the best attorney for your situation.) Your arraignment can also be waived if your attorney thinks it is not necessary. In that instance, a plea of not guilty is automatically registered on your behalf.

If you appear at your arraignment and you are not represented by a lawyer, the court will ask whether you plan to obtain representation. The court might delay the arraignment, if necessary, to give you more time to arrange for legal representation, but this is not a reason to delay choosing an attorney. A delay only hurts you by giving you less time to prepare a defense; it does not hurt the prosecution, which simply gains more time to prepare to prosecute you.

In many cases, we advise entering a plea of not guilty, even if you are guilty of the charge(s) against you. This gives us (or whoever your attorney is) more time to work on your case, including determining whether your arrest was lawful or unlawful.

You can always change your plea later, once your lawyer has had the chance to negotiate with the prosecutor, should you and your lawyer decide that pleading guilty makes the most sense in your particular situation.

Once you plead guilty, however, you cannot change your plea back to not guilty, so it is not a decision that should be made lightly. Always consult an experienced defense attorney willing to fight for your rights before deciding to enter a guilty plea.

In most counties in Texas, the judge will not accept a guilty plea at arraignment.

What to Do

Texas takes all these charges very seriously. So should you. Don't take chances. Hire a legal advisor who knows the ins and outs of drug charges and convictions to ensure your rights are protected from minute one.

What Are Controlled Substances?

Simply put, a controlled substance is a drug that cannot be possessed legally without a legitimate prescription. Think of narcotics, for example. Some controlled substances (e.g., marijuana) may be available by prescription in other states but because they cannot legally be prescribed in Texas, that makes them illegal to possess here for any reason—no exceptions.

So, having a prescription doesn't necessarily mean it's legal!

All controlled substances are drugs, but not all drugs are controlled (restricted) substances. Over-the-counter medications, for example, are drugs but they are not controlled substances, because they are not regulated—that is, they are readily accessible to you without much, if any, limitation.

Additionally, certain drugs are regulated in Texas but still are not classified as controlled substances. To illustrate, alcohol is also a drug, but Texas legislature does not define it as a controlled substance. That said, it is still controlled in the sense that you cannot purchase or publicly consume it unless you are at least 21 years old. But it is not a controlled substance that is restricted among the adult population.

How much is too much?

The definition of “controlled substance” in the Texas Controlled Substances Act includes not just the controlled drug, but also any “adulterant” or “dilutant” that has been added to the drug. So, if you’ve got an ounce of cocaine on you, for example, and it’s cocaine that’s been cut with other ingredients that are not controlled substances, you’re still considered to be carrying an ounce of a controlled substance, even if the quantity of the actual controlled substance is considerably less.

That may seem like a negligible, even somewhat unimportant distinction if you’re talking about heavyweights like cocaine or methamphetamines, but what about marijuana?

If your pot is in the form of a chocolate bar or brownie, your degree of possession is based not on how much pot is in the brownie, but on how much the brownie itself weighs.

**A 4-oz.
brownie
equals a
felony record!**

That’s right. Texas law bases the weight on the *entire* product, not just the amount of marijuana it contains.

Consider the difference between carrying a six-ounce chocolate bar vs. six ounces of pot. As far as Texas is concerned, it’s one and the same. And it’s a felony.

You read that right: **Possession of just one chocolate bar can—and often does—carry a felony charge.**

By basing sentences on the total weight of the product sold, Texas law can impose severer sentences for high-volume dealers selling the most product to the most customers, regardless of purity.

You read that right. If you sold 50 grams of something that's 99% inositol and 1% powder cocaine, you would be subject to the same maximum sentence as someone who sold 50 grams of 100% pure cocaine.

And while judges can elect to consider drug purity when imposing a sentence, the fact that a drug has been diluted rarely influences a Texas judge to impose a more lenient sentence.

Drug paraphernalia

Drug paraphernalia generally refers to products used to grow, manufacture, package, or ingest a controlled substance, including marijuana.

That's a pretty broad definition. Arguably, drug paraphernalia could include anything from sandwich bags that can hold illicit drugs right down to a garden hoe allegedly used to cultivate marijuana plants.

Items potentially used to ingest drugs, such as pipes or bongs, are also considered to be drug paraphernalia.

When the intended use of something is unclear, prosecutors may try to prove it was intended for drug use. However, such a leap is not always apparent. A skilled lawyer can argue that your pipe, for instance, was meant for smoking tobacco, not marijuana, or that the syringe you were found with was intended to inject insulin, not heroin.

Possession of paraphernalia is a crime in Texas, as are manufacturing or giving/selling it to someone else. Merely passing a marijuana pipe to someone else is considered to be a "delivery" of the pipe. And even making a makeshift

pipe from an empty beer or soda can could be charged as criminal “manufacturing.”

It is important to understand the potential consequences of such a seemingly minor drug paraphernalia conviction. Although a simple possession charge is a misdemeanor and only punishable by a fine, it still means that you now have a criminal record that will follow you.

So, while it might seem easiest to pay the fine in a hasty attempt to put the entire situation behind you, there are significant collateral consequences (see chapter 10 for more details on additional consequences of a drug conviction).

Having a criminal record can create problems when you want to apply for employment, obtain a professional license or security clearance, or merely vacation in a foreign country.

Delivery, possession with intent, and manufacturing drug paraphernalia are Class A misdemeanors but *only* if the charge is a first offense and *only* if delivery was made to either an adult or a minor less than three years younger than you. Any delivery of paraphernalia to a minor who is more than three years younger is a felony—that’s not negotiable.

A second offense that does not involve a minor carries a minimum 90-day sentence. The best way to avoid being exposed to the harsh consequences of a second offense is to avoid conviction of a first offense.

The same is true of charges of manufacturing or delivering paraphernalia. If the product you made or sold could be used for a legitimate purpose, it may be difficult for prosecutors to prove your intent.

Delivery, possession with intent to deliver, and manufacturing charges also require proof that the accused knew that the recipient intended to use the item as drug paraphernalia.

Even if you delivered a product knowing that it *could* be used as drug paraphernalia, if the recipient of the product indicated they intended to use the product for a legitimate purpose, we would argue such a defense to the charge.

In our experience, the prosecution's burden of having to prove both the seller and buyer's intent can make convictions difficult to obtain.

Marijuana

An entirely different set of Texas laws apply to marijuana. Does that mean it's a lot less serious to be caught with marijuana? NO!

Everything you might need to know concerning marijuana possession and delivery could fill a book. (In fact it has: we have published a separate book on the subject, *A Citizen's Guide to a Marijuana Arrest in Texas*, which can be found on our website.)

Possessing marijuana is not the same as possession of a controlled substance. Despite that, charges for marijuana possession and intent to deliver range from misdemeanors to felonies, just as they do for controlled substances, and sentences of **life imprisonment for marijuana** are possible.

With the exception of synthetic marijuana, marijuana-related crimes are classified separately, but they are no less weighty and should never be shrugged off as less serious. Texas sure doesn't look at it that way. Neither should you.

Growing marijuana

Growing or cultivating cannabis plants is not treated as "manufacturing" marijuana under Texas law, although you can be charged with possession of marijuana if you grow or cultivate it.

The penalties depend upon the nature of the crime and the amount of marijuana involved. Unlike the delivery of other controlled substances, if you give someone a small quantity of marijuana without demanding to be paid for it, that carries a lesser penalty than had you sold someone the same quantity.

While Texas law doesn't actually distinguish between simple possession and possession with intent to deliver where marijuana's concerned, if you are caught in possession of a large quantity of marijuana, the law assumes that your intent was to deliver (sell) it to others rather than using it for yourself.

Manufacturing—which, in the case of marijuana, means growing or cultivating the plants—comes under the same umbrella as simple possession, and so it carries no additional penalty in the way manufacturing controlled substances do.

However, even if you have not yet harvested the plants to create a consumable drug, you are still considered to be in possession of marijuana.

Penalties

Although Texas no longer classifies marijuana as a narcotic, state law continues to authorize harsh sentences for marijuana delivery. Unlike most jurisdictions, Texas law authorizes a life sentence for the possession of sizable amounts of marijuana. Texas law also imposes a minimum sentence for delivery of such magnitude.

The penalty for delivering marijuana depends upon:

- a) the amount of marijuana that was delivered; and
- b) if the delivery involved less than a quarter-ounce and whether the defendant sold the marijuana. “Sold” means exchanging it for anything of value, not just cash.

Mature stalks and sterilized seeds are excluded when weighing marijuana, but as we mentioned in chapter 3, if your pot is in the form of a chocolate bar or brownie, for example, your degree of possession is based not on how much pot is in the brownie but on how much the brownie itself weighs. Chew on that for a moment.

What we’re saying is that what would otherwise weigh in as a small fraction of an ounce, a misdemeanor charge, has suddenly ballooned into four ounces because possession of chocolate, flour, butter, and sugar has suddenly put you solidly in felony territory. Talk about leaving a bad taste in your mouth.

Marijuana quantities

Let’s look at what the charges are for different quantity levels. If you’re caught with:

- one-fourth of an ounce or less:
 - ◆ and you gave away the marijuana and received nothing in exchange, it’s a Class B misdemeanor.
 - ◆ and you were given something of value in exchange for the marijuana, it’s a Class A misdemeanor.

- more than a quarter-ounce, up to and including 5 pounds, that's a state jail felony.
- more than 5 pounds, up to and including 50 pounds, it's a second degree felony.
- more than 50 pounds, up to less than 2,000 pounds, and it's automatically a first degree felony.
- 2,000 pounds or more is a first degree felony that is punishable by a prison sentence of at least 10 years, right on up to life imprisonment.

Marijuana crimes involving children

If you involved someone under the age of 18 in growing or selling marijuana, the level of your offense is increased by one degree, unless you've already been charged with the highest offense, a first degree felony.

If you involved someone under the age of 18 through the use or threat of force, the charge against you will automatically be raised to a first degree felony, no matter how much lower the charge would have been otherwise.

Higher maximum penalties may also apply if you gave or sold marijuana to a minor.

Community supervision

With limited exceptions, the court has the authority to suspend your sentence, if it's less than 10 years, and to place you on community supervision (probation) instead.

If your offense is classified as a state jail felony, the court *must* suspend your sentence and place you on community supervision (probation) if:

- your crime involved no more than one pound of marijuana, and
- you have no prior felony convictions

If you have been arrested in connection with marijuana, we urge you to read our comprehensive book, *A Citizen's Guide to a Marijuana Arrest in Texas*, and discuss any questions you may have with either us or another experienced criminal defense attorney.

Prescription Drug Offenses

Drug crimes in Texas are not just limited to illegal substances. Prescription fraud, from the unauthorized use of prescriptions or possession of prescription forms to the improper issuance of prescriptions, also ranks among drug crime charges.

Let's take a brief look at what falls under the heading of prescription drug fraud and the kinds of penalties you might face, if involved.

- Forging a prescription or fictitious signature to a prescription
- Altering a prescription by changing the quantity of the prescribed drug
- Using a forged, fictitious, or altered prescription
- Using a prescription issued to another person
- Making a fraudulent oral communication (such as calling a pharmacy, pretending to be a doctor) to prescribe a drug for a patient
- Engaging in any fraud, misrepresentation, forgery, or deception to obtain a prescription or drug requiring a prescription

- Distributing a controlled substance that requires a prescription when you don't have one
- Issuing a prescription using a fictitious or other person's DEA registration number

Criminal Charges

Controlled Substance¹

Schedule I or II

Schedule III or IV

Schedule V

Criminal Charge

Second degree felony

Third degree felony

Class A misdemeanor

Offense

Possession of a blank prescription form or a prescription for a Schedule II or III drug

Delivery of a blank prescription form or a prescription for a Schedule II drug

Possession of a prescription for a Schedule IV or V drug

Delivery of a prescription for a Schedule III, IV or V drug

Criminal Charge

State jail felony

Second degree felony

Class B misdemeanor

Third degree felony

Simulated substance offenses

A simulated controlled substance is essentially a lookalike, imitation, or fake drug. Most often, it is not a drug at all. An example of this would be passing off something like baking soda or baby powder as cocaine.

¹ See chapter 11 for an overview of Schedule classifications.

A counterfeit controlled substance on the other hand is an actual controlled substance made to mimic a legitimately manufactured one. Fake pills are manufactured and given an identical mark to that of the licensed manufacturer.

Delivery or Manufacturing with Intent to Deliver a Simulated Controlled Substance

Going back to our cocaine example, selling a bundle filled with baking soda while telling the buyer that it's cocaine is an example of delivering a simulated controlled substance. That and manufacturing it are both state jail felony charges.

Other Dangerous Substances

Occasionally, drug charges involve drugs that are classified as dangerous (requiring a prescription) but they are not on the list of controlled substances. Xanax is one such drug.

Illegally possessing a dangerous drug is a Class A misdemeanor, while delivering, offering to deliver, or manufacturing a dangerous drug is a state jail felony.

Depending upon the offense and (in some cases) whether you have been convicted of the same offense in the past, the crime is generally a Class A or Class B misdemeanor.

Volatile chemicals

Texas criminalizes the recreational use of certain legal substances that are not categorized as controlled substances or dangerous drugs, labeling them as "abusable volatile chemicals." Sniffing glue and aerosols fall under this category. These are Class B misdemeanors.

It's also illegal to sell such chemicals to anyone under 18. If you're caught doing so and you're not licensed to generally sell such items, it's a state jail felony. If you are licensed, it's typically a misdemeanor, unless you've been convicted of doing so previously.

Defenses

Every case differs, from the type and amount of drugs involved to the circumstances surrounding their arrest. Even which county you're arrested in can make a difference, as some take a harder line than others in terms of sentencing, opting for jail time over community service, for example.

Using a skilled local lawyer also ensures that they are familiar with the programs available in your jurisdiction which could be viable options to jail time, should you be convicted.

Hamilton, Hull & Rogers performs skilled legal drug defense throughout Texas, and staffs ten (10) regional offices to ensure you get the best, most exhaustive defense possible.

We employ investigators to uncover every detail of what went down and use our comprehensive scientific training to determine precisely what substance was involved to ensure you are not convicted for something you haven't actually done.

Popular Police Myths Debunked

Myth 1: If you're not Mirandized, all charges must be dropped

This is a common myth, likely due in part to watching too many crime shows on television where, in the interest of drama and storytelling, facts like this get distorted a bit. They call this taking “literary license.”

And it is most certainly a myth.

The first thing to remember is that you don't have to wait to be Mirandized to assert your rights. They're yours, no matter what, and you're entitled to them at any time, not just when you're being arrested.

The second thing to remember is that if you're brought in simply for questioning, **the police aren't required to read you your rights** or remind you not to incriminate yourself or suggest you get an attorney. Despite that, anything you say can legally be used against you, and they will, if they can.

The third thing to remember, which is the myth buster here, is that too many people believe that if for some reason the police fail to read you your rights in the form of a Miranda warning, they cannot prosecute you. That is FALSE.

Certainly, your attorney can vigorously argue that this procedural mishap is cause to get your charges dismissed. But the reality is that if the evidence against you is substantial enough to suggest that you committed this or another drug offense, and if any statement you made to the police isn't the only evidence against you—that your statement isn't necessary to convict you—then it's highly likely that your charges will stand and you will be prosecuted.

What it does mean is that any statement you made without having been reminded of your rights will not be used against you as evidence in a trial.

This is yet another reason why it is critical to have a licensed criminal defense attorney beside you, one who knows not just the legal system inside out but also the prosecutor and court officials, advising you and speaking up in your defense.

Myth 2: The police can't lie to you

We talk about this in *A Citizen's Guide to a Drug Arrest in Texas*, where we discuss the right to remain silent. Too many people mistakenly believe that the police are not allowed to lie when they question someone.

Wrong!

The police are not only permitted to lie; they are encouraged to deceive you in any way that might encourage you to admit to wrongdoing, to incriminate yourself.

They are allowed to tell you all sorts of things, including claiming how things will go very badly for you if you refuse to talk, if you refuse to admit to what they think you're guilty of—or might be guilty of—or they might tell you that they

can ensure things go more easily for you if you just admit to something.

You, on the other hand, will be in serious trouble if you say anything and they decide you're not telling the truth. You are NOT allowed to lie to the police. You ARE allowed to keep your mouth shut, however.

Keep reminding yourself that they're not required to speak the truth. And that you're entirely within your rights not to speak at all.

Myth 3: Police must honor the deals they offer

Police do not have to honor the deals they offer. Why not?

Because they're not authorized to make deals.

It doesn't matter what kind of deal they offer, they don't have to deliver, even if you have done what they asked. If they say they are authorized to make a deal, it's only because they're permitted to lie—to tell you anything they think will make you incriminate yourself. It doesn't have to be true, and claiming they can offer you a deal is definitely untrue.

No police officer, from a patrolman to the chief of police, can offer you a deal that is legally enforceable. Only the prosecutor has the authority to make a deal with you.

And the prosecutor is in no way obligated to offer you whatever the police did in order to get you to talk. The prosecutor will simply thank you for making his or her job easier and your alleged deal will disappear like a wisp of smoke, without a trace. And there's not one thing you—or your attorney—can do about it.

Don't accept any deals from the police. Talk to your attorney. Your attorney knows that only deals from the prosecution are guaranteed.

Myth 4: The "good" cop

Yes, just about everyone is familiar with the good cop/bad cop scenario. Watch any film where a suspect is being questioned and the technique is very obvious. You wonder how anyone could fall for it. Well, they do. And it's a lot easier to fall for it than you might think.

First off, anyone who's under arrest is naturally apprehensive, even frightened, particularly if it's their first time. Combine your fear with your eagerness to blurt out your innocence and add to that recipe a seemingly sympathetic police officer who speaks to you as if they understand your situation and are there to help justice be served and to help you to establish your innocence. Now you're talking.

Because, in your mind, how can you best establish your innocence? Why, you do it by talking to them, right? Surely they wouldn't twist your words. They'll keep whatever you tell them in the strictest confidence—they just promised you they would. They've already assured you that they only want what's right.

Should you believe them?

NO!

Even if the police officer seems sincere and concerned for you, their job is not to help you if you're innocent of some or all of what they suspect you've done. That officer might

be the nicest person in the world, but they're not there to help you. That's what your attorney is for.

Just smile, thank them for their time, and advise them that you are not going to make any sort of statement whatsoever without first consulting your attorney and then having them present during questioning.

Your attorney is your advocate. The police officer who is looking to arrest you is most decidedly not your friend. When it comes to defending yourself, the only one you should see as being "the good guy" is your attorney.

Myth 5: Police can legally search you without a warrant

Can you physically prevent a police officer from searching you? No. But that doesn't mean it's legal.

As your attorney will confirm for you, any search performed without a search warrant or probable cause (such as witnessing you firsthand with drugs in your possession) is not legal.

It doesn't mean you can stop them from searching you. But your attorney can and will argue if the search was illegal in order to get any evidence uncovered during the illegal search tossed out, so that it cannot be used against you as evidence during a trial.

The Fourth Amendment to our nation's Constitution is designed specifically to protect citizens from illegal search and seizure. It says:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

That means that you have an inherent right to be free of unreasonable searches and seizures and that no search warrant can be issued unless sufficient probable cause can be shown.

It also says that any search warrant must detail precisely what property is to be searched and what items can be seized. If it just says the garage, they cannot search the house.

If it lists only a person, they cannot search a vehicle or premises. Not unless, that is, there's either evidence in plain sight, such as their witnessing you stuffing drugs into your pocket or seeing drug paraphernalia through a car or house window, for example.

So, no, the police cannot necessarily legally search you without a warrant.

Your attorney can explain more of the nuances and exceptions to this rule, but for the most part, searches are illegal unless: a) you (foolishly) give your consent; b) they have a warrant; or c) there exists probable cause.

If the search is not performed under any of these conditions, a skilled attorney will argue that the search was illegal, violated your rights, and that any and all evidence seized as a direct result of that illegal search cannot be used against you in a trial.

Do's & Don'ts If You're Arrested

Here are some of the tips that we at Hamilton, Hull & Rogers always share with our clients on how to cope with being arrested and begin building a solid defense right away.

If you are arrested, either with or without a warrant, you can start making strategic decisions that will aid in your defense and prevent the prosecution from gaining fodder to use against you.

- **DO *identify yourself honestly*.** There is no justifiable reason to refuse to correctly identify yourself when asked by police to do so. Just don't answer any other questions.
- **DO *remain silent*.** Whether or not the police have read you the Miranda warning, you **ALWAYS** have the right to remain silent and the right to seek counsel. Never answer questions or volunteer any information until you have spoken with a practiced defense lawyer.
- **DO *invoke your right to talk to a lawyer*.** If you don't yet have a lawyer, get one. Call a trusted friend or family member and have them find one. (You don't have to keep them if you don't want to.) The sooner you "lawyer up," the sooner there will be someone knowledgeable and experienced standing at your side to help you.

- **DON'T** *lie to police officers.* If you lie about your identity or anything else, you will be charged with an additional crime. They will check your identity to make sure they are arresting the right person, so identify yourself honestly and immediately invoke your right to remain silent. If you lie to the police, the prosecution will also use this against you.
- **DON'T** *try to talk your way out of the situation.* You will never talk your way out of an arrest. If the police have come to arrest you, they are already convinced of your guilt. Remember: anything you say can and will be used against you. The only thing you should say after confirming your identity is that you are invoking your right to remain silent and consult with your lawyer.
- **DON'T** *flee from, or struggle with, the arresting officer.* Resisting arrest will only lead to more criminal charges being brought against you. Your attempt to flee will be considered an admission of guilt. You risk being subjected to police brutality and excessive use of force that could result in serious bodily injury. And the magistrate is likely to set a high bail because you have just demonstrated that you are a flight risk.

The hours, days, weeks, and even months to come after your arrest can be nothing short of overwhelming and disorienting. During this time, you will be forced to jump through many hoops, explain yourself to many people—both in legal proceedings and in your personal and professional lives—and make big life adjustments that may include everything from losing your driver's license to kicking a drug habit.

Throughout this process, your lawyer will guide you, keep you informed, and help you to make strategic decisions designed to obtain the best possible outcome. Meanwhile, the law firm's paralegals are there to help you navigate the tangled bureaucracy of the criminal justice system.

A lot of people haven't been through the system before and so of course they don't know how it works. And that's scary. But that's just one way that a legal firm's experienced paralegals can help you—to explain how the system works so you know what to expect.

At Hamilton, Hull & Rogers, we ensure we have support staff available to help our clients when they're preparing to go to court, including telling them when to check in and how long things are going to take. It's a huge comfort to our clients to be assured that someone's always there to answer their questions.

Our lawyers and legal staff are all on call to answer any questions and help defendants as best we can. Make sure your legal team does the same. Anything less is just not acceptable. This is just too important—it can affect your entire life if not handled correctly and thoughtfully from the start.

If your license has been suspended due to drug-related charges, ideally, your defense attorney's firm will staff paralegals to help you pull together the correct paperwork and documentation to apply for a provisional license.

Note that drug tests are highly likely to be a condition of your release on bond. Our firm's paralegals guide our clients through this process as well.

From the moment of your arrest, if you follow our suggestions and listen to the advice of your attorney, you can begin to make informed decisions designed to benefit you in the long run—even if your rights are ignored when dealing with the police. No matter what happens, the minute you find yourself arrested you should remain silent, retain a defense attorney, and know your options.

When someone is arrested on drug charges, they may be ordered to submit to a drug test or participate in a drug treatment program as a condition of their release. This can mean anything from attending Narcotics Anonymous (NA) meetings to spending inpatient time in a drug treatment clinic.

If you're out on bond and have been ordered to submit to a drug test, be smart. *Don't do drugs.* It's as simple as that.

You need to get any and all drugs out of your system. A negative (favorable) result on a drug test will strengthen your defense and your mitigation package, which consists of everything that points to your being a decent person who deserves a break. (We explain much more about mitigation packages in our companion volume, *A Citizen's Guide to a Drug Arrest in Texas.*)

At the risk of stating the obvious, it will be a condition of your release not to commit more crimes—drug-related or otherwise. You want to make it as hard as you can for them to put you away, so why hand them the hammer to nail your coffin shut?

Sentencing

More often than not, sentencing is performed by the judge. If you plead guilty as part of a plea bargain negotiation, the judge will always be the one to pronounce sentence.

There are a number of considerations that factor into deciding a sentence. Judges (or juries) base this decision upon how serious the offense was, any history of criminal activity on your part, and the perceived need to protect society from drug crimes in the future. Note that your mitigation packet (as explained in detail in *A Citizen's Guide to a Drug Arrest in Texas*) plays a major role in this stage of the trial, weighing heavily on consideration of an appropriate sentence.

Drug crimes involving very large amounts of a drug often carry a longer minimum sentence than an ordinary first degree felony.

A record of prior criminal convictions can, in some cases, increase the maximum penalty.

Minimum sentences

Texas felonies carry a minimum sentence but, in most cases, the judge is not required to impose any prison sentence at all. The judge can instead impose a term of community supervision. If the judge imposes a sentence, the judge cannot sentence below the minimum, but the judge can suspend all or part of the sentence and place the defendant

on community supervision. In that sense, the minimum sentence is not the kind of “mandatory” sentence that a convicted defendant is always required to serve.

A true mandatory minimum sentence nevertheless exists when the crime carries a statutory minimum of more than 10 years. Judges cannot impose community supervision for those crimes. They also lack the power to stay (suspend or postpone) a sentence of longer than 10 years. A minimum sentence of more than 10 years is effectively a mandatory minimum sentence that a defendant will always be required to serve if the defendant is convicted.

Several serious drug crimes in Texas subject a defendant to a mandatory minimum sentence. A minimum sentence of 15 years applies to crimes involving the delivery, possession with intent to deliver, or manufacture of large quantities of controlled substances in Penalty Group 1. When the crime involves large quantities of LSD, those crimes as well as possession carry a 15-year minimum sentence. Other drug felony penalties can be enhanced to require a minimum 15 year sentence when a repeat offender is convicted. Finally, the “three strikes” law in Texas requires a minimum sentence of 25 years for certain third felony convictions.

FELONY SENTENCES

Felony	Maximum Sentence	Type of Controlled Substance
First degree	5 years to life; fine up to \$10,000	All
Second degree	2 to 20 years; fine up to \$10,000	Penalty groups 1 & 1A
Third degree	2 to 10 years; fine up to \$10,000	Penalty Group 2
State jail	180 days to 2 years; fine up to \$10,000	Penalty Group 3

MISDEMEANOR SENTENCES

Misdemeanor	Maximum Sentence	Type of Controlled Substance
Class A	Up to 1 year; fine up to \$4,000	Any not listed in Penalty Groups 1, 1A, 2, 2A, or 3 (excluding marijuana)
Class B	Up to 180 days; fine up to \$2,000	Any not listed in Penalty Groups 1, 1A, 2, 2A, or 3 (excluding marijuana)
Class C*	No jail; fine up to \$500	<i>See note below*</i>

** Class C misdemeanor charges, which carry no jail time, are rarely, if ever, assigned to drug-related crimes in Texas, and so there are no specific controlled substances allocated to this level of charge.*

It is important to point out here that charges of distributing more than a quarter of an ounce of marijuana to someone, or possessing more than four ounces of an illegal controlled substance, typically carry a higher range of sentences.

Jail sentences less than 10 years can be suspended IF the court feels your character merits it

Fortunately, the legislature has, for most cases, created statutes that permit a judge or jury to suspend all or part of this mandatory minimum jail time—*if less than ten years*—in favor of probation.

Your mitigation packet, which your attorney will share with the court, will weigh heavily into whether you are granted this consideration. Submit character references, show every conceivable concrete contribution you have made to society,

and be sure to document your employment, particularly if it has been steady.

This is your final chance to share the circumstances of your life to the judge and jury so they can see who you are as a person before they carry out sentencing. Make it count!

There are many different types of drug charges in Texas.

They range from the two most common: 1) possession; and 2) possession with intent to deliver, on up to 3) manufacturing a controlled substance, 4) drug paraphernalia charges, and 5) manufacturing, possessing or delivering the precursor chemicals used to make illegal drugs, such as those used to make methamphetamine or any other illegal controlled substance.

All of these vary in terms of seriousness of the charge and the sentences they carry. None of them should be taken lightly, because Texas takes none of them lightly.

Alternatives to Jail

A drug conviction in Texas is considered a serious offense. Depending on the magnitude of the offense—the amount of drugs in question, for example, and whether there are additional factors that cause the Court to view the offense as even more, well, offensive—many drug charges in this state can result in imprisonment as well as a hefty fine.

When we represent clients who are facing drug charges, our primary goal is to avoid a conviction altogether. However, depending on the circumstances and the gravity of the offense, that is not always possible. When all other avenues have been exhausted, and one of our clients faces sentencing, we make our most persuasive argument to minimize or avoid jail or prison.

Mandatory sentences became popular during the “get tough on crime” era that began in the 1980s, which did nothing to reduce drug crime. While Texas drug laws are still tough, Texas has been recently moving away from the “lock ’em up” mentality. In 2007, some nonviolent offenders began being sent to treatment facilities rather than prison. The result? Crime rate has dropped.

We believe that lengthy incarceration for nonviolent criminals does not reduce crime. We want our clients to move forward, to turn things around when drug use has affected their lives, to have hope in turning things around. And we believe that alternatives to jail are part of that path, so we fight hard to

obtain one of the following options for our clients who face possible jail or prison time:

- Drug Court (supervision and drug treatment program participation which can lead to charges being dismissed)
- Community Supervision (probation)
- Deferred Adjudication (probation granted after pleading guilty or no contest—meaning you aren't arguing your innocence—without an actual conviction being recorded until and unless you fail to adhere to all the terms of your probation, which gives you the chance to avoid a conviction on your record altogether)
- Court-ordered Treatment
- Electronic Monitoring
- Work Release Program
- Community Service

Let's take a look at each of these and what they mean for you.

Drug Court

This progressive program has been adopted by a number of counties in Texas. If you are invited to participate, you are evaluated to determine whether you have a substance abuse problem that might be better addressed through treatment than incarceration. Drug Court, which typically runs from 12 to 18 months, involves intense community

supervision (probation) and participation in one or more treatment programs. If selected, you will be required to provide frequent urine samples to confirm that you're no longer using drugs.

Here, you regularly appear in front of a Drug Court judge to establish whether you've been faithfully complying with your probation terms, and your supervisor updates the judge about your progress and any setbacks.

If you have not been fully compliant (for example, if you've missed one or more treatment sessions or your urine sample reveals continued drug use), the judge will decide whether to continue your Drug Court participation or send you back to be incarcerated.

If you successfully complete Drug Court, you may get the charges against you dismissed, which means you will no longer risk this offense becoming part of your permanent record.

Community supervision

Commonly referred to as probation, community supervision is a viable option for most drug crimes, either instead of a sentence or in exchange for part or all of a suspended sentence.

If you have been convicted by a jury, the jury can recommend a suspended sentence with community supervision if you have never committed a previous felony, and the judge must comply. However, only a judge can decide to award you probation if you already have a felony record. (This is something we consider when deciding whether to elect for a jury trial vs. a bench trial, where the judge serves as both judge and jury.)

Deferred adjudication

A deferred adjudication grants you community supervision (probation) *before* you are convicted of a crime. In this instance, if you plead guilty or no contest (meaning you accept the sentence without actually admitting guilt), the Court postpones any conviction while you are put on probation. If you complete community supervision successfully, the charge against you is dismissed. If you don't, or you commit another crime while on probation, you must then return to court for sentencing. Since you've already pled either guilty or no contest, there is no further opportunity for a trial. The judge can only enter a conviction against you and impose a sentence.

More often than not, we negotiate a deferred adjudication as part of a plea bargain. Unlike probation, deferred adjudication is a possibility in cases where the crime you committed carries a minimum sentence of 10 or more years, but it's not a likely possibility. And it won't be granted if you're a repeat offender who commits a drug crime in a legally defined drug-free zone, that is, on a school bus or within 1000 feet of a primary or secondary school, daycare facility, or youth center.

The risk with deferred adjudication is that, in order to receive it, you must waive your right to trial and any possibility of being found not guilty by a jury. However, for our clients who do not want to risk taking their case to trial and who will obey the conditions of their supervision, the possibility of scoring a dismissal with no conviction makes this option an attractive one.

Court-ordered Treatment

Even if you are convicted of simply a Class A or B misdemeanor, and not a felony, you face a possible fine and/or jail sentence. (Class C misdemeanors do not carry a jail sentence.) Court-ordered treatment, however, is a possible alternative. Here, the judge can elect to send you to a treatment facility for up to 90 days instead, if all of these conditions apply:

- Addiction is seen to be the reason behind your committing the crime
- An approved treatment facility is available and agrees to admit you
- You are deemed mentally competent

Electronic monitoring

House arrest is another alternative to spending time behind bars. This typically involves wearing a GPS ankle bracelet at all times which alerts authorities when you stray outside the area to which you're restricted, but permits you to spend your time sentenced at home and, depending on the circumstances, on the job so you can continue working. (See "Work Release" below).

Work Release

We can potentially negotiate county jail sentences or any confinement that is part of a community supervision sentence to be limited to nonworking hours. This permits you to continue to work while serving your sentence.

Community Service

We may try to negotiate community service if you are convicted of a drug crime to replace some, or all, of your jail sentence, as long as a jury hasn't imposed a sentence requiring you to spend time in jail.

Here, we argue that such a sentence provides you an opportunity to contribute to the community in a positive and constructive way, by providing an unpaid valuable service rather than spending time in jail. Community service can sometimes be combined with work release (see above).

Additional Penalties & Consequences

Convictions for drug crimes have both direct and collateral consequences. Direct consequences can be compared to totaling your car, having it crushed beyond recognition, whereas collateral consequences are comparable to waking up the next morning and discovering you've got whiplash and that you can't sit up or get yourself out of bed. Direct consequences are those imposed by a court as a form of punishment, such as incarceration and fines.

Collateral consequences are not court-imposed when you are convicted. Instead, they're that unanticipated unpleasant side effect, which in this case is your inability to do or possess certain things as a result of having been convicted of a drug crime. Collateral consequences include being denied eligibility for certain financial benefits, a passport, or green card, for example.

Let's take a closer look at some of these direct and collateral consequences. Some may likely come as an unpleasant surprise.

Direct Consequences

Fines

All drug convictions carry the possibility of your having to pay a fine.

The court takes into consideration your ability to pay a fine before imposing one on you, however. So, if you genuinely do not have sufficient resources to pay a fine, you cannot be imprisoned for not being able to pay it. However, you can be punished for deliberately refusing to pay a fine when the Court decides that you can afford to do so.

We negotiate payment schedules for our clients in this situation, so that any fine can be paid over time, if need be, so it poses less of a hardship.

Jail or prison sentences

All drug crimes, except those classified as Class C misdemeanors, carry with them the possibility of jail time, spanning from 180 days to life imprisonment. Imprisonment may, at the discretion of judge or jury, be replaced with one or more of the alternative sentences covered in the previous chapter, such as probation, treatment center participation, and/or community service.

Court costs

If you are convicted, you will be required to repay the Court for costs incurred during your trial. You need to know that these costs are fixed by law and so they are not negotiable.

Forfeiture

The State of Texas can seek the forfeiture of certain assets if you are convicted of a drug crime. This is specifically to prevent you from benefiting from any criminal activity—it is NOT designed to be an arbitrary part of your punishment.

For example, understandably, any controlled substances found in your possession at the time of, or as a result of, your

arrest will be seized. But other assets that could be seized, which you might not have considered, include:

- Any property—land, buildings, vehicles, weapons, or any other type of asset—used or intended to be used in the commission of a drug felony. If, for example, you own a building that you use to manufacture drugs in, whether it’s your home or another building, the government can take it from you.
- Proceeds, such as cash and other valuables, gained from the commission of a drug felony, such as, for example, any cash you may have received from selling drugs.
- Property you acquired with the proceeds gained from the commission of a drug felony. If money you made from selling drugs was used to buy a car or house, for example, they can be confiscated.

When property is seized, you have the right to file a claim for its return and receive a hearing. The property will be returned if it is judged not to be contraband. If the property was clearly used in the commission of a drug crime, however, we wouldn’t advise admitting ownership of the property as it might give the prosecution additional evidence to prove a criminal charge.

Collateral (Additional) Consequences

A sizable number of both federal and state laws generate collateral consequences when you’re convicted of a drug crime. Since they are not direct consequences of a conviction, the court doesn’t warn you about them before you enter a plea of guilty or no contest. You should nevertheless be

aware of them because they might have a significant impact upon your life and upon that decision to plead guilty.

Federal collateral consequences

Federal statutes that impose consequences on drug convictions have been justly criticized when more harmful crimes are not subject to the same harsh consequences. Just a few of the benefits you can be denied are:

- Student federal loan and grant eligibility
- Immigration status and eligibility
- Military enlistment
- Federal benefits, including TANF (Temporary Assistance for Needy Families), SNAP (food stamps), and Housing Assistance
- Loss of a commercial license
- Loss of certain veteran benefits

Texas (state) consequences

In addition to those consequences imposed by the federal government, Texas imposes even more that you should know about, depending upon the type and severity of the crime you are convicted of. Some of the more common ones include:

- Driver's license suspension of 180 days (a commercial license can be permanently suspended if the drug felony involved the use of a motor vehicle)
- Denial of all voting privileges in public elections

- Five-year ban on obtaining a concealed weapon carry permit (federal law prohibits anyone with a felony conviction to ever possess a firearm)
- Expulsion from school/university
- Loss or denial of most professional licenses
- Ban on holding any form of public office
- Denial of permit to sell alcoholic beverages
- Ban on working certain types of jobs

As you can see, a drug conviction in the state of Texas ripples across potentially every aspect of your life, long after the sentence has been served. It's not something to dismiss casually.

Always make sure you have a highly skilled legal team behind you to protect you as much as possible from this otherwise inevitable fallout.

Drug Schedules

Texas classifies drugs as controlled substances, whether legal or illegal, and ranks them according to seriousness in relation to their potential criminal abuse. These rankings are referred to as “schedules.”

Therefore, the penalty for a drug crime depends upon which controlled substance schedule the drug is listed in.

Schedule I

These drugs are both highly addictive and have either no accepted medical use for treatment throughout the United States or it’s been judged that they cannot be used safely, even under medical supervision. Drugs represented in Schedule I include LSD, Ecstasy/XTC, and marijuana.²

Schedule II

These drugs can be legally prescribed, but have a high potential for abuse that could potentially lead to addiction. Cocaine, methamphetamine, and most narcotics can be found listed in Schedule II.

2 Note that while marijuana has been approved for medicinal use at the time of this writing in 23 states, and recreational use in certain states and D.C., this does not affect federal law, and marijuana is still classified as a Schedule I controlled substance (though not listed in any Penalty Group).

Schedule III

These are drugs with an accepted medical use that could be abused but are considered to be less of a risk than those listed in Schedules I and II. Schedule III drug abuse can result in moderate physical dependence or high psychological dependence. Vicodin is an example of a Schedule III drug.

Schedule IV

These drugs are essentially the same as Schedule III in that they have an accepted medical use yet are vulnerable to potential abuse, but these are seen to pose less of a risk and create a lower level of dependency. Valium is a Schedule IV drug.

Schedule V

These drugs present even less serious risks than those classified in the first four schedules. Cough suppressants with very low concentrations of codeine are an example of a Schedule V drug.

Penalty Groups

Most illicit drugs in Texas are listed in one of four basic penalty groups, two of which have subcategories. Each penalty group carries a maximum (and sometimes minimum) sentence based upon the quantity involved.

The lists of all drugs and their derivatives are long. In this chapter we list a number of familiar ones. Check with us or your lawyer if you are not sure which penalty group the drug that you've been charged with belongs to.

The most serious controlled substances are classed as Penalty Group 1 and, as such, carry the severest penalties. However, although the substances classed under the other penalty groups are considered less serious, the charges that accompany possession and other related crimes for these drugs are by no means insignificant.

With the exception of LSD, penalties are determined by drug weight, including anything added to dilute it, even if the additive is not a controlled substance (see chapter 3).

Excluding marijuana, possession of a drug not listed in any Penalty Group is typically a Class B misdemeanor.

Delivery, possession with intent to deliver, or manufacturing of any controlled substance not listed in a Penalty Group, again excluding marijuana, is a Class A misdemeanor.

Penalty Group 1

This group includes cocaine, heroin, hydrocodone, ketamine, methadone, methamphetamine, morphine, opium, oxycodone, rohypnol, and their many derivatives.

If you are convicted, you could be fined anywhere from \$10,000 to \$100,000 and sentenced to a state jail felony, from six months to two years, right up to an enhanced first degree felony, which can carry a sentence of 10 to 99 years or life in a state prison, depending on the quantity of the drugs involved and the circumstances.

Charges for Possession

Quantity	Criminal charge
Less than 1 gram	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
1 to <4 grams	Third degree felony, punishable by 2 to 10 years and up to a \$10,000 fine
4 to <200 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
200 to <400 grams	First degree felony, punishable by 5 to 99 years and up to a \$10,000 fine
400+ grams	First degree felony, punishable by 10 to 99 years, or life, and up to a \$100,000 fine

Charges for Delivery, Possession with Intent to Deliver, or Manufacture

Quantity	Criminal charge
Less than 1 gram	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
1 to <4 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
4 to <200 grams	First degree felony, punishable by 5 to 99 years and up to a \$10,000 fine
200 to <400 grams	First degree felony, punishable by 10 to 99 years, or life, and up to a \$100,000 fine
400+ grams	First degree felony, punishable by 15 to 99 years, or life, and up to a \$250,000 fine

Crimes involving lesser quantities that also involve injury, death, or a minor (under 18) increase in penalty as follows:

Basic Charge	⇒	Enhanced Charge
State jail felony	⇒	Third degree felony
Third degree felony	⇒	Second degree felony
Second degree felony	⇒	First degree felony

Lesser-quantity crimes, if involving a minor (under 18) who was coerced or threatened in order to ensure their involvement, **are automatically charged as first degree felonies.**

Delivery to a child can also carry higher maximum penalties.

Penalty Group 1-A

Lysergic acid diethylamide (LSD) and its analogs.³

Penalty Group 1-A penalties are the same as Group 1 above: If convicted, you could be fined up to \$10,000 and sentenced to a state jail felony, from six months to two years, right on up to an enhanced first degree felony, which carries a minimum sentence of 10 years (or 15 years, if the abuse units total more than 8000) to 99 years, or life, in a state prison, depending on the circumstances and the quantity of the drugs involved.

Charges for Possession

Quantity (in dosage/ abuse units)	Criminal charge & penalties
less than 20	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
20 to <79	Third degree felony, punishable by 2 to 10 years and up to a \$10,000 fine
80 to <4000	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
4000 to <8000	First degree felony, punishable by 5 to 99 years and up to a \$10,000 fine
8000+	First degree felony, punishable by 15 years to life and up to a \$250,000 fine

³ LSD (along with its analogs) is classified separately because it is sold by dose vs. weight.

Charges for Delivery, Possession with Intent to Deliver, or Manufacture

Quantity (in dosage/ abuse units)	Criminal charge & penalties
less than 20	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
20 to <79	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
80 to <4000	First degree felony, punishable by 5 to 99 years and up to a \$10,000 fine
4000+	First degree felony, punishable by 15 to 99 years and up to a \$250,000 fine

Penalty Group 1-A drugs are measured in “abuse units,” typically a single dose, whether delivered via capsule, tablet, sugar cube, the gummed back of a stamp, or any other delivery mechanism.

If delivered on blotter paper, Texas law defines each and every perforated square as one abuse unit. If the sheet of paper is not perforated, each quarter-inch square of paper qualifies as an abuse unit. In liquid form, 40 micrograms equals one abuse unit.

Lower-quantity crimes, if involving injury, death, or a minor (under 18), increase (enhance) as follows:

Basic Charge	⇒	Enhanced Charge
State jail felony	⇒	Third degree felony
Third degree felony	⇒	Second degree felony
Second degree felony	⇒	First degree felony

Lower-quantity crimes, if involving a minor (under 18) who was coerced or threatened in order to ensure their involvement, **are automatically charged as first degree felonies.**

Delivery to a child can also carry higher maximum penalties.

Penalty Group 2

This group includes hallucinogenic drugs, such as Ecstasy/XTC, mescaline, PCP, psilocin/psilocybin (psychedelic mushrooms), synthetic marijuana (THC), and their counterparts, including comparable designer drugs, and most amphetamines.

Possession can result in fines up to \$10,000, depending on the amount in your possession, and jail time ranging from six months to two years for quantities totaling less than one gram (0.035 ounces), up to five to 99 years in state prison for 400 grams (about 14 ounces) or more.

Charges for Possession

Quantity	Criminal Charge
less than 1 gram	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
1 to <4 grams	Third degree felony, punishable by 2 to 10 years and up to a \$10,000 fine
4 to <400 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
400+ grams	First degree felony, punishable by 5 to 99 years and up to a \$50,000 fine

Charges for Delivery, Possession with Intent to Deliver, or Manufacture

Quantity	Criminal Charge
less than 1 gram	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
1 to <4 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
4 to <400 grams	First degree felony, punishable by 5 to 99 years and up to a \$10,000 fine
400+ grams	First degree felony punishable by 10 to 99 years, or life, and up to a \$100,000 fine

Less-severe crimes, if involving injury, death, or a minor (under 18), increase as follows:

Basic Charge	⇒	Enhanced Charge
State jail felony	⇒	Third degree felony
Third degree felony	⇒	Second degree felony
Second degree felony	⇒	First degree felony

Less severe crimes, if involving a minor (under 18) who was coerced or threatened in order to ensure their involvement, **are automatically charged as first degree felonies.**

Delivery to a child can also carry higher maximum penalties.

Penalty Group 2-A

The controlled substances in the very recent classification penalty group 2-A are synthetics, with synthetic cannabinoids known by a variety of street names, including Spice and K2, as well as “bath salts,” often marketed under street names such as Blue Silt, Cloud Nine, Ivory Wave, and Mephedrone.

Although the penalty group lists specific synthetic cannabinoids, it also includes any synthetic that has the same effect on people.

Synthetic cannabinoids are a relatively new drug. New drugs typically provoke exaggerated claims of the harm they can do and, unfortunately, some judges pronounce harsh sentences, hoping it might somehow serve as an effective deterrent. (It hasn't yet.)

If you have been arrested for a drug crime pertaining to Penalty Group 2-A, speak to us or your attorney about the kind of charges and penalties you may be facing.

Less severe crimes, if involving a minor (under 18) who was coerced or threatened in order to ensure their involvement, **are automatically charged as first degree felonies.**

Delivery to a child can also carry higher maximum penalties.

Penalty Group 3

This penalty group contains depressants, many of them barbiturates. Overall, the group includes Alprazolam (Xanax), Amobarbital, anabolic steroids, Clonazepam (Rivotril), Diazepam (Valium), Lorazepam (Ativan), Methylphenidate (Ritalin), Nitrazepam, Pentobarbital, peyote, Secobarbital, and Sulfonylmethane.

In this group, any amount less than 28 grams is considered a Class A misdemeanor, bringing penalties of up to a year in county jail and fines not to exceed \$4,000. On the other end, within this penalty group, possession of over 400 grams will be charged as an enhanced first degree felony, resulting in 5 to 99 years in state prison and fines of up to \$50,000.

Charges for Possession

Quantity	Criminal Charge
less than 28 grams	Class A misdemeanor, punishable by up to a year in jail and a fine of up to \$4,000
28 to <200 grams	Third degree felony, punishable by 2 to 10 years and up to a \$10,000 fine

Quantity	Criminal Charge
200 to <400 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
400+ grams	First degree felony, punishable by 5 to 99 years or life, and up to a \$50,000 fine

Charges for Delivery, Possession with Intent to Deliver, or Manufacture

Quantity	Criminal Charge
less than 28 grams	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
28 to <200 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
200 to <400 grams	First degree felony, punishable by 5 to 99 years or life, and up to a \$10,000 fine
400+ grams	First degree felony punishable by 10 to 99 years, or life, and up to a \$100,000 fine

Less severe crimes, if involving injury, death, or a minor (under 18), increase as follows:

Basic Charge	⇒	Enhanced Charge
State jail felony	⇒	Third degree felony
Third degree felony	⇒	Second degree felony
Second degree felony	⇒	First degree felony

Less severe crimes, if involving a minor (under 18) who was coerced or threatened in order to ensure their involvement, **are automatically charged as first degree felonies.**

Delivery to a child can also carry higher maximum penalties.

Penalty Group 4

This group consists of compounds and preparations containing small amounts of narcotics that have been combined with one or more non-narcotic active medicinal ingredients, such as acetaminophen with codeine (e.g., Tylenol 3).

While being the lowest class of drugs in terms of danger, potential abuse, and concentration, Penalty Group 4 is not without severe ramifications. Mere possession of 400 grams or more is a first degree felony charge that carries 5 to 99 years or life in state prison and a fine of up to \$10,000, while lesser amounts can still mandate 6 months to 20 years in jail or prison and fines ranging up to \$2,000.

Charges for Possession

Quantity	Criminal Charge
less than 28 grams	Class B misdemeanor, punishable by up to 6 months in jail and up to a \$2,000 fine.
28 to <200 grams	Third degree felony, punishable by 2 to 10 years and up to a \$10,000 fine
200 to <400 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine

Quantity	Criminal Charge
400+ grams	First degree felony punishable by 5 to 99 years or life and up to a \$50,000 fine

Charges for Delivery, Possession with Intent to Deliver, or Manufacture

Quantity	Criminal Charge
less than 28 grams	State jail felony, punishable by 6 months to 2 years and up to a \$10,000 fine
28 to <200 grams	Second degree felony, punishable by 2 to 20 years and up to a \$10,000 fine
200 to <400 grams	First degree felony, punishable by 5 to 99 years or life and up to a \$10,000 fine
400+ grams	First degree felony punishable by 10 to 99 years or life and up to a \$100,000 fine

Less severe crimes, if involving injury, death, or a minor (under 18), increase as follows:

Basic Charge	⇒	Enhanced Charge
State jail felony	⇒	Third degree felony
Third degree felony	⇒	Second degree felony
Second degree felony	⇒	First degree felony

Less severe crimes, if involving a minor (under 18) who was coerced or threatened in order to ensure their involvement, **are automatically charged as first degree felonies.**

Delivery to a child can also carry higher maximum penalties.

Finding Legal Representation

If you don't already have an attorney when you are arrested, start looking for one immediately. Or have a close friend or family member find one for you.

Don't worry too much about how good they are in terms of defending you the best way possible. Right now you just need someone to handle your bond/bail and arraignment.

If you have doubts about how good a fit they are for you, you can always hire someone else to handle the real case once you're arraigned.

We cannot caution you strongly enough against discussing any details of your case with anyone, no matter how minor you think they are, over the phone when you're in jail. This includes when you're talking to a potential attorney. Wait until you're alone and face to face, and your attorney confirms that anything you say is confidential.

**Never discuss
ANYTHING
about your
case over the
phone—to
ANYONE!**

**ALL PHONE CALLS FROM JAIL ARE RECORDED
AND WHAT YOU SAY
CAN AND WILL BE USED AGAINST YOU!**

Your conversations, even with potential lawyers, are NOT protected by attorney-client privilege. Far from it! The most

damning evidence against defendants often arises from what is recorded on these calls.

Calling an attorney from jail is fine, but it is definitely NOT the time to explain the details of your circumstances.

Never, never, NEVER talk about the facts of your case or situation on a recorded line. Don't share your version of what happened, apologize, admit wrongdoing, or say ANYTHING regarding the charges being levied against you.

We cannot stress this strongly enough. Save that conversation for face-to-face meetings, and only when your lawyer assures you that you can talk freely and in complete confidence—*not before!*

Remember This When Hiring an Attorney

This is worth repeating: after your attorney gets you released on bond/bail, if you have concerns about them in any way, from their skills to their availability to the quality of their support team, you are not obligated to keep them as your attorney to the end.

That's right.

You are not obligated to keep them!

Start shopping around. We do, however, recommend that you don't terminate the first lawyer's services until you're confident that you've found and hired someone else that you are happier with.

Choosing an attorney is arguably the most important decision you will have to make in this legal process—at

the very least it is the first important decision you need to make. Remember that, in choosing a lawyer, you are choosing someone to advocate for you—you're choosing a confidant, an investigator, and a representative.

And while we go into this in greater depth in *A Citizen's Guide to a Drug Arrest in Texas*, there are several key things to look for in a law firm and certain red flags to avoid.

What to Look for in a Law Firm

- **At least one member of the firm is board certified in criminal law by the Texas Board of Legal Specialization.** Your particular lawyer does not have to carry this certification, but at least one member of the team ought to have it. If no one in the firm is board certified, we strongly suggest you look elsewhere.
- **At least one member of the firm is a former prosecutor.** Again, this doesn't have to be your attorney, but at least one attorney in the firm should have extensive prosecution experience because it provides your firm a look inside, a better understanding of how the prosecution works and thinks.

A firm that boasts a former prosecutor can anticipate the prosecution's strategy and prepare for it. They will know with certainty when the prosecution's case is weak and what to zero in on.

- **At least one firm member possesses certified scientific training.** Since your charges deal with an illegal controlled substance, it is critical to have a law firm with attorneys who can competently process the raw data found in lab reports, understand the

science, techniques, and instruments of drug testing, and know how to shrewdly evaluate the scientific evidence in your case.

You want attorneys representing you who have invested significant time, money, and energy into educating themselves on the science of drug charges. The more they know about the science behind your case, the better they can defend you.

- **The firm focuses on criminal law.** This is one time you want to stay away from general practitioners. The last thing you need is a lawyer who has a divorce case in the morning, a property case in the afternoon, and a drug case in the evening.

You want a firm that specializes in criminal law precisely because it is complex and nuanced. Criminal law—especially when it comes to controlled substances, both legal and illegal—is always changing.

If you're going to come out of this frightening situation in the best possible way, you need to find a law firm sharply focused on criminal law.

- **The firm has a private investigator at hand.** The most effective law firms have regular access to a private investigator. Skimping on the investigation aspect of trial preparations is like taking a final exam without having studied or done your homework. A smart law firm knows the importance of having a private investigator on staff, ready to launch an investigation on your behalf.
- **The firm is well organized.** A good law firm makes it easy for you to work with them. You should be able

to reach your attorney 24 hours a day, seven days a week. The best, most professional law firms have an after-hours answering company staffed by individuals who possess each attorney's direct numbers for immediate contact.

These firms have a secure text and messaging service in place so clients can communicate freely with their attorneys without fear of surveillance. Their staff is competent and helpful, with paralegals who are diligent in getting the right documents to clients on time and keeping them informed on what to do and when.

- **You feel at ease with and confident in them.** These are the people pledging to look out for your best interests. These are the people to whom you must tell everything, and trust they will use the information you give them to help you. These are the people you need to protect your rights and ensure the best possible outcome for you.

If you don't feel good about your law firm, don't waste time. Look elsewhere. You should feel comfortable in your attorney's presence and the law firm's staff should always be accessible, approachable, and helpful.

You should never feel pressured to retain the lawyer you find first to get you out of jail or work with a law firm you don't feel comfortable with.

What you want is professionalism and experience. That is not asking too much.

You want a law firm with a variety of lawyers who operate in different roles and specializations—all within the field of criminal law.

You want a law firm with scientific expertise.

You want a law firm that knows how the other side thinks and reacts.

You want a law firm that is committed to providing you the best, most comprehensive defense you can find.

Once you have identified firms that comfortably provide you with these assurances, it's time to assess your individual attorney. Let's look now at how to do that.

Identifying a Superb Attorney

There are some fundamental ways to establish whether your attorney is indeed a superb attorney, much the same way as we discussed how to identify a strong law firm in the previous chapter.

The keywords here are **experience** and **credibility**. The attorney you want to have handle your case directly should have extensive experience working with drug charges, including in taking cases to trial.

There are many things that only experience can give, and the risks you face battling drug charges in Texas are such that you need to hire someone who's seen it all before, and has an established track record of success.

**experience
+ credibility
= superb
attorney**

First off, you should feel comfortable with them, starting from the get-go, from the time of your very first meeting.

There is a tremendous amount of trust in an attorney-client relationship and the success of your case relies to a great degree on your ability to be perfectly candid with each other. If you don't feel comfortable talking with your attorney, how can they possibly do a superb job defending you?

A skilled, professional criminal defense lawyer is not interested in judging you. They are only interested in

learning absolutely everything about your situation so that they can defend you to the best of their ability. They have chosen to become a criminal defense attorney because they believe everyone, no matter what their situation, is entitled to the best defense available and to ensure their rights are not violated. So you must find an attorney that you feel comfortable disclosing EVERYTHING to.

No attorney can predict the future, and an experienced attorney knows that a good outcome can inexplicably come from a weak case and that a strong case can sometimes end less favorably than anticipated. No one knows how a case will end until it's over—there are just too many variables.

Can They Perform a Thorough Investigation?

A good attorney conducts an aggressive investigation, keeps you informed of your options, and helps you to make the best decision to achieve the best possible outcome based on the strength of your case and the strength of the case against you. The outcome is never certain and any attorney who claims that the outcome of your case is certain, good or bad, is not an attorney you want defending you.

If you are going to emerge from this in the best way possible, your lawyer should understand not only the laws regarding drug possession and delivery but also the culture and attitudes in the legal world that go along with them.

An experienced lawyer is also familiar with the different local prosecutors and judges and has a good sense of how they think and operate.

Do They Know the Science Behind Drug Cases?

You want an attorney who knows the laws and nuances of drug possession and delivery charges *and* who is knowledgeable in the science behind it.

When it comes to drug cases, understanding the underlying science is crucial, and lab results are always subject to error. And those results can make or break your case. If you are facing drug charges, the last thing you want is an attorney who either doesn't know enough to realize that lab findings are never infallible or shrugs and chooses to accept lab results at face value. That kind of attitude closes the door on a whole host of strong defense options.

A sharp attorney possesses both the know-how to analyze the raw data of any laboratory test results and an up-to-date working knowledge of the lab instruments used. They also know to take a hard look at the lab itself and the staff performing the tests.

Does this really matter? Yes. Because drug charges are based on the fact that the drugs you were caught in possession of were indeed the precise illegal controlled substances that the law claims them to be. You might not even realize yourself that what was in your possession is not actually the drug you thought it was.

If there is a shred of reasonable doubt that these substances were actually the illegal controlled substances the law claims them to be, a skilled attorney will know how to uncover that fact and can discredit the lab findings. Would you want to overlook the possibility of that happening?

The science of controlled substance charges is by no means simple. If it were, every drug defense attorney out there would

(we would hope) undergo training. To learn the science takes extensive time, effort, training, and commitment, because it involves mastering the science involved, understanding the intricacies of how a lab operates, and knowing how and why each scientific procedure is performed.

Attorneys who are willing to take the time to complete forensic science training and invest the money and effort in this are diligent, tenacious, and committed to excellence in their field. In other words, by definition, they're superb. And isn't that who you want fighting for you?

What Kind of Reputation Do They Have?

You need an attorney who is well respected and has a good reputation. In this era where reviews can be found posted on just about anything, lawyers are no exception. What's even better is that it is possible to find reviews of attorneys not just by their clients but also by other attorneys. (We'll tell you where to find these in just a moment.) If other attorneys have good things to say about yours, then you have found the right representation.

Attorneys are arguably the best at distinguishing between unskilled lawyers and skilled ones, and they have no reason to endorse one who isn't good—it's just plain bad for their reputation.

Endorsing another attorney means that they are banking their own credibility on your attorney's skills. If that's not a good sign, we don't know what is.

If other attorneys think highly of your potential attorney and, even better, seek your potential attorney's advice on their tough cases, you've found the ideal person to represent you.

Your attorney should maintain good rapport not just with peers but also with past clients. Often, the most telling opinions are those of others who have been in your situation before and emerged successful. Ask for and read the testimonials of past clients of every attorney you consider. If possible, ask to contact them and speak to them directly. Most clients are willing to voice their opinion, good or bad. You want to hear what they have to say.

You wouldn't just hire someone off the street for a job without references, and you shouldn't just hire any lawyer without references either.

Steps to Identify a Superb Lawyer

Let's look at some specific ways of finding out how superb your attorney really is.

A superb attorney is one who has invested time, money, and energy into expanding their knowledge base and improving their craft. A superb criminal defense attorney makes time to periodically attend classes and training sessions on the current nuances of the charges they defend against.

If you are facing drug charges, you want a lawyer who has attended these kinds of defense trainings, as well as training in the precise lab instruments used to test for both drugs in urine and the drugs themselves. Skimping on the science is, in our opinion, inexcusable.

A superb attorney will provide you with testimonials from their peers endorsing the work they do.

Perhaps the most straightforward way to gauge how esteemed they and their work are is to insist on an attorney

who has achieved an “A” rating through the Martindale-Hubbell peer review assessment. This rating is an objective indicator that attests to both their professional ability and how high their ethical standards are, based on evaluations given by peers—other members of the Bar and judiciary. We recommend you only consider attorneys who have achieved an “A” rating.

Your ideal attorney should also have a high AVVO rating. What’s that? Good question. That’s an important consideration so let’s take a closer look at what it is.

AVVO is a mathematical method, an algorithm, developed by attorneys, law professors, and other legal workers, that rates attorneys based on information collected from their websites, profiles, and other background material attesting to their grasp of the law and overall performance.

Ratings range from 1 (which equates to “use extreme caution when dealing with this attorney”) to 10 (the cream of the crop).

When looking for representation, your best bet for a successful outcome is to go with an attorney with a high AVVO rating, ideally at least 8. (We prefer 9s and 10s, although this is by no means the only criterion on which to base your choice of attorney.)

Why? Because while the AVVO rating is not everything, it’s a very useful filtering tool in finding a qualified attorney. The AVVO takes *objective* factors into consideration, while *subjective* factors, such as communication skills, advocacy ability, judgment, and understanding of the laws, are not factored into this rating the way they are in the Martindale-Hubbell rating.

And, although the AVVO is purely objective, the AVVO website features a helpful section where past clients can post feedback about an attorney's performance, ability, and interpersonal skills, giving you the extra nuance that you need before making a decision. There, you can assess potential attorneys based on not just their AVVO rating but also past client testimonies.

Another important consideration, if the drug charges against you are for marijuana, is whether or not your attorney is a member of NORML, the National Organization for the Reform of Marijuana Laws. NORML is an organization very active in marijuana legal reform and keeps its members up to date on emerging legal issues and changes in law relating to marijuana defense issues in each state as well as in the federal realm. If your lawyer is a superb drug defense lawyer, he/she is a member of NORML.

Your Contribution to Your Defense

You want an attorney who gives you homework. You need to be invested in the outcome of your case, not sitting back waiting for someone else to deliver a miracle. You do not want an attorney who does absolutely everything for you.

Why? Because it's just not possible. If you're not being asked to contribute, then everything that can possibly be done isn't getting done.

For example, your attorney should stress to you the importance of your getting rehabilitated and producing clean urine samples if you're a user, which also contributes to assembling the most comprehensive mitigation packet possible.

We discuss mitigation packets in greater detail in our companion book, *A Citizen's Guide to a Drug Arrest in Texas*, but basically it's about collecting information that puts you in the best light possible when negotiating your case with the prosecutor outside of court in order to obtain leniency.

You know best who will provide superior character references for you, what your relationships were like, both on the job and personally, and what contributions and good works you may have made to your community. A good attorney will not expect—or permit—you to rely solely on them. This is a team effort. And you're a member of this team, not a spectator.

Does Your Attorney Communicate with You?

A skilled attorney will keep you in the loop on *everything* concerning your case.

You should be apprised of the specifics of the charges being brought against you and given the police reports and discovery items to review so that you can discuss the ins and outs with them. Only by doing this can you make informed key decisions with regard to your defense strategy.

The best lawyers explain precisely *why* your case is a good or bad case, and make sure you fully understand what the prosecution is offering you *before* you show up to negotiate a deal.

If your attorney pushes aside your questions by saying: "We'll talk about it in court," run for the hills. A competent attorney would **NEVER** put you in that position. You are entitled to know what you are getting yourself into **BEFORE** you make decisions that could and likely will affect you for the rest of your life.

When an attorney assesses the potential outcome of any case, they should always make it clear that no outcome is guaranteed. Their assessment should always be accompanied by: “I can’t say with any certainty.” If an attorney takes a look at your case and immediately decides that you’re either doomed or it’s in the bag, don’t waste another minute. Find another attorney.

If you’ve found an attorney who meets all these criteria, congratulations. You’ve found yourself a truly superb attorney.

If your attorney is all this **AND** is one whom other attorneys turn to when they have a particularly difficult case or have hit a roadblock, you’ve hit the mother lode. Hire them!



How to Recognize a Superb Attorney:

- You feel comfortable with them from the very first meeting
- They have years of experience with clients facing similar charges
- They have related scientific training
- They have achieved an “A” Martindale-Hubbell peer review rating indicating that their peers hold them in high esteem
- They have received excellent reviews from other clients
- They have an AVVO rating of 8 (preferably 9 or 10)
- They give you homework
- They keep you informed
- They do not guarantee outcomes

Red Flags to Run From

We have talked about what characterizes a superb attorney, so by now you know what to look for.

But, like many things in life, it's not just what to look for that matters but also what to look out for.

Do you know the red flags that indicate that an attorney's way of doing business isn't necessarily in your best interest?

We at Hamilton, Hull & Rogers believe that it's important to weigh the bad as well as the good in order to make fully informed decisions.

With that in mind, let's zero in on some of the more significant red flags to be on the alert for, so that you can avoid getting saddled with poor or mediocre representation.



Red Flags

- Bargain basement prices—you get what you pay for
- Answering machines instead of a real person when you call
- No private investigator on staff or on call
- Promises on outcomes
- General practitioners—no specialization means no expertise

It's daunting to have to find a skilled defense lawyer at a moment's notice, one you can trust to fight for you. It's a huge decision. You need someone in whose hands you can trust your future. Your life depends on it.

What should you know to avoid?

- **Cheap Lawyers**

In this business, you really do get what you pay for. When searching for the best attorney to represent you, don't let money become your main concern. Right now, you are facing fines, jail time, and hidden penalties that will affect the rest of your life—your reputation, your risk of a permanent criminal record, your future job, education, and home-owning prospects. It's really hard to put a price on that. You need to focus on protecting YOU.

- **Answering Machines**

If you get an answering machine every time you call, either it's a firm that lacks sufficient coverage or you're dealing with a one-man show. You don't want either. Why? Because one person cannot possibly do everything necessary to conduct an effective investigation and build a strong case and still have sufficient time left to navigate you through the bureaucratic aspects of the legal system. Likewise, how can a law firm that can't figure out how to answer your calls be a firm with your best interests at heart?

- **No Dedicated Private Investigator**

Some attorneys want you to track down and talk with witnesses yourself. Think *Titanic*—it's time

to abandon ship! A skilled private investigator conducting your investigation is a real life preserver, and can sometimes mean the difference between surviving and going under. Relying on an amateur (or you) to conduct comprehensive investigations and background checks is like relying on a leaky life raft. Without the investigative results of a private investigator, you might find yourself treading water to stay afloat or, worse, drowning. Our advice? Keep swimming.

- **Promise Makers**

No attorney can ever guarantee an outcome. It is not only not possible but, to put it bluntly, it's downright unethical to make such promises to clients. No one can ever guarantee a home run before seeing the pitch. Uncertainties can and do arise. Witnesses recant, disappear, or are simply unreliable. A juror harbors a secret bias against you. The police or prosecution inadvertently or willingly conceals information that would prove favorable to your case.

No ethical lawyer will ever promise what he/she is unable to guarantee. If an attorney promises that he or she will get your charges dropped, drop the attorney instead.

Conversely, an attorney who tells you from the start that you're going to strike out, that there's no hope for you before conducting a full evaluation of your case, is also making you a promise—a promise that they will fail to represent you. The same way winners win, losers lose. The core reason to hire an attorney is to have them build the strongest, most strategic case possible. An attorney who dismisses any chance of a

good outcome for you right off the bat without even taking a swing has already walked. Look for one who's willing to step up to the plate and go to bat for you.

- **General Practitioners**

This is one time when expertise is priceless. You want someone with highly specialized skills in—and knowledge of—criminal law to represent you in court. What you *don't* want is a jack of all trades who's a master of none. Criminal law is nuanced and detailed and constantly changing. A general practitioner will lack focus and understanding and this could cost you gravely.

Finding an attorney to defend you is not the time to cut corners or be overly frugal. This is your life. Your freedom and your future are on the line.

- Find someone with sterling references from clients and peers.
- Find someone you feel comfortable talking to and working with.
- Find a law firm with at least one board-certified attorney and one former prosecutor.
- Find someone with scientific training who has invested significant time and effort in their craft and continues to educate themselves in their field.

Yes, this will take some effort and investigation on your part. But by keeping these alerts in mind, you have a heads up on a lot of other people in your shoes. You know what to look for—the kind of attorney you want in your corner investigating your case and advising you throughout the process.

Lawyer Up!

It bears repeating: drug charges in Texas are serious. You need a serious lawyer to prepare your defense.

The lawyers at Hamilton, Hull & Rogers are committed to providing clients with an aggressive defense that best suits their needs. In some cases we avoid a conviction entirely.

In other cases, it means positioning ourselves to negotiate from a position of utmost strength in order to secure an outcome that avoids the worst consequences that a conviction can bring.

Some cases are won by filing motions that use the law to the client's advantage. In other cases, we expose the weaknesses in the government's alleged evidence to win a verdict of "Not guilty."

We tailor our strategy to your case after conducting a thorough investigation of the facts and law. If you must eventually decide between a trial and a negotiated resolution, we will make sure that your decision is a smart one, with a full understanding of the risks and advantages of each potential course of action.

The criminal defense lawyers at Hamilton, Hull & Rogers are dedicated professionals. They have earned the respect of Texas judges, prosecutors, and other defense attorneys, as well as a litany of kudos and appreciation from past clients.

Our lawyers meet regularly to brainstorm every case we're handling. We also have paralegals and an investigator on staff to assure that your case receives the careful attention it deserves.

No drug case is too big or too small. No matter how seemingly minor the charge is, it is always a big deal to the person being charged. Don't ever underestimate how important it is to clear your record whenever possible. We believe that every person charged with a crime is entitled to respect. We will give the same loyal representation to you that we afford every client, regardless of whatever crime they claim you have committed.

We know what is at stake in a drug prosecution. Your freedom, your reputation, and your dignity are what are important. The law presumes that every client is innocent. So do we.

Our job is to protect your rights and to assure your fair treatment in a criminal justice system that too often views people as statistics.

If you are questioned or arrested by the police or charged with a drug crime, every minute counts. You need legal representation immediately to deal with bail and other immediate concerns and to begin an investigation before valuable evidence is lost.

In Conclusion

By now, having read this book, you have a stronger grasp of the charges and penalties here in Texas. And, if you have already read our companion book, *A Citizen's Guide to a Drug Arrest in Texas*, you have a good insider's perspective on the processes of the criminal justice system and some possible defense measures you and your attorney can take.

You are now confident that you understand not only your rights but also why they are important and how critical it is that you do not let your guard down—ever. You know **NEVER** to talk to or trust the police because you now appreciate that they are not on your side.

In this book, you have a firm and informative guide as to how to choose the right attorney to best represent you and stand up for your rights in court. These same attributes are what we look for in the attorneys in our firm.

At Hamilton, Hull & Rogers, our attorneys maintain superb AVVO ratings and have received strong endorsements from their peers. We do whatever it takes to ensure we meet each and every criterion on that list of “must haves.”

We possess years of experience defending clients against drug charges, conducting thorough investigations in conjunction with skilled private investigators, and doing our utmost every day to serve our clients’ best interests.

This is what we want you to have. This is what you deserve.

If you find yourself facing drug charges in Texas and are unsure how to proceed, we can help. We are always available to sit down and discuss your case with you.

We believe so strongly in this that we make it possible to contact us twenty-four hours a day, seven days a week, every day of the year. Arrests aren’t limited to Monday to Friday, 9 to 5, and neither are we.

Try us. Call 800-456-STEVE. There’s always someone at the other end to answer your call.

For more information about our team, the firm and its multiple convenient locations, and our services, along with numerous helpful articles on drug-related offenses and controlled substances, please visit our website at www.attorneyhamilton.com.

If you or a loved one ever find yourself arrested for possession of drugs in Texas, this book is a must-read!

Attorneys Stephen Hamilton, Meghan Rogers, and Shane Byrd believe in empowering people to make the best decisions when confronted with potentially life-altering events caused by a drug arrest. Everyone is entitled to a strong and passionate defense. That is why they have written this book. It will arm you with information about drug arrests in Texas and *how to assemble the best defense possible*.

ABOUT THE AUTHOR



Attorney Stephen Hamilton is the founding partner and lead trial attorney at Hamilton, Hull & Rogers. Stephen ranks among the fewer than 1% of practicing criminal attorneys across Texas who have achieved coveted board certification in criminal law by the Texas Board of Legal Specialization. He has been awarded numerous awards, and his counsel is highly esteemed by his peers. He is a lifetime legal member of the National Association of Criminal Defense Attorneys, the Texas Criminal Defense Lawyer's Association, and several other regional legal associations.

"Stephen fights to win and cares about his clients. He is not afraid to go to trial and defend the rights of citizens. He has defended the worst of the worst and the best of the best, yet he puts his heart into every case." — Glen Neeley, Attorney, Ogden, UT

"Stephen Hamilton is a rare talent. As a board certified criminal law specialist, Steve's knowledge of the law places him in the top 1% of our profession." — Grant Scheiner, Criminal Defense Attorney, Houston, TX

"Mr. Hamilton is a proven winner. This trait is often underestimated in our society, but absolutely necessary in the courtroom. If you want to win the big one, are you going with a cut rate attorney or the best? When it counts, you better retain Stephen Hamilton."
— Michael Wysocki, Attorney in Dallas, TX

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