

# SEALING DEFERRED ADJUDICATIONS WITH ORDERS OF NONDISCLOSURE

by Christian T. Souza

## I. RESTORING THE BENEFIT

The benefit of a deferred adjudication “dismissal” waned as information technology advanced.<sup>1</sup> Many defendants responded by seeking expunctions or pardons. They were told that a deferred adjudication is not subject to expunction because it involves probation<sup>2</sup> and that a pardon is unavailable when there is no “conviction.”<sup>3</sup>

The 78<sup>th</sup> Legislature passed new laws to restore the benefit of deferred adjudication. Certain defendants may now obtain an order to seal court and law enforcement records reflecting their successful deferred adjudication probations.<sup>4</sup> The relief should be welcome news to the hundreds of thousands of felony defendants<sup>5</sup> and to millions of misdemeanor defendants<sup>6</sup> who resolved and will resolve their cases by deferred adjudication.

## II. AVAILABILITY OF REMEDY

The first thing for a practitioner to do is to make sure that relief is available. Relief may be unavailable for procedural reasons; it may be precluded by the type of offense in question; it may be unavailable due to the defendant having a new offense during the applicable waiting period; or it may be unavailable if the State opposes the petition and could show that granting the petition is not “in the best interest of justice.”<sup>7</sup>

### a. Procedural Bar

Relief is not available if the case was handled by regular probation or if there was a plea of “not guilty.”<sup>8</sup> Of course, a “not guilty” verdict would allow for expunction.<sup>9</sup>

### b. Excluded Offenses

The specifically excluded offenses are murder, capital murder, aggravated kidnapping, injury to a child (or to an elderly or disabled individual), abandoning or endangering a child, violation of protective order (but not if due to bias or prejudice)<sup>10</sup> and stalking.<sup>11</sup>

While not expressly listed, driving while intoxicated (“DWI”) cases are excluded in effect because deferred adjudication was removed as a punishment option in 1984.<sup>12</sup> Older DWI cases and DWI reductions are technically eligible for relief, but as discussed in Part II(f) below, they might be challenged pursuant to the “interest of justice” requirement.

Relief is also statutorily precluded as to any other offenses that require sex offender registration under Chapter 62 of the Code of Criminal Procedure or

that involve a finding of “family violence” as defined in the Family Code.<sup>13</sup>

### *c. Sex Offenders*

Relief cannot be denied to sex offenders unless they are statutorily required to register.<sup>14</sup> Most common felony sexual offenses require registration, but offenders who are forced to register merely as a condition of probation should not be barred from relief.<sup>15</sup> The distinction could be significant for defendants charged with successive indecent exposures under penal code section 21.08.<sup>16</sup> If the defendant received a deferred adjudication on his first indecent exposure, he arguably would not be statutorily required to register until he commits the offense for a third time.<sup>17</sup>

### *d. Family Violence*

A finding of “family violence” in an assault case<sup>18</sup> is narrower than “family violence” for purposes of the nondisclosure statute.<sup>19</sup> There may be “family violence” to preclude relief in any offense that “involves” actual or intended “physical harm, bodily injury, assault, or sexual assault” or a “threat” that “reasonably places” family members and certain other individuals “in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself.”<sup>20</sup> Since the legislation could be read to provide extra-elemental factors to establish “family violence,”<sup>21</sup> counsel should warn plea bargaining defendants who are at risk of losing a subsequent petition for nondisclosure and counsel should be prepared to contest claims of extra-elemental “family violence” asserted to defeat a petition.

### *e. Offense During Waiting Period*

A defendant can also be barred if he is convicted or receives deferred adjudication on another case during the applicable waiting period.<sup>22</sup> To trigger the bar, the new case must involve an offense other than a traffic offense punishable by fine only.<sup>23</sup> Many misdemeanors do not have a waiting period; in these cases, all the defendant has to do is make it through deferred probation.<sup>24</sup> The charitable list of no wait cases includes any and all otherwise eligible misdemeanor offenses besides the misdemeanor offenses listed in Chapters 20-22, 25, 42 and 46 of the Penal Code.<sup>25</sup> Defendants seeking orders of nondisclosure for misdemeanor offenses listed in those chapters must survive a five-year waiting period from the date of the discharge of their deferred probation.<sup>26</sup>

#### 1. Five-Year Wait Misdemeanors

The five-year waiting period applies to unlawful restraint (section 20.02); homosexual conduct (section 21.06); public lewdness (section 21.07); indecent exposure (section 21.08); assault (section 22.01); deadly conduct (section 22.05); terroristic threat (section 22.07); aiding suicide (section 22.08); leaving a child in a vehicle (section 22.10); bigamy (section 25.01); enticing a child (section 25.04); harboring a runaway (section 25.06); violation of protective order due to bias or prejudice (section 25.071); advertising for placement of a child (section 25.09); disorderly conduct (section 42.01); riot (section 42.02); obstructing a roadway (section 42.03) (often used to settle DWI cases); disrupting a meeting or procession (section 42.05); false alarm or report (section 42.06); silent or abusive calls to 911 (section 42.061); interference with emergency telephone call

(section 42.062); harassment (section 42.07); abuse of corpse (section 42.08); cruelty to animals (section 42.09); dog fighting (section 42.10); destruction of flag (section 42.11); discharge of firearm within city limits (section 42.12); use of laser pointers (section 42.13); UCW (section 46.02); UCW handgun license holder (section 46.03); possession of firearm (section 46.04); unlawful transfer of weapon (section 46.06); hoax bombs (section 46.08); and making firearm accessible to child (section 46.13). An offense charged as the attempted commission of state jail offense that resulted in deferred adjudication for a misdemeanor under chapters 20-22, 25, 42 and 46 would also presumably fall under the five-year waiting list.<sup>27</sup> For example, a defendant might agree to deferred on a misdemeanor charge of attempted interference with child custody.<sup>28</sup>

#### 2. No Wait Misdemeanors

Defendants with misdemeanors that are not on the five-year wait list and that are otherwise eligible may petition immediately upon completion of their probation.<sup>29</sup> Common misdemeanors on the no wait list include all thefts, marijuana possession, burglary of vehicle, evading and resisting arrest, driving with license suspended and criminal trespass.<sup>30</sup>

#### 3. Ten-Year Wait in Felonies

The waiting time for felonies is ten years from the date of discharge regardless of the offense.<sup>31</sup> If a defendant is otherwise eligible, he may petition for nondisclosure ten years after successful completion of deferred probation provided that he has not been convicted or placed on deferred adjudication for any new offenses other than a traffic ticket in the ten years since his discharge.<sup>32</sup>

### *f. Best Interest of Justice*

Even if there are no statutory preclusions, the State could still oppose the petition as not in the “best interest of justice.”<sup>33</sup> Mere statutory eligibility should normally satisfy the “interest of justice” requirement because the purposes of the legislation are to restore the benefit of deferred adjudication to defendants and to serve judicial economy by fostering settlements. The best practice is to include an affidavit in the petition and to be prepared to show that the defendant, the criminal justice system and society generally would benefit as intended by the legislature should the petition be granted. The State might oppose relief in certain cases where it claims the “best interest of justice” would not be served. These cases might include DWI reductions and the old deferred adjudication DWI cases.

## III. PROCEDURAL CONSIDERATIONS

### *a. Drafting and Filing*

A form for filing the petition for nondisclosure is set out below in Part V. Before filing the petition, counsel will need to obtain copies of the original judgment of deferred adjudication and of the order of discharge and dismissal. To avoid the need for calling witnesses at uncontested hearings, counsel should also prepare and attach an affidavit of counsel or of the defendant stating the reasons why justice will be served by granting the petition. A copy should be prepared for service to the State. When the petition is filed, a hearing date should be obtained, and the State should be notified of the hearing date when

it is served with its copy of the petition. The original petition should be filed with the clerk of the county or district court where the probation was served. The filing fee of \$28.00 is earmarked for the State's general revenue fund,<sup>34</sup> but the counties might charge additional nominal "transaction" fees.

#### **b. Hearing and Order**

After notice to the state and a "hearing" where the defendant prevails, the court shall issue an order "prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense giving rise to the deferred adjudication."<sup>35</sup>

When an order of nondisclosure is issued, the clerk of the court "shall send a copy of the order by certified mail, return receipt requested" to the DPS Crime Records Service.<sup>36</sup>

#### **c. Implementation of Order**

Unlike expunctions, no confirmation is received and no records are destroyed or returned.<sup>37</sup> The nondisclosure statute only requires DPS to "send a copy of the order by mail or electronic means to all law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state, and to all central federal depositories of criminal records" that the Department has "reason to believe" have "criminal history record information that is the subject of the order."<sup>38</sup>

#### **d. Right to Deny**


Once the order is issued, the defendant "may deny the occurrence of the arrest and prosecution to which the information relates" unless the information "is being used against the person in a subsequent criminal proceeding."<sup>39</sup> The order and the right to deny the arrest and prosecution does not prevent a criminal justice agency from disclosing criminal history record information to the defendant himself; to another criminal justice agency; or to a non-criminal justice agency authorized by state or federal law to receive criminal history record information.<sup>40</sup>

#### **e. Appeal**

No express right to appeal is provided to either the defendant or to the State. Any right to appeal might have to be conferred by the statute,<sup>41</sup> such as allowed to DPS in expunctions.<sup>42</sup> On the other hand, the appellate courts review denials of expunctions<sup>43</sup> and strictly enforce the statute.<sup>44</sup> If the appellate courts do review denials of orders of nondisclosure, they will probably enforce the eligibility requirements *de novo* but they might apply an abuse of discretion standard in reviewing factual conclusions in connection with the finding on "interest of justice."

### **IV. ENFORCEMENT AGAINST NON-GOVERNMENTAL ENTITIES**

A defendant who is granted relief may lawfully deny the arrest and prosecution when asked,<sup>45</sup> but contradictory evidence will probably still be available on the Internet. To address this problem, the nondisclosure legislation includes a provision for a "civil penalty."<sup>46</sup> A "private entity" that compiles or discloses

criminal history data "for compensation" is subject to the order of nondisclosure if the defendant complies with certain additional statutory requirements after the original order of nondisclosure is issued.<sup>47</sup> The defendant must first take the evidence of a violation to the "district court" (even if the case was a misdemeanor).<sup>48</sup> The district court responds by issuing a "warning" to the private entity, presumably a conscientious corporate citizen sufficiently concerned about its public image that it would discontinue the disclosure, even if it meant the omission would mislead its customers.<sup>49</sup> "After receiving a warning for the first violation, the private entity is liable to the state for a civil penalty not to exceed \$500 for each subsequent violation."<sup>50</sup> The penalty is only enforceable on suit by the attorney general or by "an appropriate prosecuting attorney," but the threat of being in noncompliance with a court order may be enough to prompt compliance by corporate information brokers. 

Note: A Petition for *Order of Nondisclosure* follows on page 18.

#### **ENDNOTES**

- 1 See TEX. CODE CRIM. PROC. art. 42.12 §5(c) ("[o]n expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him").
- 2 The expunction statute specifically excludes any case where there was "court ordered community supervision under Article 42.12." TEX. CODE CRIM. PROC. art. 55.01(a)(2)(B).
- 3 According to Attorney General Opinion No. DM-349 (May 31, 1995), "a finding of substantiated guilt under section 5(a) of code article 42.12 is not a 'conviction' for purposes of the governor's constitutional pardon power."
- 4 SB 1477, effective Sept. 1, 2003, amended TEX. GOV'T CODE § 411.081 by adding subsections (d) through (h), and it amended Chapter 552 of the Government Code to add TEX. GOV'T CODE §§552.142 and 552.1425.
- 5 According to statistics released by the Office of Court Administration, over 400,000 felony cases have been resolved by deferred adjudication since 1988, and in 2002, deferred adjudication was ordered in 35,550 felony cases, or in about 28% of all felony cases. The statistics are available at: [www.cjpc.state.tx.us/stattabs/courtconvictions](http://www.cjpc.state.tx.us/stattabs/courtconvictions).
- 6 No statistics are available for misdemeanor cases, but since misdemeanors are commonly resolved with deferred probation, it is reasonable to conclude that there are millions of people who might now and in the future be in a position to take advantage of employment and other opportunities that did not exist prior to the reforms.
- 7 See TEX. GOV'T CODE §§411.081(d), 411.081(e), 411.081(f) and 411.081(h).
- 8 The statute provides that a defendant must be "placed on deferred adjudication" in order to qualify for relief. TEX. GOV'T CODE §411.081(d).
- 9 See TEX. CODE CRIM. PROC. art. 55.01(a)(1)(A) ("[a] person... is entitled to have all records and files relating to the arrest expunged if...acquitted").
- 10 Violation of protective order is excluded if charged under TEX. PENAL CODE §25.07, enacted in 1983, but for reasons known only to the legislature, violation of a protective order is not excluded if charged under TEX. PENAL CODE §25.071, providing that a person commits an offense if he violates a protective order on account of bias or prejudice.
- 11 The excluded offenses are set out in TEX. GOV'T CODE §§ 411.081(e)(2) and 411.081(e)(3).
- 12 See TEX. CODE CRIM. PROC. art. 42.12 §5(d)(1)(A), formerly TEX. CODE CRIM. PROC. art. 3d (d), amended effective January 1, 1984, to provide that persons convicted of DWI and of related offenses could no longer receive deferred adjudication. The former DWI statute, TEX.

- REV. CIV. STAT. art. 67011- 1(h) was also amended in order to provide that a DWI conviction on or after January 1, 1984 would be “a final conviction” even when probated.
- 13 TEX. GOV’T CODE §§411.081(e)(1) and 411.081(e)(4).  
 14 TEX. GOV’T CODE §411.081(e)(1).  
 15 *Id.*  
 16 The offense of indecent exposure is provided in TEX. PENAL CODE §21.08.  
 17 The issue is unsettled. The definition of “reportable conviction or adjudication” necessary to bring the registration requirement into play includes a “conviction or adjudication” that constitutes a second “conviction” for indecent exposure. TEX. CODE CRIM. PROC. art. 62.01(5)(F). Whether or not the legislature meant “revocation of deferred probation” by stating “adjudication,” the statute specifically provides that indecent exposure is not among the offenses where “a deferred adjudication” would trigger the statute. *See* TEX. CODE CRIM. PROC. art. 62.01(5)(I). The requirement of a second “conviction” for indecent exposure appears to mean that deferred adjudications for indecent exposure do not count. *Id.*
- 18 A person commits a felony assault if the offense is committed against “a member of the defendant’s family or household” and “it is shown that the defendant has been previously convicted of an offense against a member of the defendant’s family or household under this section.” TEX. PENAL CODE §22.01(b)(2).  
 19 TEX. GOV’T CODE §411.081(e)(4).  
 20 TEX. FAM. CODE §§71.003 and 71.004. The family code definition also includes child abuse and “dating violence.” TEX. FAM. CODE §71.004.  
 21 TEX. FAM. CODE §71.004(1).  
 22 TEX. GOV’T CODE §§411.081(d)(1), 411.081(d)(2) and 411.081(d)(3).  
 23 TEX. GOV’T CODE §411.081(e).  
 24 *Id.*  
 25 TEX. GOV’T CODE §§411.081(d)(1) and 411.081(d)(2).  
 26 TEX. GOV’T CODE §411.081(d)(2).  
 27 *Id.*  
 28 The offense would be charged under TEX. PENAL CODE §§15.01(d) (attempt offense is “one category lower”) and 25.03 (interference with child custody).  
 29 TEX. GOV’T CODE §411.081(d)(1).  
 30 TEX. GOV’T CODE §411.081(d)(2).  
 31 TEX. GOV’T CODE §411.081(d)(3).  
 32 TEX. GOV’T CODE §411.081(e).  
 33 TEX. GOV’T CODE §411.081(d).  
 34 TEX. GOV’T CODE §411.081(h). After the 79<sup>th</sup> legislature realizes how much time and money is being spent by the counties and by DPS on orders of nondisclosure, it might decide to raise the modest fee provided by the 78<sup>th</sup> legislature.  
 35 TEX. GOV’T CODE §411.081(d).  
 36 TEX. GOV’T CODE §411.081(g).  
 37 TEX. CODE CRIM. PROC. art. 55.02 §5.  
 38 TEX. GOV’T CODE §411.081(g).  
 39 TEX. GOV’T CODE §552.142(b).  
 40 TEX. GOV’T CODE §§411.081(d) and 411.083(b).  
 41 *See, e.g., Texas Dept. of Public Safety v. Story*, — S.W.3d —, 2003 WL 21665542 (Tex.App.—Waco 2003, no pet. his.) (noting that there would be no right to appeal suspension of the “privilege” to drive absent specific statutory authorization).  
 42 TEX. CODE CRIM. PROC. art. 55.02 §3.  
 43 *See, e.g., Ex parte Gray*, 109 S.W.3d 917 (Tex.App.—Dallas 2003, no pet. his.).  
 44 *See, e.g., Texas Dept. of Public Safety v. Deck*, 954 S.W.2d 108, 112 (Tex.App.—San Antonio 1997, no pet.) (holding that expunction procedures provided in statute “are mandatory *and* must be complied with”) (emphasis supplied).  
 45 TEX. GOV’T CODE §552.142(b).  
 46 TEX. GOV’T CODE §552.1425.  
 47 TEX. GOV’T CODE §§552.1425(a) and 552.1425(b).  
 48 TEX. GOV’T CODE §552.1425(b).  
 49 *Id.*  
 50 *Id.*



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