

**SEX OFFENDER HEARINGS &  
REGISTRATION**

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Texas Juvenile Probation Commission &  
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**NUTS & BOLTS OF JUVENILE LAW**

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Austin, Texas

# DAVID M. GONZALEZ

## PROFESSIONAL QUALIFICATIONS & AFFILIATIONS

### *Education:*

Dartmouth College  
Stanford Law School

### *Certifications:*

Board Certified – Criminal Law, Texas Board of Legal Specializations, 2007  
Standardized Field Sobriety Testing Practitioner - National Highway Traffic Safety Administration, 2008

### *Honors & Awards:*

2008 Outstanding Young Lawyer of the Year, Austin Young Lawyers Association  
Finalist, 2008 National Young Lawyer of the Year, American Bar Association  
Texas Monthly Rising Star, Criminal Law – 2005, 2006, 2007, 2008  
Finalist, Stanford Law School Kirkwood Memorial Moot Court Competition, 1999  
Barrett Cup Award for All-Around Achievement in the Dartmouth Class of 1995  
1991 5A State Champion, Cross-Examination Debate

### *Member:*

Leadership Austin, Essential Class 2007  
Robert W. Calvert American Inn of Court  
Leadership Academy for Public Service, 2007  
Austin Criminal Defense Lawyers Association, Board of Directors – 2002-2005  
State Bar of California

## PUBLICATIONS & RECENT PRESENTATIONS

- September 16, 2008 • Harris County Bar • “*Communicating with the Mentally Impaired Client*”
- July 29, 2008 • Advanced Criminal Law Course • “*Confessions*”
- January 21, 2008 • Annual Municipal Prosecutors Conference • “*Direct, Opening, & Closing*”
- December 13, 2007 • Communities in Schools • “*Understanding Criminal Records*”
- November 2, 2007 • TRLA Public Defender Training • “*Jury Selection; Cross-Examination*”
- October 12, 2007 • TCLDA Juvenile Law Conference • “*Juvenile Sex Offender Registration*”
- September 26, 2007 • Annual TDCAA Criminal Law Update • “*Texas DUI Prosecution*”
- September 18, 2007 • Judicial Section Annual Conference • “*Criminal Competency Proceedings & the Insanity Defense*”
- August 3, 2007 • NACDL Legislative Conference • “*Sex Offender Legislation*”
- July 17, 2007 • Austin Criminal Defense Lawyers Association • “*2007 Legislative Update*”

## PROFESSIONAL DEVELOPMENT

### *Public Policy:*

Legislative Counsel, Texas Criminal Defense Lawyers Association, 2006-present  
Assistant Foreperson, Travis County Grand Jury, 2004

**I. THERE ARE SEXUALLY VIOLENT CHILD MURDERERS, AND THEN THERE ARE CHILDREN THAT ARE ACCUSED OF INAPPROPRIATE SEXUAL BEHAVIORS. THIS FUNDAMENTAL DISTINCTION PROVIDES THE CORE STRATEGY FOR EXEMPTING JUVENILES FROM SEX OFFENDER REGISTRATION. \***

Bad facts make bad law, and on October 22, 1989, some particularly dreadful facts were brewing.

Eleven year-old Jacob Wetterling lived in St. Joseph, Minnesota. He, his brother, and a friend were riding home from a convenience store on bikes, when a masked man came out of a driveway and ordered the boys to throw their bikes into a ditch and lie down on the ground. The man had a gun, so the boys complied. He asked each boy his age. Jacob's brother and friend were told to run toward a nearby wooded area, but Jacob was taken away. A massive search effort was undertaken to locate Jacob, but neither he nor his abductor have been found. In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. Section 14071, more simply known as the Jacob Wetterling Act, was passed in his honor.

Five years later, another horrendous crime would alter the landscape from sex offender registration to include community notification. Eight year-old Megan Kanka lived across the street from a man named Jesse Timmendequas, a convicted sex offender recently released from the New Jersey treatment-oriented correctional facility for sex offenders. On July 29, 1994, Timmendequas tricked Megan to come inside his house by saying he had a puppy that was too young to come outside. He proceeded to rape her, and tried to kill her by slamming her head into a dresser and suffocating her with a plastic bag. He finally strangled her to death with a belt. He moved her body to his car, where he raped her again before placing her in a toybox and dumping her in a park. A jury later convicted Timmendequas of Kanka's rape and murder and sentenced him to death. Megan Kanka's death resulted in the New Jersey Legislature passing Megan's Law, which requires notification when a convicted sex offender moves into a neighborhood. In 1996, the Jacob Wetterling Act was amended by Megan's Law.

These isolated cases are sure to make every parent fearful for their children's safety. Heck, I'll admit it: after reviewing the facts of above-referenced cases, I went home and gave my two girls fifteen extra hugs and kisses before tucking them in to bed that night. These cases are the extremes - the rarities - that probably warrant extreme responses. However, when you imagine the sexual predator capable of these types of acts - do you ever think of a 16 year-old awkward adolescent?

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\* This paper draws upon the work, expertise and wisdom of a number of sources, including Linda Icenhauer-Ramirez, John Zepeda, Robert Dawson, Patricia Cummings, Catherine Burnett, Kevin Collins, and Nancy Arrigona, whose materials, presentations and papers have been incredible resources. All of the research and analysis of sex offender registration laws and their efficacy come from reports generated by the Council on Sex Offender Treatment, the Center for Sex Offender Management, and the Office of Juvenile Justice and Delinquency Prevention's Juvenile Justice Clearinghouse.

Probably not.

Most teenagers consistently only really inspire fear when they are on the road learning to drive. However, when publicly labeled a “sex offender,” that same teenager is deemed a sexual predator, whether his unlawful behavior was sexually experimental, or, much less common, sexually violent.

What began as assistance in law enforcement has developed into a groundswell of a public demand to know what kind of people live next door. While sex offender registration allows law enforcement to monitor sex offenders who have completed probation or parole, community notification allows the public to take matters into its own hands. From neighborhood association bylaws outlawing residency by sex offenders to distributing leaflets notifying neighbors of a sex offender, there are few limits to what the community is allowed to do with this public registration information. Nearly every single court across the United States has held that registration and notification requirements are nothing more than “collateral consequences” to conviction. *See Smith v. Doe*, 538 U.S. 84 (2003) (United States Supreme Court finds no violation of ex post facto clause in Alaska’s sex offender registration statute because sex offender registration and notification fulfilled law enforcement, not punitive, purposes).

“Collateral” to who? If the purpose is not punitive, then why is it made so public and for such a long period of time?

A “collateral consequence” shouldn’t brand you for decades.

A “collateral consequence” shouldn’t prevent you from obtaining a job.

A “collateral consequence” shouldn’t prevent you from finding a place to live.

A “collateral consequence” shouldn’t prevent you from enrolling in college.

A “collateral consequence” shouldn’t prevent you from moving forward with your life.

A “collateral consequence” shouldn’t make sure you have your porch light off for Halloween, or prevent you from having a ‘MySpace’ account, or from accessing the Internet altogether.

A “collateral consequence” wouldn’t taunt you or tease you; throw rocks through your windows, slice your tires or throw eggs at your house.

A “collateral consequence” shouldn’t be an invitation for others to berate, demean, and physically attack you without knowing who you are or what really happened.

By definition, a “collateral consequence” is not meant to be punitive. With all due respect to the appellate courts, if you believe that sex offender registration and notification are not punitive, spend a few minutes talking with the families of juveniles who have suffered under this burden - especially when registration occurred because of inappropriate sibling sexual contact. If the public supports and demands this type of legislation then that is the benefit and burden of living in a democratic society. However, the fact that the public so angrily demands registration as a form of “justice” ironically illustrates the punitive motive behind blanket registration and notification for all

offenders. If the trial court believes that registration or notification has only a “collateral” effect on a 16 year-old’s life, we will have a difficult time winning the motion for exemption.

The focus of this paper is to assist defenders in challenging juvenile sex offender registration and public notification by negotiating for a non-registerable offense, obtaining an exemption to sex offender registration, or by successfully litigating a motion for deregistration. There is little empirical evidence that proves that sex offender registration, especially juvenile registration, reduces recidivism or increases public safety. On the contrary, once our clients are labeled sex offenders during their most formative adolescent years, their rehabilitation - the focus, after all, of the juvenile court - is not advanced, but hindered. While the process and notification requirements for juveniles are substantially similar to the adult system, the juvenile court’s presumption for rehabilitation should be the important distinction in challenging sex offender registration of kids.

## **II. THE PROCESS OF JUVENILE SEX OFFENDER REGISTRATION**

When Congress passed the Jacob Wetterling Act, every state was required to create registries of sex offenders. This was an unfunded mandate: states did not receive any additional federal funding to comply with the Act, but a state would be financially penalized if it failed to comply with the Act’s requirements.<sup>1</sup> Under the Act, at a minimum, the states must maintain a state registry of offenders and an Internet site with public information; classify offenders as either sexually violent offenders, sexually violent predators or committing sex crimes against minors; and create procedures for offenders to verify and update residential information.

There is no federal requirement that the states institute registration requirements for juvenile offenders. Unfortunately, our Legislature did not want to take any chances: Texas is among 28 states that have expanded the registration requirements set forth in the Jacob Wetterling Act to include juveniles.

### **A. Differences Between Adult & Juvenile Registration: Exemption & Non-Registration**

The significant differences between juvenile and adult sex offender registration requirements involve the greater ability to excuse registration, and the shorter duration of registration. **THIS MAY NOT BE THE LAW IN THE FUTURE.** As of July 27, 2009, Texas was supposed to be in compliance with the federal Sex Offender Registration and Notification Act (SORNA) or risk a loss of \$1,404,571.00 in federal funds. During the most recent legislative session, the Legislative Budget Board calculated that it would cost \$38,771,924.00 for Texas to become compliant with SORNA. Based upon the economic

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<sup>1</sup> States that do not comply forfeit 10% of their federal Byrne Formula Grant Funding criminal justice funds.

consequences and the belief that juvenile registration may not be the best public policy, the Texas Legislature declined to be compliant with federal law.

Will this last forever? Obviously it depends upon the political climate each legislative session, and whether or not the federal government increases the financial punishment for noncompliance.

**FOR THIS REASON, YOU SHOULD NEVER PROMISE A CHILD OR HIS FAMILY THAT THE DEREGISTRATION OR EXEMPTION IS FINAL.**

Many of the requirements of SORNA are retroactive, and there is a very real possibility that children who are exempt from registration or successfully deregistered may be subject to future registration requirements despite the previous court order. However, it is important to let your clients know the political landscape and how matters may change in two years. There is a clear conflict between federal and state law on this issue which will have to be resolved.

Thus, under current Texas law, here are the differences between juvenile and adult sex offender registration:

1. *Any type of juvenile adjudication can be prevented from registration.*

Whereas most adult offenses preclude any ability to exempt registration, any juvenile adjudication for any sex offense is eligible for exemption - even offenses that would be considered sexually violent offenses had the respondent been over 17. Furthermore, as compared to juvenile adjudications, the limited exemption for certain young adult sex offenders under Article 62.301 also requires proof of consensual sexual contact and that the defendant was younger than 19 and the victim was at least 13.

2. *Juvenile Sex Offender Registration can be deferred while the respondent receives treatment.*

While the adult sex offender registration requirements begin upon release on probation or parole, juvenile registration can be deferred while the child receives treatment on probation, at a Residential Treatment Center, or at TYC.

3. *Registration can be non public.*

Even if a juvenile is required to register as a sex offender, the court can order that the registration information is kept off the Internet and made non-public.

4. *Juvenile Sex offender registration can be retroactively exempted for any type of adjudication.*

Six years ago, the legislature also allowed early termination of an *adult's* obligation to register retroactively. However, in order for this to occur the Council on Sex Offender Treatment must create an Individual Risk Assessment in order to determine who would be eligible for early termination. As of this date, the Council has not developed a risk assessment tool:

During the 79th Regular session of the Texas Legislature, two companion bills became law which potentially impact deregistration of some sex offenders in Texas. First, H.B. 867 amended Chapter 62, Code of Criminal Procedure, by adding Subchapter I, Art. 62.401 et seq., thereby creating a potential deregistration exemption for certain non-aggravated first-time sex offenders, after those offenders have been registered for a minimum of ten (10) years. This delayed exemption is limited to those sex offenders which currently require lifetime registration under Texas law, but who are only subjected to a ten (10) year registration requirement under Federal law.

The five specific penal code offenses which are subject to deregistration under Art. 62.404 are: Indecency with a Child (Section 21.11(a)(1)); Promotion and Distribution of Child Pornography (Section 43.26); Burglary with Intent (Section 30.02); Sexual Performance of a Child (Section 43.25); and Compelling Prostitution of a Child under 17 (Section 43.05(a)(2)). The Legislature did not consider the deregistration of other sexual offenses to avoid violating the Jacob Wetterling Act which would cause the state to risk losing 10% of the annual federal grants it receives in the form of Edward Byrne Memorial funds.

The provisions of H.B. 867, however, cannot be implemented without a consideration of H.B. 2036. In amending Chapter 110, Occupations Code, the Legislature charged the Council on Sex Offender Treatment with “developing, researching, implementing, and deploying dynamic risk assessment tools and protocols for the use of individuals licensed under this chapter for the purpose of determining a sex offender’s risk to the community”. Similarly, H.B. 867 requires the Council by rule to “establish, develop, and/or adopt an individual risk assessment and/or a group of individual risk assessment tools and to evaluate persons using those tools”. Thus, Occupations Code § 110.501, and Art. 62.403, Code of Criminal Procedure, are to be read in conjunction with each other regarding the issue of sex offender risk assessment tools and protocols in Texas.

In October 2005, the Council began its Dynamic Risk Assessment Research project. The goal of this project is to collect research data from a variety of risk assessment tools which in turn can be used when considering deregistration issues. While the Council’s research project is well underway, deregistration as contemplated by the Legislature under H.B. 867 will not occur immediately. On July 2006, the President signed into law House Resolution 4476 (Adam Walsh Act) pertaining to sex offender registration. This broadened sex offender registration nationally and impacted the above referenced offenses from consideration for deregistration under Texas law. The Adam Walsh Act does allow Tiered 1 offenders to potentially deregister after 10 years, and Tiered 3 offenders to deregister after 25 years with a clean record and having completed sex offender treatment. There is no deregistration for Tiered II offenders who must register for 25 years.

H.B. 867 cannot be implemented until the Council’s research has been completed to statistically support the assessment tool(s) utilized in determining a sex offender’s risk to the community and the administrative rules promulgated. Upon concluding the research project and pursuant to Article 62.403(b)(1-2), the Council shall evaluate the person using the individual risk assessment tool or group of individual risk assessment tools and

provide to the person a written report detailing the outcome of the evaluation conducted. Under Art. 62.404, that person may then file with the sentencing trial court a petition for early termination of his/her obligation to register. There remains an enormous amount of work to be completed by the Council before this process can be implemented in Texas, not to mention the possibility of a federal law negating the Council's work altogether.

Please know that the Council takes this responsibility very seriously and is working diligently and expeditiously to complete the project with the goal of allowing individuals the potential opportunity to seek deregistration at some later date.

*Last Updated March 21, 2007*

Texas Department of State Health Services, Council on Sex Offender Treatment website at [http://www.dshs.state.tx.us/csot/csot\\_sodregis.shtm](http://www.dshs.state.tx.us/csot/csot_sodregis.shtm)

Thankfully, juvenile courts have been allowed to use their own discretion in the un-registration and de-registration process. When compared to the juvenile court's power to retroactively exempt registration, the trial court maintains discretion. In the adult system, it appears that the Council has the most significant power at this point unless a District Court judge uses his or her own discretion in using a currently available risk assessment and then approving early termination of registration.

5. *There are no limits to the number of adjudications in order to be exempt from registration*

In order to qualify for exemption as a young adult sex offender under Article 62.301, a person can only have a single reportable conviction or adjudication. There is no similar restriction for juveniles.

6. *Registration expires 10 years after disposition is completed.*

While most sex offenses in the adult system impose a lifetime registration requirement, there is more or less a twenty-year cap on juvenile sex offender registration. The duty to register ends on the tenth anniversary of the date of disposition or when the respondent completes the terms of the disposition, whichever date is later. Unless the respondent is on a 10-year determinate sentence probation, his duty to register will usually expire before his 30<sup>th</sup> birthday.

## **B. School Notification & Removal**

Unlike many adults who may still be allowed to continue their professional lives without their boss or manager knowing about a criminal accusation, our client's principal, vice-principal, and teachers will likely know of their arrest immediately.

1. Notification to the school upon arrest



Upon arrest of any felony or certain misdemeanors (including indecent exposure), the arresting officer must contact the school within 24 hours or on the next school day. This requirement will always encompass sexually related offenses even when they happen off campus or during the summer.

Recent amendments to Article 15.27 of the Code of Criminal Procedure addresses the school notification issue for sex offenders specifically:

Art. 15.27. NOTIFICATION TO SCHOOLS REQUIRED.

(a) A law enforcement agency that arrests any person or refers a child to the office or official designated by the juvenile board who the agency believes is enrolled as a student in a public primary or secondary school, for an offense listed in Subsection (h), shall attempt to ascertain whether the person is so enrolled. If the law enforcement agency ascertains that the individual is enrolled as a student in a public primary or secondary school, the agency shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is enrolled **of that arrest or referral** within 24 hours after the arrest or referral is made, or on the next school day. If the law enforcement agency cannot ascertain whether the individual is enrolled as a student, the agency shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is believed to be enrolled of that arrest or detention within 24 hours after the arrest or detention, or on the next school day. If the individual is a student, the superintendent shall promptly notify all instructional and support personnel who have responsibility for supervision of the student. All personnel shall keep the information received in this subsection confidential. The State Board for Educator Certification may revoke or suspend the certification of personnel who intentionally violate this subsection. Within seven days after the date the oral notice is given, the law enforcement agency shall mail written notification, marked "PERSONAL and CONFIDENTIAL" on the mailing envelope, to the superintendent or the person designated by the superintendent. Both the oral and written notice shall contain sufficient details of the arrest or referral and the acts allegedly committed by the student to enable the superintendent or the superintendent's designee to determine whether there is a reasonable belief that the student has engaged in conduct defined as a felony offense by the Penal Code. The information contained in the notice may be considered by the superintendent or the superintendent's designee in making such a determination.

(a-1) The superintendent or a person designated by the superintendent in the school district may send to a school district employee having direct supervisory responsibility over the student the information contained in the confidential notice under Subsection (a) if the superintendent or the person designated by the superintendent determines that the employee needs the information for educational purposes or for the protection of the person informed or others.

(b) On conviction, deferred prosecution, or deferred adjudication or an adjudication of delinquent conduct of an individual enrolled as a student in a public primary or secondary school, for an offense or for any conduct listed in Subsection (h) of this article, the office of the prosecuting attorney acting in the case shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is enrolled of the conviction or adjudication and whether the student is required to register as a sex offender under Chapter 62. Oral notification must be given within 24 hours of the time of the order or on the next school day. The superintendent shall, within 24 hours of receiving notification from the office of the prosecuting attorney, ~~promptly~~ notify all instructional and support personnel who have regular contact with the student. Within seven days after the date the oral notice is given, the

office of the prosecuting attorney shall mail written notice, which must contain a statement of the offense of which the individual is convicted or on which the adjudication, deferred adjudication, or deferred prosecution is grounded and a statement of whether the student is required to register as a sex offender under Chapter 62.

(c) A parole or probation office having jurisdiction over a student described by Subsection (a), (b), or (e) who transfers from a school or is subsequently removed from a school and later returned to a school or school district other than the one the student was enrolled in when the arrest, referral to a juvenile court, conviction, or adjudication occurred shall notify the new school officials of the arrest or referral in a manner similar to that provided for by Subsection (a) or (e)(1), or of the conviction or delinquent adjudication in a manner similar to that provided for by Subsection (b) or (e)(2). The new school officials shall promptly notify all instructional and support personnel who have regular contact with the student.

(d) The superintendent or a person designated by the superintendent in the school district may send to a school district employee having direct supervisory responsibility over the student the information contained in the confidential notice if the superintendent or the person designated by the superintendent determines that the school district employee needs the information for educational purposes or for the protection of the person informed or others.

(e)(1) A law enforcement agency that arrests, or refers to a juvenile court under Chapter 52, Family Code, an individual who the law enforcement agency knows or believes is enrolled as a student in a private primary or secondary school shall make the oral and written notifications described by Subsection (a) to the principal or a school employee designated by the principal of the school in which the student is enrolled.

(2) On conviction, deferred prosecution, or deferred adjudication or an adjudication of delinquent conduct of an individual enrolled as a student in a private primary or secondary school, the office of prosecuting attorney shall make the oral and written notifications described by Subsection (b) of this article to the principal or a school employee designated by the principal of the school in which the student is enrolled.

(3) The principal of a private school in which the student is enrolled or a school employee designated by the principal may send to a school employee having direct supervisory responsibility over the student the information contained in the confidential notice, for the same purposes as described by Subsection (d) of this article.

(f) A person who receives information under this article may not disclose the information except as specifically authorized by this article. A person who intentionally violates this article commits an offense. An offense under this subsection is a Class C misdemeanor.

(g) The office of the prosecuting attorney or the office or official designated by the juvenile board shall, within two working days, notify the school district that removed a student to a disciplinary alternative education program under Section 37.006, Education Code, if:

(1) prosecution of the student's case was refused for lack of prosecutorial merit or insufficient evidence and no formal proceedings, deferred adjudication, or deferred prosecution will be initiated; or

(2) the court or jury found the student not guilty or made a finding the child did not engage in delinquent conduct or conduct indicating a need for supervision and the case was dismissed with prejudice.

- (h) This article applies to any felony offense and the following misdemeanors:
- (1) an offense under Section 20.02 [Unlawful Restraint], 21.08 [Indecent Exposure], 22.01 [Assault], 22.05 [Deadly Conduct], 22.07 [Terroristic Threat], or 71.02 [Engaging in Organized Crime], Penal Code;
  - (2) the unlawful use, sale, or possession of a controlled substance, drug paraphernalia, or marihuana, as defined by Chapter 481, Health and Safety Code; or
  - (3) the unlawful possession of any of the weapons or devices listed in Sections 46.01(1)-(14) or (16), Penal Code, or a weapon listed as a prohibited weapon under Section 46.05, Penal Code.

(i) A person may substitute electronic notification for oral notification where oral notification is required by this article. If electronic notification is substituted for oral notification, any written notification required by this article is not required.

(j) The notification provisions of this section concerning a person who is required to register as a sex offender under Chapter 62 do not lessen the requirement of a person to provide any additional notification prescribed by that chapter.

## 2. Removal of Sex Offenders from the Regular Classroom

As of September 1, 2007, there is an entirely new procedure for educating (and removing) students who must register as a sex offender. Essentially, if the student is currently under court supervision for a sex offense the school district **MUST** remove the student to an alternative education placement (AEP) for at least one semester. If the student is merely registering as a sex offender and is no longer on probation (probably an extremely rare occurrence) the school may keep the student in the regular classroom if the student can prove he is not a danger to other students, is not an educational disruption, and is not a threat.

The full text of the law – which is not yet integrated into the Education Code on Texas Statutes Online – is as follows:

SECTION 3. Chapter 37, Education Code, is amended by adding Subchapter I to read as follows:

### SUBCHAPTER I. PLACEMENT OF REGISTERED SEX OFFENDERS

Sec. 37.301. DEFINITION. In this subchapter, "board of trustees" includes the board's designee.

Sec. 37.302. APPLICABILITY. This subchapter:

- (1) applies to a student who is required to register as a sex offender under Chapter 62, Code of Criminal Procedure; and
- (2) **does not apply** to a student who is no longer required to register as a sex offender under Chapter 62, Code of Criminal Procedure, including a student who receives an exemption from registration under Subchapter H, Chapter 62, Code of Criminal Procedure, or a student who receives an early termination of the obligation to register under Subchapter I, Chapter 62, Code of Criminal Procedure.

Sec. 37.303. REMOVAL OF REGISTERED SEX OFFENDER FROM REGULAR CLASSROOM. Notwithstanding any provision of Subchapter A, on receiving notice under Article 15.27, Code of Criminal Procedure, or Chapter 62, Code of Criminal Procedure, that **a student is required to register as a sex offender under that chapter, a school district shall remove the student from the regular classroom and determine the appropriate placement of the student in the manner provided by this subchapter.**

Sec. 37.304. PLACEMENT OF REGISTERED SEX OFFENDER WHO IS UNDER COURT SUPERVISION. (a) **A school district shall place a student to whom this subchapter applies and who is under any form of court supervision, including probation, community supervision, or parole, in the appropriate alternative education program as provided by Section 37.309 for at least one semester.**

(b) If a student transfers to another school district during the student's mandatory placement in an alternative education program under Subsection (a), the district to which the student transfers may:

(1) require the student to complete an additional semester in the appropriate alternative education program without conducting a review of the student's placement for that semester under Section 37.306; or

(2) count any time spent by the student in an alternative education program in the district from which the student transfers toward the mandatory placement requirement under Subsection (a).

Sec. 37.305. PLACEMENT OF REGISTERED SEX OFFENDER WHO IS NOT UNDER COURT SUPERVISION. **A school district may place a student to whom this subchapter applies and who is not under any form of court supervision in the appropriate alternative education program as provided by Section 37.309 for one semester or in the regular classroom.** The district may not place the student in the regular classroom if the district board of trustees determines that the student's presence in the regular classroom:

- (1) threatens the safety of other students or teachers;
- (2) will be detrimental to the educational process; or
- (3) is not in the best interests of the district's students.

Sec. 37.306. REVIEW OF PLACEMENT IN ALTERNATIVE EDUCATION PROGRAM. (a) At the end of the first semester of a student's placement in an alternative education program under Section 37.304 or 37.305, the school district board of trustees shall convene a committee to review the student's placement in the alternative education program. The committee must be composed of:

(1) a classroom teacher from the campus to which the student would be assigned were the student not placed in an alternative education program;

(2) the student's parole or probation officer or, in the case of a student who does not have a parole or probation officer, a representative of the local juvenile probation department;

(3) an instructor from the alternative education program to which the student is assigned;

(4) a school district designee selected by the board of trustees; and

(5) a counselor employed by the school district.

(b) The committee by majority vote shall determine and recommend to the school district board of trustees whether the student should be returned to the regular classroom or remain in the alternative education program.

(c) If the committee recommends that the student be returned to the regular classroom, the board of trustees shall return the student to the regular classroom unless the board determines that the student's presence in the regular classroom:

- (1) threatens the safety of other students or teachers;
- (2) will be detrimental to the educational process; or

(3) is not in the best interests of the district's students.

(d) If the committee recommends that the student remain in the alternative education program, the board of trustees shall continue the student's placement in the alternative education program unless the board determines that the student's presence in the regular classroom:

- (1) does not threaten the safety of other students or teachers;
- (2) will not be detrimental to the educational process; and
- (3) is not contrary to the best interests of the district's students.

(e) If, after receiving a recommendation under Subsection (b), the school district board of trustees determines that the student should remain in an alternative education program, the board shall before the beginning of each school year convene the committee described by Subsection (a) to review, in the manner provided by Subsections (b), (c), and (d), the student's placement in an alternative education program.

**Sec. 37.307. PLACEMENT AND REVIEW OF STUDENT WITH DISABILITY.** (a) The placement under this subchapter of a student with a disability who receives special education services must be made in compliance with the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.).

(b) The review under Section 37.306 of the placement of a student with a disability who receives special education services may be made only by a duly constituted admission, review, and dismissal committee. The admission, review, and dismissal committee may request that the board of trustees convene a committee described by Section 37.306(a) to assist the admission, review, and dismissal committee in conducting the review.

**Sec. 37.308. TRANSFER OF REGISTERED SEX OFFENDER.** Except as provided by Section 37.304(b), a school district shall determine whether to place a student to whom this subchapter applies and who transfers to the district in the appropriate alternative education program as provided by Section 37.309 or in a regular classroom. The school district shall follow the procedures specified under Section 37.306 in making the determination.

**Sec. 37.309. PLACEMENT IN DISCIPLINARY ALTERNATIVE EDUCATION PROGRAM OR JUVENILE JUSTICE ALTERNATIVE EDUCATION PROGRAM.** (a) Except as provided by Subsection (b), a school district shall place a student who is required by the board of trustees to attend an alternative education program under this subchapter in a disciplinary alternative education program.

(b) A school district shall place a student who is required by the board of trustees to attend an alternative education program under this subchapter in a juvenile justice alternative education program if:

- (1) the memorandum of understanding entered into between the school district and juvenile board under Section 37.011(k) provides for the placement of students to whom this subchapter applies in the juvenile justice alternative education program; or
- (2) a court orders the placement of the student in a juvenile justice alternative education program.

**Sec. 37.310. FUNDING FOR REGISTERED SEX OFFENDER PLACED IN JUVENILE JUSTICE ALTERNATIVE EDUCATION PROGRAM.** A juvenile justice alternative education program is entitled to funding for a student who is placed in the program under this subchapter in the same manner as a juvenile justice alternative education program is entitled to funding under Section 37.012 for a student who is expelled and placed in a juvenile justice alternative education program for conduct for which expulsion is permitted but not required under Section 37.007.

**Sec. 37.311. CONFERENCE.** (a) A student or the student's parent or guardian may appeal a decision by a school district board of trustees to place the student in an

alternative education program under this subchapter by requesting a conference among the board of trustees, the student's parent or guardian, and the student. The conference is limited to the factual question of whether the student is required to register as a sex offender under Chapter 62, Code of Criminal Procedure.

(b) If the school district board of trustees determines at the conclusion of the conference that the student is required to register as a sex offender under Chapter 62, Code of Criminal Procedure, the student is subject to placement in an alternative education program in the manner provided by this subchapter.

(c) A decision by the board of trustees under this section is final and may not be appealed.

Sec. 37.312. LIABILITY. This subchapter does not:

(1) waive any liability or immunity of a governmental entity or its officers or employees; or

(2) create any liability for or a cause of action against a governmental entity or its officers or employees.

Sec. 37.313. CONFLICTS OF LAW. To the extent of any conflict between a provision of this subchapter and a provision of Subchapter A, this subchapter prevails.

### **C. Laundry List of Offenses That Trigger Sex Offender Registration**

Article 62.001(5)(H) of the Code of Criminal Procedure lists the following offenses that are classified as a “reportable conviction or adjudication”:

- Indecency with a child
- Sexual assault
- Aggravated sexual assault
- Continuous Sexual Assault of a Child
- Prohibited sexual conduct (Incest)
- Indecent Exposure (second adjudication)
- Compelling prostitution
- Sexual performance by a child
- Possession or promotion of child pornography
- Online solicitation of a minor
- Aggravated kidnapping if the respondent committed the offense with intent to violate or abuse the victim sexually
- Burglary of a habitation with intent to commit a specific sexual offense
- Unlawful restraint, Kidnapping, or Aggravated Kidnapping if the victim or intended victim was younger than 17 years of age
- Any attempt, conspiracy, or solicitation to commit an aforementioned offense (except indecent exposure)
- An adjudication of delinquent conduct under the laws of another state, federal law, or the laws of a foreign country based on the violation of an offense containing elements that are substantially similar to the elements of the above offenses. The Texas Department of Public Safety determines whether an offense under federal law, the laws of a foreign country, or the laws of another state contains elements that are substantially similar to the elements of a Texas offense that requires registration.

Additionally, there is no age-based exemption or affirmative defense<sup>2</sup> under Section 43.26 (Possession or promotion of child pornography) or 43.25 (sexual performance by a child) which would prevent prosecution of an amorous high school couple armed with a camera (*e.g.* Keanu Reeves and Martha Plimpton's bedroom scene in Ron Howard's movie,  Parenthood.) While this type of case might not be prosecuted, it illustrates how the legislature simply tacked on juvenile registration to a system designed to punish predatory adult conduct.

#### **D. Where & How to Register**

A juvenile subject to sex offender registration registers with the local law enforcement authority of the municipality (police station) where he or she resides. If the juvenile does not reside in a city, he registers with the local law enforcement authority of the county (sheriff's office) where the juvenile resides. Registration must be completed not later than the seventh day after the date the juvenile arrives in the municipality or county or the first date the local law enforcement authority of the municipality or county by policy allows the person to register. Once the juvenile registers with the local law enforcement authority of the municipality or county where s/he resides, that local law enforcement authority becomes the juvenile's primary registration authority.

If a sex offender resides outside of Texas and works or attends school in Texas, the person registers with the local law enforcement authority of the municipality or county where the offender works or attends school.

Ironically, most law enforcement agencies make it complicated for a person to register. In many jurisdictions a person cannot simply walk in on the last day and register without an appointment. Every local law enforcement authority has different procedures, and unless you are familiar with the local rules, a client may miss the deadline to register even if he started the process within seven days.

#### **E. What Information Must Be Provided**

The following information is required under Article 62.051(c):

1. the person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, social security number, driver's license number, shoe size, and home address;
2. a recent color photograph or, if possible, an electronic digital image of the person and a complete set of the person's fingerprints;

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<sup>2</sup> See, *e.g.*, Section 33.021(b) (online solicitation of a minor) where only persons over 17 years old can be prosecuted, or Section 21.11(b) (indecenty with a child) where a three-year age difference is an affirmative defense to prosecution.

3. the type of offense the person was convicted of, the age of the victim, the date of conviction, and the punishment received;
4. an indication as to whether the person is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision;
5. an indication of each business, occupational, or professional license, certificate, permit, or other authorization issued by a licensing authority that is held or sought by the person;
6. an indication as to whether the person is or will be employed, carrying on a vocation, or a student at a particular public or private institution of higher education in this state or another state, and the name and address of that institution; and
7. any other information required by the Texas Department of Public Safety.

This information is considered public information except for the person's social security number, driver's license number, telephone number and information that would identify the victim. If additional information is required by DPS under the catchall of Article 62.051(c)(7), it is also considered nonpublic.

#### **F. How Frequently the Information Must Be Provided**

In another indication of how the sex offender registration and notification laws did not have juveniles in mind, juveniles who live in divorced households may have particularly cumbersome registrations requirement. If the child is subject to a standard visitation schedule, the child may or may not have to register at two different addresses. Given the number of divorced households, plus given then number of households where one parent is not actively involved in raising the child, this creates yet another battleground about which household has to be listed as the home of a registered sex offender.

Registered sex offenders must report all changes in address to the proper local law enforcement authorities seven days before an intended change in address. If the juvenile moves to another state, he or she has ten days after arrival in the other state to register with the law enforcement agency that is identified by the Texas Department of Public Safety as the agency designated by that state to receive registration information.

In addition to providing notification of all address changes, registered sex offenders have seven days to provide notice about changes in the offender's name, physical health, job status, and educational status. Furthermore, if the person spends more than 48 consecutive hours in a municipality or county, other than the municipality or county in which the sex offender is registered, for more than three times in a month, he or she must report that fact to the local law enforcement authority of the municipality or



county in which the offender is visiting. In reporting this fact to the proper local law enforcement authority, the sex offender must provide all the information that is required for sex offender registration, the address of any location in the municipality or county at which the offender was lodged during the month, and a statement as to whether the offender intends to return to the municipality or county during the succeeding month.

All registered sex offenders who either work at or enroll in a public or private institution of higher education (university, college, community college, or technical or trade institution) must provide notice of that fact to two different entities. First, the offender must notify the authority for campus security (i.e. campus police department) for the institution of higher education that the offender has begun to work or attend school at the institution. Second, the offender must notify the offender's primary registration authority of the offender's work or enrollment at the institution of higher education. These notifications must be provided not later than the seventh day after the date the offender begins work or enrollment at the institution of higher education. The offender must also notify the authority for campus security and primary registration authority when the offender terminates work or enrollment at the institution of higher education. This notification must be provided not later than the seventh day after the date the offender terminates work or enrollment at the institution.

#### **G. Numeric Risk Levels & the Notification Implications for High Risk Offenders**

A numeric risk level indicates the level of risk a sex offender poses to the community. A numeric risk level is assigned to each sex offender when the offender is released from a penal institution or placed on community supervision or juvenile probation. It is determined by using the sex offender screening tool adopted by the Risk Assessment Review Committee. There are three different risk levels:

Level one (low): indicates that the person poses a low danger to the community and will not likely engage in criminal sexual conduct.

Level two (moderate): indicates that the person poses a moderate danger to the community and may continue to engage in criminal sexual conduct.

Level three (high): indicates that the person poses a serious danger to the community and will continue to engage in criminal sexual conduct.

Each level is based on a point system derived from the danger the person poses to the community or the likelihood that the person will continue to engage in criminal sexual conduct. The numeric risk level assignment impacts the intensity of the offender's registration requirements, and can determine, among other things, whether or not there is a neighborhood notification requirement. DPS will notify local law enforcement when a registered sex offender moves to its area. That local law enforcement authority must then

verify with DPS the registrant's numeric risk level within eight days of receiving the risk level notice.

If a person is assessed a risk level of three, there are two additional public notice requirements:

#### *Postcard Notification of Civilly Committed and High-Risk Offenders*

When the Texas Department of Public Safety receives notice that a sex offender is either civilly committed as a sexually violent predator or assigned a high-risk level is due to be released into a community or intends to move to a new address, the Texas Department of Public Safety will provide written notice in English and Spanish to the immediate community where the sex offender intends to reside. This written notice will be in the form of a postcard mailed or delivered to at least each address (excluding post office boxes) within a one-mile radius, in an area that has not been subdivided, or a three-block area, in an area that has been subdivided, of the place where the civilly committed or high-risk sex offender intends to reside.

#### *Newspaper Publication*

Local law enforcement authorities are permitted to publish all high-risk sex offenders in any newspaper, periodical or circular in the area where the offender intends to reside. For low and moderate-risk offenders, local law enforcement authorities are permitted to publish the offender in a newspaper, periodical or circular in the area where the offender resides unless the offender is registering on the basis of one or more adjudications of delinquent conduct (juveniles).

Thankfully, even if a juvenile offender is assessed a high risk level Article 62.062 prevents newspaper publication for juvenile adjudications.

### **H. Public Notification for all other offenders**

Except for the additional notice requirement required by persons with a risk level of three, all registered sex offenders will be subject to the following:

#### *Local Law Enforcement*

Approximately one week before a person subject to registration is due to be released from jail or placed on probation, the local law enforcement agency must be notified of where the person expects to reside.

#### *The DPS Sex Offender Database*

Local law enforcement authorities submit all sex offender registration information to the Texas Department of Public Safety. The Texas Department of Public Safety puts this information in the DPS Sex Offender Database. The public may obtain information contained in this database at any time via the Texas Department of Public Safety website. The DPS Sex Offender Database can be accessed at <http://records.txdps.state.tx.us/soSearch/default.cfm>.

#### *Driver's License or Personal Identification*

Any registered sex offender must apply for a driver's license or personal identification or renew their existing ID within thirty days of starting probation or parole. Failure to timely apply for a driver's license or renewal could result in an automatic suspension of the person's license.

#### *DNA Specimen*

A person required to register as a sex offender must comply with a request for a DNA specimen made by law enforcement. At least one court of appeals has held that a respondent must submit a DNA specimen even though he was excused from sex offender registration. *See In re D.L.C.*, 124 S.W.3d 354 (Tex.App.-Fort Worth, 2003) ("The fact that a juvenile may be excused from registration does not alter the fact that he was placed on probation for an offense requiring sex offender registration or nullify the independent requirement of a DNA sample. Thus, here, because Appellants were adjudicated of a qualifying offense and were placed on probation, the prerequisites for applying the DNA statute were met. *See* TEX. FAM.CODE ANN. § 54.0405(b) (specifying that DNA statute applies to child placed on probation for conduct constituting an offense requiring registration as sex offender)).

### **I. Distinction Between Restrictions Resulting From Registration Versus Restrictions That Are A Condition Of Probation Or Parole**

Because there are so many restrictions placed upon a person accused of a sex related offense, it is difficult to keep track of the authority for each restriction. As a general rule, the mere fact that a person is registered as a sex offender does not prohibit a person from doing anything; the only additional criminal liability imposed by registration is that failure to register is a felony offense.

Restrictions related to unsupervised contact with minors, polygraph examinations, residency restrictions, and employment restrictions are all conditions of parole or probation. Texas probation and parole law requires the imposition of a "child safety zone" on a sex offender placed on community supervision (probation) or released on parole or mandatory supervision if the offender's victim was a child. A "child safety zone" prohibits sex offenders on community supervision, parole, or mandatory supervision from supervising or participating in any program that includes as participants

or recipients persons 17 years of age or younger and that regularly provides athletic, civic, or cultural activities or going in, on, or within a specified distance of a premises where children commonly gather (i.e. schools, day care facilities, or playgrounds). A violation of the “child safety zone” can result in the revocation of a sex offender’s probation or parole and, consequently, incarceration. This “child safety zone” lasts for as long as the sex offender is on community supervision, parole, or mandatory supervision. Similarly, the Texas Sex Offender Registration Program itself does not prohibit registered sex offenders from working in certain trades, occupations or professions.

However, this is where the “collateral consequences” conversation begins again. While the sex offender registration statute does not prohibit where a person can live or work, other state laws that regulate a particular trade, occupation or profession may bar sex offenders from working in the trade, profession or occupation. Likewise, private employers, neighborhood associations, and landlords can develop their own set of regulations which exclude registered sex offenders.

#### **J. Length of time of juvenile sex offender registration**

The duty to register expires ten years after the Respondent “completes the terms of the disposition.” The ten years does not start until discharged from TYC parole or discharged from adult or juvenile probation/supervision.

#### **K. Penalty for Failure to Register**

Before a person who will be subject to registration is released from jail or TYC, he will be informed of his registration requirements and the penalties for failure to comply. By this stage in the process, the person has likely reviewed the registration requirements with his attorney, as well as been questioned by the juvenile court about sex offender registration during the plea colloquy. The registration forms again explain the timelines of the registration requirements. Taken together, these repeated warnings make it difficult to defend a position that a respondent was not aware he was under an obligation to register.<sup>3</sup>

For juveniles subject to sex offender registration, failure to register is a state jail felony as a ten-year period of registration is involved. For adults who must register for life or high risk offenders who must register every ninety days, the penalty jumps to a third degree or second degree felony.

#### **L. Hindering Apprehension**

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<sup>3</sup> The other implication of the “collateral consequence” of registration is that if the trial court fails to admonish the juvenile about registration requirements, it does not affect the voluntariness of the plea.

Two sessions ago the Legislature also amended the Penal Code to make it a crime for a person to hinder apprehension of a person who is required to register and fails to comply with the registration requirements:

Section 38.05, Penal Code, is amended by amending Subsection (c) and adding Subsection (d) to read as follows:

(c) Except as provided by Subsection (d), an [An] offense under this section is a Class A misdemeanor.

(d) An [,-except that the] offense under this section is a felony of the third degree if the person who is harbored, concealed, provided with a means of avoiding arrest or effecting escape, or warned of discovery or apprehension is under arrest for, charged with, or convicted of a felony, including an offense under Section 62.102, Code of Criminal Procedure, or is in custody or detention for, is alleged in a petition to have engaged in, or has been adjudicated as having engaged in delinquent conduct that violates a penal law of the grade of felony, including an offense under Section 62.102, Code of Criminal Procedure, and the person charged under this section knew that the person they harbored, concealed, provided with a means of avoiding arrest or effecting escape, or warned of discovery or apprehension is under arrest for, charged with, or convicted of a felony, or is in custody or detention for, is alleged in a petition to have engaged in, or has been adjudicated as having engaged in delinquent conduct that violates a penal law of the grade of felony.

Does that mean that a parent who allows a child who has not registered to live in her home is harboring a fugitive before the child has ever been charged with a crime? Article 62.102 (a) states that “A person commits an offense if the person is required to register and fails to comply with any requirement of this chapter.” Is the offense committed once the registration date lapses? If so, does this make the hindering apprehension case possible if the parent knows that the child has not registered and yet allows him to continue living there?

I think this would be a pretty big stretch, but defense lawyers are paid to be paranoid.

### **III. PREVENTING SEX OFFENDER REGISTRATION THROUGH PLEA NEGOTIATION**

#### **A. Negotiating With the State Prior to Filing a Petition**

In cases where the respondent and the victim are family members, parents are in a difficult bind: if they fail to report an instance of sexual abuse, they are failing to protect the one child at the expense of another. On the other hand, where do you draw the distinction between sexual experimentation and sexual abuse? If a fourteen-year old plays “doctor” with his nine-year old cousin, is that indecency with a child by contact or sexual assault? What if the sexual contact began as experimentation and then gradually developed into more disconcerting behavior?

If a case like this is submitted for prosecutorial review, you may be able to request the prosecutor hold the case until the child can engage in treatment and counseling. If the family can appropriately deal with the child's behaviors and a therapist can confirm that the situation is under control, there is less need for juvenile court intervention in what will ultimately be a family issue.

### **B. Propose a Plea to An Equally Serious But Non-registerable Offense**

The easiest way to avoid registration is to sidestep the issue altogether. If one of the main concerns of the juvenile court system is for the child to be rehabilitated, what prevents a plea to a non-registerable offense with a condition of probation being successful completion of sex offender therapy? If the child is adjudicated for an offense that sounds ominous (deadly conduct, endangering a child) but avoids registration, the prosecutor may be more likely to agree.

#### Examples of offenses that do not trigger sex offender registration

- Assault
- Aggravated Assault with serious bodily injury
- Attempted Aggravated Assault with serious bodily injury
- Public Lewdness
- Indecent Exposure (1 adjudication only)
- Attempted indecent exposure
- Obscenity
- Possession or distribution of obscenity
- Display, Sale or distribution of harmful material to a minor
- Unlawful restraint (without affirmative finding that victim is less than 17)
- Unlawful transport
- Injury to a child
- Endangering a child
- Deadly conduct
- Enticing a child
- Criminal Mischief
- Criminal Trespass
- Disorderly conduct
- Harassment

### **C. Avoiding Registration Though Deferred Prosecution**

A juvenile disposition that does not involve an adjudication under 53.03 (deferred prosecution) does not trigger registration requirements.

### **D. Plea Agreement & State Waives its Right to a Hearing (not conditioned as part of the plea agreement)**

If the State agrees to waive its right to a hearing under Article 62.355, and it is not conditioned as part of a plea agreement, the court must exempt the respondent from registration.

**E. Plea Agreement & State Waives its Right to a Hearing (conditioned as part of the plea agreement)**

If the court accepts the plea agreement, then the juvenile is exempt from registration without a hearing. However, the court does not have to accept the plea agreement. If the court does not accept the plea bargain or requires a hearing, then the respondent has a right to withdraw the plea or proceed to a hearing on exemption.

**F. Plea Agreement & State Agrees to Defer Registration**

This is becoming the most common position by the State and the juvenile court because it allows registration to be used as a carrot or a stick depending upon the child's progress in sex offender therapy. While deferral is a short-term victory for the respondent, it is unclear how, when, and why the State could seek to move to revoke the deferral. While deferral is a far better alternative than registration, sex offender registration should not be used as a threat for non-compliance if it is truly a collateral consequence.

**IV. EXEMPTION FROM SEX OFFENDER REGISTRATION (“UNREGISTRATION”)**

If the State refuses to agree to exempt a respondent from registration, you must file a motion and have a hearing. Typically, the hearing on sex offender exemption will be held at the same time as the disposition hearing.

**A. Juveniles eligible for Exemption**

1. Any juvenile who would, upon adjudication, be subject to the registration requirement who has a pending adjudication for a “reportable conviction or adjudication.”

2. Any child in the Texas Youth Commission who has not been released on parole (and who has not been registered as a result of a prior probation or adjudication in the same case).

3. Any child who was assessed a determinate sentence and who has been transferred to the Texas Department of Criminal Justice - Institutional Division (the adult prison system) and who has not yet been released on parole.

## **B. Motion and Hearing for Exemption**

The procedure for exemption from registration is set forth in Article 62.351:

During or after disposition of a case under Section 54.04, Family Code, for adjudication of an offense for which registration is required under this chapter, the juvenile court on motion of the respondent shall conduct a hearing to determine whether the interests of the public require registration under this chapter. The motion may be filed and the hearing held regardless of whether the respondent is under 18 years of age. Notice of the motion and hearing shall be provided to the prosecuting attorney.

The hearing is without a jury and the burden of persuasion is on the respondent to show by a preponderance of evidence that:

(1) that the protection of the public would not be increased by registration of the respondent under this chapter; or

(2) that any potential increase in protection of the public resulting from registration of the respondent is clearly outweighed by the anticipated substantial harm to the respondent and the respondent's family that would result from registration under this chapter.

The court at the hearing may make its determination based on:

- (1) the receipt of exhibits;
- (2) the testimony of witnesses;
- (3) the representations of counsel for the parties; or
- (4) the contents of a social history report prepared by the juvenile probation department that may include the results of testing and examination of the respondent by a psychologist, psychiatrist, or counselor.

All written matter considered by the court shall be disclosed to all parties as provided by Sec. 54.04(b), Family Code.

## **C. The Four Options at the Conclusion of the Hearing**

At the conclusion of the Motion to Exempt Sex Offender Registration, the juvenile court can issue an order for one of the following options:

1. *Grant the Motion*



The respondent is exempted from registration, but the State can appeal the juvenile court's decision under an abuse of discretion standard or whether the juvenile court committed procedural error.

A person who has an adjudication of delinquent conduct that would otherwise be reportable under Art. 62.001(5) does not have a reportable adjudication of delinquent conduct for purposes of this chapter if the juvenile court enters an order under this subchapter exempting the person from the registration requirements of this chapter.

If the juvenile court enters an order exempting a person from registration under this chapter, the respondent may not be required to register in this or any other state for the offense for which registration was exempted.

2. *Defer decision on requiring registration until the respondent has completed treatment as a condition of probation or while committed to the Texas Youth Commission*

If the court enters an order deferring its decision on requiring registration, the court retains discretion and jurisdiction to require, or exempt the respondent from, registration under this chapter at any time during the treatment or on the successful or unsuccessful completion of treatment, except that during the period of deferral, registration may not be required. Following successful completion of treatment, the respondent is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the state, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration. Not later than the tenth day after the date of the respondent's successful completion of treatment, the treatment provider shall notify the juvenile court and prosecuting attorney of the completion. Article 62.352(c).

Upon the State's motion and an evidentiary hearing, the Court can require registration based solely upon whether the interests of the public require registration. Unlike the initial inquiry of anticipated substantial harm that would result from registration, the Court does not revisit the balancing test. Furthermore, there are no guidelines as to when or why the State can file a motion for the juvenile court to require registration. Although one would assume that the State would only file a motion if the respondent was unsuccessful in treatment, there is no restriction in the statute. If the court or the elected District Attorney believes that it is always in the public's interest to require registration, agreeing to defer registration and then subsequently mandating registration is a statutorily permissible way around the balancing test.

While the legislature does not specifically address the right to appeal this decision, Professor Robert Dawson believes that neither the State nor the respondent have the right to appeal this decision. *See* ROBERT O. DAWSON, TEXAS JUVENILE LAW, p. 228 (Texas Juvenile Probation Commission, 6<sup>th</sup> ed. Sept. 2004) (“this right [to appeal] does not extend to less sweeping decisions refusing to excuse all registration in favor of deferred or non-public registration.”).

3. *Require the respondent to register as a sex offender but restrict the public access to the information*

If the respondent is required to register as a sex offender but the registration information is not public, it may still be accessed by law enforcement and criminal justice agencies, the Council on Sex Offender Treatment and public or private institutions of higher education. However, the information may not be posted on the Internet or released to the public. Article 62.352(d).

As discussed above, the respondent may not have a right to appeal this decision.

4. *Deny the motion and require the juvenile to register as a sex offender*

Under Article 62.357, the respondent may appeal the court’s ruling. The standard of review is whether the juvenile court committed procedural error or abused its discretion in requiring registration.

A better option may be to have the respondent proceed through sex offender treatment, obtain a successful evaluation, and then file a motion for deregistration. Before 2005 a respondent only had one shot, but the change to Article 62.353(c) allows two motions for deregistration to be filed.

## **V. DEREGISTRATION OF JUVENILES WHO ARE CURRENTLY REQUIRED TO REGISTER**

### **A. Juveniles Eligible for Deregistration or Non-publication**

A person who has registered as a sex offender for an adjudication of delinquent conduct, regardless of when the delinquent conduct or the adjudication for the conduct occurred, may file a motion in the adjudicating juvenile court for a hearing seeking exemption from registration or an order under Art. 62.352(b)(2) that the registration become nonpublic.

The person may file a motion under Subsection (a) in the original juvenile case regardless of whether the person, at the time of filing the motion, is 18 years of age or older.

A person required to register or already registered as a sex offender in this state because of an out-of state adjudication of delinquent conduct may file in the juvenile court of the person's county of residence a petition under Art. 62.351 for an order exempting the person from registration under this chapter.

**B. Two chances for deregistration**

A subsequent motion may be filed if a previous motion for deregistration under has been filed concerning the case.

**C. List of agencies to receive notice**

Like a petition for expunction of records, Article 62.353(d) requests a list of all public and private agencies and organizations, including public or private institutions of higher education, that possess sex offender registration information about the case. The motion for deregistration included on your CD includes a list of all the public and private entities that collect sex offender registration information.

**D. The Three Options at the Conclusion of the Hearing**

At the conclusion of the Motion to for Deregistration, the juvenile court can issue an order for one of the following options:

1. *Grant the Motion*

As set forth in Article 62.353(f)-(i), if the court grants a motion, the clerk of the court shall by certified mail, return receipt requested, send a copy of the order to the department, to each local law enforcement authority that the person has proved to the juvenile court has registration information about the person, and to each public or private agency or organization that the person has proved to the juvenile court has information about the person that is currently available to the public with or without payment of a fee. The clerk of the court shall by certified mail, return receipt requested, send a copy of the order to any other agency or organization designated by the person. The person shall identify the agency or organization and its address and pay a fee of twenty dollars (\$20.00) to the court for each agency or organization the person designates.

In addition to disseminating the order, at the request of the person, the clerk of the court shall by certified mail, return receipt requested, send a copy of the order to each public or private agency or organization that at any time following the initial dissemination of the order gains possession of sex offender registration information pertaining to that person, if the agency or organization did not otherwise receive a copy of the order.

An order must require the recipient to conform its records to the court's order either by deleting the sex offender registration information or changing its status to nonpublic, as applicable. *A public or private institution of higher education may not be required to delete the sex offender registration information under this subsection.*

A private agency or organization that possesses sex offender registration information the agency or organization obtained from a state, county, or local governmental entity is required to conform the agency's or organization's records to the court's order on or before the thirtieth day after the date of the entry of the order. Unless the agency or organization is a public or private institution of higher education, failure to comply in that period automatically bars the agency or organization from obtaining sex offender registration information from any state, county, or local governmental entity, in the future.

A person who has an adjudication of delinquent conduct that would otherwise be reportable under Art. 62.001(5) does not have a reportable adjudication of delinquent conduct for purposes of this chapter if the juvenile court enters an order under this subchapter exempting the person from the registration requirements of this chapter.

If the juvenile court enters an order exempting a person from registration under this chapter, the respondent may not be required to register in this or any other state for the offense for which registration was exempted.

2. *Require the respondent to register as a sex offender but restrict the public access to the information*
3. *Deny the Motion*

While Article 62.357 explicitly allows for the State to appeal any order exempting registration under Chapter 62, the article does not mention a reciprocal right to appeal any order denying a motion for exemption of registration. Instead, the text of Article 62.357(b) appears to only permit the respondent to appeal an order denying a motion seeking exemption under Article 62.352 for juveniles that have never registered as a sex offender. Before the 2005 legislative changes, one court of appeals held that the absence of a specific right to appeal a final order prevented the

respondent from appealing a motion to exempt registration. *See Ex Parte McGregor*, 145 S.W.3d 824 (Tex.App.-Dallas, 2004). Article 62.357(b) allows an appeal of an order requiring registration, but in a motion for deregistration the court is arguably addressing the exemption and not the order requiring registration. Furthermore, the article related to unregistration orders is completely separate from the article concerning deregistration orders. Because the statute only allows an appeal of a juvenile court order under Article 62.352(a), a respondent's only redress may be to represent the motion a second time.

#### **E. The Difficulty of Removing Sex Offender Registration Information**

With the advent of offshore internet companies, it has become increasingly difficult to enforce expunction and deregistration orders. If the company refuses to comply with the order, it is difficult - if not impossible - to enforce it. Furthermore, with the caching of outdated information on Google and Yahoo, even if the records are removed there are still old copies that may resurface on the internet. Finally, our office has encountered blatant disregard for deregistration orders as some of the companies that republish sex offender registration information claim a moral responsibility to let the public know of a respondent's offense. Representatives from these companies delighted in telling us that "they threw the order away" because our client would "always be a sex offender." Even with these hurdles, deregistration is still incredibly advantageous considering that most Internet searches for sex offenders are done by zip code and not by name.

### **VI. DEREGISTRATION FOR 17, 18, AND 19 YEAR OLDS**

The legislature has created a limited exemption for young adults who were convicted and required to register for statutory rape under Article 62.301:

#### **A. Eligibility for Exemption for Consensual Teenage Sexual Conduct**

A person who is required to register only as a result of a single reportable conviction or adjudication, other than an adjudication of delinquent conduct; and that at the time of the offense the defendant was younger than nineteen years of age and the victim was at least thirteen years of age, and the conviction was based solely on the ages of the defendant and the victim at the time of the offense.

A person who was convicted or placed on deferred adjudication before Sept. 1, 2001, for an offense under Sec. 21.11, Sec. 22.011, 22.021 or 43.25, Penal Code may petition the court for an exemption. The court may consider the petition if the petition states and the court finds that the defendant would have been entitled to the entry of an affirmative finding under Art. 42.017 or Art. 42.12, Sec.5(g), had the conviction or placement on deferred adjudication community supervision occurred after Sept. 1, 2001.

## **B. Procedure**

After a hearing on the petition, the court may issue an order exempting the person from registration if it appears by a preponderance of the evidence:

- (1) as presented by a registered sex offender treatment provider, that the exemption does not threaten public safety; and
- (2) that the person's conduct did not occur without the consent of the victim or intended victim.

## **C. Withdrawal of the Order of Exemption**

An order exempting the person from registration does not expire, but the court shall withdraw the order if after the order is issued the person receives a reportable conviction of adjudication.

# **VII. STRATEGIES FOR WINNING THE HEARING TO EXCUSE SEX OFFENDER REGISTRATION**

## **A. Addressing the Burden of Proof**

Under Article 62.352(b), the respondent has the burden of proof and must show by a preponderance of the evidence that the anticipated harm of registration “clearly outweighs” any potential increase in protection. One interpretation is that the statute is written so that the court should err on the side of exemption. The respondent does not have to prove actual harm, and almost anybody can imagine the anticipated harm that an adolescent would suffer should his picture be posted on the Internet as a sex offender.

However, an argument can be made that the actual burden of proof is closer to the clear and convincing evidence standard. Although Article 62.352(1)(b) declares the burden of proof to be by the preponderance of the evidence, Article 62.352(2) inserts the requirement that the harm must “clearly outweigh” public protection. Is it possible to prove that the harm clearly outweighs the protection by a preponderance of the evidence? If the term “clearly outweigh” refers to the quality of evidence and not the quantity, there is less of a conflict.

Ultimately, respondent will have an easier time proving anticipated harm than the State will have proving potential protection unless the respondent has a long history of sex offenses or a counselor or therapist testifies that he is not amenable to treatment.

## **Factors To Prove That The Protection Of The Public Would Not Be Increased By Sex Offender Registration**

- 1. Contesting that the public is protected by registration*

Factors related to the child's age vis-à-vis an adult offender

- a. The child will be supervised at home
- b. The child will be supervised on probation
- c. The child will be supervised at school
- d. The child cannot drive
- e. The child will have no unsupervised contact with other minors

No evidence that registration increases public protection

- f. No scientific evidence to prove that public notification deters or reduces crime
- g. No scientific evidence that the public uses the registry and alters behavior accordingly
- h. The cost of maintaining the registry and diverting law enforcement to notification efforts shifts resources from other proven methods of crime prevention like education
- i. Provides a false sense of security

2. *Evidence that respondent is not a threat to the public*

Factors related to the offense

- a. A weapon was not used
- b. No restraint was applied to the victim
- c. No retaliatory threats were made to the victim
- d. Age of respondent and age of victim
- e. Type of touching / sex act involved
- f. Where the offense occurred

Factors related to the respondent

- g. Age
- h. Whether he was sexually abused and by whom
- i. Whether he was previously in counseling / treatment
- j. Family support network
- k. Plans for the future (college, military, etc.)
- l. Height / weight

Testimony

- m. Family members
- n. Teachers
- o. The victim
- p. Parents of the victim
- q. Family counselors

- r. Sex offender treatment provider
- s. Probation officer
- t. Previous girlfriend/boyfriend

Documentary Evidence

- u. Treatment records
- v. Psychological report
- w. Notes from the probation file
- x. Probation records
- y. J-SAOP II evaluation
- z. Rejected job applications
- aa. Copies of harassing e-mails, myspace messages
- bb. Tapes of harassing telephone messages

**B. Anticipated Substantial Harm To The Respondent And Respondent's Family**

1. Potential for violence
2. Potential for property damage
3. Potential for false accusations
4. Exclusion from neighborhoods
5. Harassment by neighbors, vigilante groups
6. Loss of employment and/or employment opportunities
7. Increase risk of re-offending due to stress and inability to settle into the community
8. Limits the ability of the respondent to function in the community (go to school without fear of being found out)
9. Potential for depression and/or possibly suicide
10. Impact on victims when the respondent is related to the victim
11. Undermines treatment by precipitating the problems that lead to sex offenses, like poor self-esteem, lack of empathy, feelings of rejection, anger, isolation from others, etc.