

# **NUTS AND BOLTS OF JUVENILE LAW 2009**

## **PRINCIPLES OF PRE-TRIAL DIVERSION**

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## **Introduction**

Diversion is a loose term and often a very loose practice. Almost any response to juvenile offending that does not involve court proceedings can go by the name of diversion, including some that amount to no response at all. For example, a police officer can choose to issue a warning rather than making an arrest.<sup>1</sup> An officer may also dispose of a child's case without referring the child to juvenile court if guidelines for such a disposition have been adopted in the officer's county.<sup>2</sup> Even if the child is referred to the probation department, an intake officer may dispose of the case informally through what is commonly called counsel and release.<sup>3</sup>

Informal disposition in which a case is closed without supervision, sanctions, or services of any kind may be appropriate in some situations, but in most situations where diversion is warranted, it should call for activity from the juvenile offender. Good diversion programs require more than just staying out of trouble for a period of time. By providing accountability, services, counseling and so forth, these programs are more likely to meet the needs of victims, offenders and the public. Good diversion, then, is the process of channeling a referred juvenile from formal court proceedings to some specific program or activity to avoid further prosecution.

In Texas, each county determines how its pre-trial diversion programs will be administered. The details of these programs will vary greatly from county to county, but there are two general diversion programs utilized by most counties: the First Offender Program and Deferred Prosecution.

## **First Offender Program**

Section 52.031 of the Texas Family Code authorizes the juvenile board of each county to establish a first offender program to dispose of certain cases without a referral to juvenile court. Dispositional guidelines for this program must be adopted by the juvenile board.<sup>4</sup> Once the guidelines are established, a law enforcement officer, who has taken a child into custody, may refer the child to the first offender program as long as the child has not previously been adjudicated of delinquent conduct and the officer follows the established guidelines.<sup>5</sup> Furthermore, a child cannot be referred to the program if the conduct he was taken into custody for constitutes a third degree, second degree, first

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<sup>1</sup> See Tex. Fam. Code § 52.01(c).

<sup>2</sup> See Tex. Fam. Code § 52.03.

<sup>3</sup> See Tex. Fam. Code § 59.004.

<sup>4</sup> See Tex. Fam. Code § 52.032.

<sup>5</sup> See Tex. Fam. Code § 52.031(d).

degree, aggravated controlled substance, or capital felony or state jail felonies and misdemeanors involving violence or the use or possession of certain weapons.<sup>6</sup>

First offender programs require the child to do specific things in order to successfully complete the program, but the participation is voluntary on the part of the child and the family. The participant may agree to pay restitution, complete community service, or attend some type of counseling or educational training as part of the program.<sup>7</sup> Upon successful completion of the program, the case is closed and may not be referred to juvenile court unless the child is taken into custody for a new offense before the 90<sup>th</sup> day after the date the child completes the program.<sup>8</sup>

### **Deferred Prosecution**

Deferred prosecution is contemplated by sanction level two of the Progressive Sanctions Model which states a child may be placed on a period of deferred prosecution by: (1) the probation department, (2) the prosecuting attorney, or (3) the juvenile court.<sup>9</sup> Like other forms of diversion, deferred prosecution is an alternative to seeking a formal adjudication, but one that entails a specific period of informal probation-- usually six months.

Deferred prosecution is authorized by section 53.03 of the Texas Family Code. A careful reading of this section is the first step in understanding this process. The Family Code requires that before a child is placed on deferred prosecution, there must be a finding of probable cause that the child has engaged in delinquent conduct or conduct indicating a need for supervision.<sup>10</sup> Deferred prosecution should not be used for cases the State clearly cannot prove in court.

### **Referral to Deferred Prosecution by Probation**

Subject to certain restrictions, the probation department may place a child on deferred prosecution if the following three conditions apply:

1. Deferred prosecution would be in the best interests of the public and the child.
2. The child and the parent know that consent to participate is voluntary.
3. The child and the parent understand they may terminate the deferred prosecution at any time and go to court.

The probation department may not defer prosecution for a case requiring forwarding to the prosecutor under Section 53.01(d) of the Texas Family Code. This section requires the forwarding of felonies and misdemeanors involving violence or weapons, unless the county juvenile board adopts an alternative-forwarding plan.<sup>11</sup> Additionally, the

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<sup>6</sup> See Tex. Fam. Code § 52.031(a).

<sup>7</sup> See Tex. Fam. Code § 52.031(h).

<sup>8</sup> Tex Fam. Code § 52.031(j)(3).

<sup>9</sup> See Tex. Fam. Code § 59.005.

<sup>10</sup> Tex. Fam. Code § 53.03(a).

<sup>11</sup> Tex. Fam. Code § 53.03(c)(1).

probation department cannot defer prosecution for a child who has **previously** been adjudicated of a felony, even if the current referral is for an offense not requiring forwarding, unless the prosecutor’s consent is obtained in writing.<sup>12</sup> The probation department can set the length of deferred prosecution for “a reasonable period of time” not to exceed six months.<sup>13</sup>

### **Referral to Deferred Prosecution by the Prosecuting Attorney**

The Family Code empowers the prosecutor with the ability to defer prosecution for any child<sup>14</sup> and in any case except for certain alcohol-related offenses.<sup>15</sup> This often occurs when the probation department forwards cases to the prosecutor and the prosecutor determines that although probable cause exists, proceeding with the case formally is not necessary. The prosecutor can return the case to juvenile probation for “further proceedings.”<sup>16</sup> At this point, probation may place the child on deferred prosecution for a felony or misdemeanors involving violence or weapons, as an agent for the prosecutor.

Theoretically, the prosecutor can also over-rule the probation department’s decision not to send a case to deferred prosecution it could have sent. Whether or not this happens practically in any given county will depend on the relationship between probation and the prosecutor’s office.

### **Referral to Deferred Prosecution by the Juvenile Court**

Prior to 2003, it was a little unclear whether the juvenile court had the power to place a child in deferred prosecution. Section 53.03 spoke only to the allocation of authority between the probation department and the prosecutor. Nothing in section 53.03 precluded the court from sending a case to deferred prosecution and certainly section 59.005 contemplated the court having this power, but still it was ambiguous. In 2003, the legislature cleared up this ambiguity by specifically stating the juvenile court can defer prosecution at any time before:

1. The jury is sworn in a jury trial.
2. The first witness is sworn in a bench trial.
3. The child pleads true or agrees to a stipulation of evidence.<sup>17</sup>

Essentially, the court must place the child on deferred prosecution before jeopardy attaches to the case. Placing a child on deferred prosecution after jeopardy attaches would be a mistrial and a new prosecution would be prohibited.

The court may grant deferred prosecution for all cases, except for the alcohol-related offenses prohibited by section 53.03(g). The court may grant deferred

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<sup>12</sup> Tex. Fam. Code § 53.03(c)(2).

<sup>13</sup> Tex. Fam. Code § 53.03(a).

<sup>14</sup> Tex. Fam. Code § 53.03(e).

<sup>15</sup> Tex. Fam. Code § 53.03(g).

<sup>16</sup> Tex. Fam. Code § 53.012.

<sup>17</sup> Tex. Fam. Code § 53.03(i)

prosecution on its own motion, but usually a child will have to ask the court for a hearing to decide whether the deferred prosecution should be granted. This hearing may be conducted by formal presentation of evidence or may be conducted by the parties making professional representations to the court concerning the case and the child's background.<sup>18</sup> Finally, the court can add to a previous order of deferred prosecution so long as the combined period does not exceed one year.<sup>19</sup>

### **To the Juvenile Defense Attorney: Obtaining Deferred Prosecution for your Client**

Preparation for obtaining deferred prosecution begins at the time you meet your client. The groundwork for a positive outcome is laid by gathering all the information you can about the delinquent act at issue and your client. Is this a first referral? Are there any mitigating factors, extenuating circumstances or subsequent displays of remorse? How is your client's behavior at home? How is the behavior at school? Does your client make good grades or participate in extra-curricular activities? Are there any mental health considerations? Have there been any changes in the client's environment since the referral? Are the parents doing all they can to properly supervise? Is it possible the complaining witness would support deferred prosecution? Focus on anything and everything a prosecutor or judge would want to know before deciding to grant deferred prosecution. Accentuate the positive, but do not ignore the negative. Dealing with harmful information early can greatly impact whether deferred prosecution will be granted. Finally, gather any documentation that reflects positively on your client and supports your arguments for deferred prosecution. The following are examples of documents you might want to obtain:

- A positive report card
- Letters from teachers, coaches, and others in support of your client
- Paperwork confirming your client's participation in extra-curricular activities
- Proof of employment such as a work schedule
- Special education or mental health records
- A letter from a service provider showing that your client has already begun services or successfully completed them in the past
- A letter from your client apologizing for the behavior and expressing commitment to change and make restitution

Part of your preparation for obtaining deferred prosecution will include preparing your client. This might involve advising your client on how to have positive interaction with decision makers or helping the client to fulfill obligations or goals. Advise your client to notify you immediately if there are any problems complying with court orders or the demands of parents and service providers. Whenever you learn of a problem, help the client come up with a solution. Take the time to explain to the client the importance of improving behavior and the connection behavior has to the objective. Monitoring your

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<sup>18</sup> Tex. Fam. Code § 53.03(k).

<sup>19</sup> Tex. Fam. Code § 53.03(j).

client's behavior before a final decision is made will help avoid some mistake that might ruin any chance of the decision being favorable.

Once you have gathered all the information, have prepared the client, and have put together your arguments, you are ready to begin persuading. Depending on the type of offense you are dealing with, you may have up to three opportunities to persuade someone to grant deferred prosecution.

### Persuading the Probation Officer

If your client has been referred for a non-violent, non-weapon misdemeanor, the probation department has the power to send the case to deferred prosecution. Understand the deferred prosecution policies of your county's probation department so that you can show your case fits within those policies or show why your case should be exempted. Communicate with the assigned officer, in person if possible, and give that person all the justification they need to agree. If you get the case early enough you may avoid a petition even being filed.

### Persuading the Prosecutor

If your client has been referred for a more serious offense, you will have to get the prosecutor to agree. Remember, the prosecutor can defer prosecution for any offense, except for certain alcohol-related offenses. Even though the probation officer has no authority over more serious cases, do not neglect them in these situations. The probation officer can be a valuable ally in persuading the prosecutor. A probation officer who is on board with deferred prosecution will support your case and lend credibility to your arguments. Even if you do not have the support of probation, you still might be successful in convincing the prosecutor to agree. Give the prosecutor a reason to agree. Because you have prepared, you should have several convincing reasons at your fingertips.

What if your client is perfect for deferred prosecution in every way, but is charged with an alcohol-related offense numerated in section 53.03(g)? Are you stuck with pleading or going to trial? Not if you ask an otherwise agreeable prosecutor to change the offense charged in the petition to a similar offense not excluded.

What if your client is offered deferred prosecution, but you do not believe the State can prove their case? Make sure your client understands he or she can refuse the offer and go to trial. If the State's case is strong and the prosecutor is not offering deferred prosecution, you can still go to the juvenile court for a final chance.

### Persuading the Judge

Like the prosecutor, the judge can grant deferred prosecution for any offense, except those listed in section 53.03(g) and the judge can do this over the objections of complaining witnesses, probation officers and prosecutors. The easiest way to initiate a hearing is by filing a motion for deferred prosecution (see appendix for a sample motion). As mentioned above, this pre-trial hearing can be held formally or informally. In a formal hearing the evidence would be presented in the form of witnesses and exhibits.

Because the rules of evidence applicable to trials generally do not apply to pre-trial hearings, evidence that would otherwise be inadmissible may be admitted.<sup>20</sup> The presentation of evidence would be geared towards the goal of giving the judge sufficient reason to grant the motion. In an informal hearing, the court can consider the professional representations by the parties concerning the nature of the offense and background of the child. In other words, defense counsel can present the case directly to the judge.

### **Violations of Deferred Prosecution**

When a child is placed on deferred prosecution, the practice is to set conditions similar to conditions of formal probation that the child must abide by during the period. As long as the child abides by these conditions, the State cannot proceed with adjudication. However, if the child violates the conditions, the agreement can be broken. The juvenile probation officer supervising a child placed on a period of deferred prosecution must report any violation of the program to the juvenile court.<sup>21</sup> In practice, the probation officer will report violations to the court through the prosecutor.

Although proceeding with the petition cannot really be considered a revocation of deferred prosecution, there may be an opportunity for defense counsel to prevent the termination of the deferred prosecution. Counsel can request a pre-trial hearing to challenge whether a violation occurred. If the state cannot prove the violation occurred, then it must abide by the agreement not to go forward with a petition. Also, since any violation must occur within the period of deferred prosecution a defense attorney can also challenge whether the violation occurred within that period.<sup>22</sup> For example, if a violation occurred a few days after the child successfully completed deferred prosecution, any attempt by the prosecutor to bring a petition to court should be challenged. Finally, if the violation is minor, the defense might ask that the deferred prosecution be extended rather than terminated.<sup>23</sup>

### **Detention and Deferred Prosecution**

Section 53.03(b) of the Texas Family Code specifically states, “Except as otherwise permitted by this title, the child may not be detained during or as a result of the deferred prosecution process.” Be careful not to read too much into this provision. This does not prohibit a child who is on a deferred prosecution agreement from being taken into custody and detained for new charges or even violations of the conditions of deferred prosecution. Professor Robert Dawson explains, “This provision was designed to prohibit the use of detention as a ‘treatment modality’ in deferred prosecution.”<sup>24</sup>

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<sup>20</sup> See *Granados v State*, 85 S.W.3d 217 (Tex. Crim. App. 2002).

<sup>21</sup> Tex. Fam. Code § 53.03(f).

<sup>22</sup> Tex. Atty. Gen. Opinion 98-069 (1998).

<sup>23</sup> See Tex. Fam. Code § 53.03(j).

<sup>24</sup> Robert O. Dawson, *Texas Juvenile Law* (6<sup>th</sup> ed. 2004 at p. 67).

## **Other Forms of Pre-Trial Diversion**

While the first offender program and deferred prosecution are specific forms of diversion authorized by the Family Code and are going to be the most commonly used forms of diversion in Texas, nothing in the Family Code prohibits setting up other types of diversion arrangements. Agreements can be entered into with the State to dismiss a case upon completion of certain requirements. The authority for the agreement comes from the State as they have the power to dismiss the case. In other words, the State does not have to dismiss a case, but might be willing in certain circumstances **if** the juvenile agrees to specific conditions. The length and conditions of the diversion can be negotiated by the prosecutor and defense counsel and can vary greatly from case to case. These types of diversion arrangements can be set up to be much less structured than a deferred prosecution or it can be set up to be much more demanding than one.

Whether or not the State will agree to any given proposed agreement will depend on the seriousness and strength of the case. The State may also consider the age of the respondent, how well the respondent has done while waiting for the case to come to juvenile court, the relationship to the complaining witness, and lack of prior referrals.

The possibilities of the conditions that could be imposed as part of a pre-trial diversion are endless. The following are some examples of conditions that might earn a future dismissal upon completion:

- Pay monetary restitution
- Perform community service
- Participate in Victim-Offender Mediation
- Participate and complete a particular type of counseling program like anger management or drug education
- Work with a mentor
- Write a letter of apology

Be creative and persuasive and present the prosecutor with a plan that holds the child accountable. If there are complaining witnesses, make sure the plan restores them, as much as possible, to the way they were in before the incident. Finally, be realistic. Does the child really deserve a break and has the child put himself or herself into a position where even the toughest prosecutor cannot dispute it?

## **Conclusion**

Diversion is an important part of the juvenile justice system. Most juveniles referred to juvenile court never return for a new referral.<sup>25</sup> In places where diversion programs are administered effectively, many positive benefits are realized. Burdens on the court system are reduced. The community and the victim are more involved in the juvenile justice system. And for the offender, the stigma of having a formal adjudication is avoided.

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<sup>25</sup> Snyder, H., and Sickmund, M. (1999). *Juvenile Offenders and Victims: 1999 National Report*. Washington D.C.: Office of Juvenile Justice and Delinquency Prevention.



# **APPENDIX**

**J-«J»**

**IN THE MATTER OF:** § **IN THE 98<sup>TH</sup> DISTRICT COURT**  
**«Client»** § **OF TRAVIS COUNTY, TEXAS**  
**DOB: «DOB»** § **SITTING AS THE JUVENILE COURT**

**RESPONDENT’S MOTION FOR DEFERRED PROSECUTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, «Client», the Respondent, by and through his attorney of record, «Atty», in the above styled and numbered cause, and pursuant to Section 53.03 of the Texas Family Code and requests the Court authorize deferred prosecution for Respondent and for cause would show the Court as follows:

I.

The Respondent is charged with the offense of «Offense» and deferred prosecution would be in the interest of the public and the child.

II.

The Respondent is not charged with an offense under Section 49.04, 49.05, 49.06, 49.07, or 49.08 of the Texas Penal Code; nor a third or subsequent offense under Section 106.04 or 106.041, Alcoholic Beverage Code; and therefore is not barred from participation in deferred prosecution.

WHEREFORE, PREMISES CONSIDERED, the Respondent prays the Court set this case for hearing and after evidence authorize deferred prosecution and any other relief the Court may deem appropriate.

Respectfully Submitted,

Kameron D. Johnson  
Juvenile Public Defender  
P.O. Box 1748  
Austin, Texas 78767  
Phone: 512.854.4128  
Facsimile: 512.854.4148

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By «Atty»

State Bar No: «SBN»

CERTIFICATE OF SERVICE

I, «Atty», certify a true and correct copy of the foregoing *Respondent's Motion for Deferred Prosecution* was served in accordance with the Texas Rules of Civil Procedure upon the attorney for the State on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
By: «Atty»

J-«J»

IN THE MATTER OF:

§

IN THE 98<sup>TH</sup> DISTRICT COURT

«Client»

§

OF TRAVIS COUNTY, TEXAS

DOB: «DOB»

§

SITTING AS THE JUVENILE COURT

ORDER ON RESPONDENT’S MOTION FOR DEFERRED PROSECUTION

On this day came on to be considered *Respondent’s Motion for Deferred Prosecution*. Upon consideration of the motion, it is hereby:

( ) GRANTED and the court finds that deferred prosecution would be in the best interest of the public and the Respondent. The court ORDERS the Respondent referred to the Deferred Prosecution Unit, pursuant to Section 53.03 of the Texas Family Code for a reasonable period of time not to exceed six months.

( ) DENIED, to which ruling the Respondent excepts.

SIGNED AND RENDERED \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge Presiding

SIGNED AND RECOMMENDED \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Juvenile Court Referee