

**DWI Sentencing Options: Pre-Trial Diversion and Deferred Adjudication**  
**97th Annual County Judge and Commissioners Association of Texas Conference**  
**Moody Gardens Hotel and Conference Center**  
**Galveston, Texas**  
**October 7, 2019**  
**Judge Ryan Kellus Turner**  
**Executive Director**  
**Texas Municipal Courts Education Center**

**I. “Climate Change?”**

**A. “Problem Solving Courts”:**

1. “Texas Specialty Courts combine rigorous monitoring and supervision with intensive community-based treatment services to reduce recidivism, prevent incarceration, and promote recovery. In 1990, the first specialty drug court was established in the State of Texas. These specialized courts cover distinct populations and offenses: drug courts (adult and juvenile), family drug courts, veterans’ treatment courts, mental health courts, commercially sexually exploited persons (prostitution) courts and “problem solving courts” which combine elements of more than one type due to co-occurring issues in participants. The goal of these courts is essentially to divert the defendant from the criminal justice system and to assure the defendant receives access to the treatment and social programs necessary for the person’s success within the community. Currently, funded by the Criminal Justice Division (CJD) and other state agencies, there are close to 200 specialty courts in the state. Each type of court has its own enabling statute found in Texas Government Code, Subtitle K.” [http://www.txspecialtycourts.org/specialty\\_courts.html](http://www.txspecialtycourts.org/specialty_courts.html)
2. Definition of “Drug Court” “the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants” Sec. 123.001(2), Gov. Code.

**B. Procedural Justice:** Four pillars of procedural justice: (1) being fair in processes, (2) being transparent in actions, (3) providing opportunity for voice, and (4) being impartial in decision making.

<https://www.courtinnovation.org/publications/what-procedural-justice>

**C. Public Policy: “Sobering Centers”:** S.B. 306 (2019) amended Texas law relating to a police officer’s release of certain individuals suspected of the offense of public intoxication (PI). Under former law, peace officers and other emergency responders had limited options for dealing with publicly intoxicated people. Individuals suspected of public intoxication could be arrested or released into the care of a responsible adult or to a treatment facility for chemical dependency. However, these options were limited by practical realities. Frequently there is no responsible adult to allow the release of a PI suspect and treatment centers are inaccessible. As a result, most PI suspects end up being arrested and booked into jail or admitted to an emergency room. Jail space is limited, expensive, generates administrative duties for jail staff and law enforcement. S.B. 306 addresses these concerns by amending Article 14.031 of the Code of Criminal Procedure.

**II. “Pretrial Diversion”**

**A. Diversion Program, *Black’s Law Dictionary* (9th Ed) “ 1. Criminal law. A program that refers to certain criminal defendants before trial to community programs on job training, education, and the like, which if successfully completed may lead to the dismissal of charges. - Also termed *pretrial diversion*; *pretrial intervention*.”**

**B. What it Is.** “[t]he State agrees to dismiss the case if the defendant performs certain conditions within a specified period of time. Both the State and the defendant request that the trial court continue the present trial setting to a certain date in the future to give the defendant time to comply with the agreed conditions .... On that date, the defendant must appear before the trial court. If the defendant has complied with the conditions of the agreement, the trial court grants the State's motion to dismiss the pending criminal charges. If the defendant has not complied with the conditions of the agreement, the case proceeds to trial as scheduled.” *Fisher v. State*, 832 S.W.2d 641,643-44 (Tex. App.-Corpus Christi 1992, no writ).

**C. What it Isn’t.** A pre-trial diversion agreement is distinguishable from probation (regular or deferred adjudication). “Unlike probation or deferred adjudication programs, pre-trial diversion agreements, if completed by the defendant, obviate the trial completely. A pre-trial diversion agreement is entered into

before the court hears any evidence, not after. A defendant may appeal from an order of regular probation and may even appeal from an order of deferred adjudication probation, despite having not been adjudicated guilty. A defendant that enters into a pre-trial diversion agreement, however, cannot appeal because the pre-trial diversion agreement is not a final order that disposes of the case. A pre-trial diversion agreement requires that the court reset the trial to a certain future date, when the State may either move to dismiss the charges or go to trial. By contrast, unless the State seeks to revoke probation or to move to proceed to final adjudication, the probationer will never again be ordered to appear. *Fisher* at 644.

- D. **“Moved by the Motion?”** “A trial court which hears a motion to proceed to final adjudication or to revoke probation is asked to find a violation of one of the terms of probation. If the defendant fails to comply with the pre-trial diversion agreement, the trial court is not asked to find a violation of the agreement. That court, or the jury, is asked to find that the defendant committed the original charged offense.” *Id.*
- E. **“Plea to Play?”** “Due to the lack of controlling legal authority, we cannot advise you whether a prosecutor may require defendants to plead guilty as a condition for pretrial intervention under section 76.011 of the Government Code. It is for the Legislature to provide a more explicit legal framework governing the scope and operation of pretrial diversion in this State.” *GA-0986* (2013).

Related Issue: Pay to Play

### III. Deferred Adjudication for DWI (Article 42A.102(b), CCP)

#### A. “Outta Luck”

1. Only applies to *eligible* offenses occurring on or after September 1, 2019
  - a) Ineligible Offenses: (1) DWI with Child Passenger (Sec. 49.045, PC); (2) Flying while Intoxicated (Sec. 49.05); (3) Assembling or Operating an Amusement Ride While Intoxicated (Sec. 49.065, PC); (4) Intoxication Assault (Sec. 49.07, PC); and (5) Intoxication Manslaughter (49.08, PC)
2. Limited to first time DWI/BWI defendants (No “provable priors”)
3. Ineligible if “at the time of the offense” defendant had:
  - a) A CDL or CDL permit
  - b) An alcohol concentration of .15 or more

B. **“The IID Trade Off”** IID is required to be ordered as a condition by the court. The court can waive if (1) a drug and alcohol evaluation has been completed, and (2) the imposition of the condition is not “necessary for the safety of the community.” The finding must be on the record. Art. 42A.408(e-2), CCP.

C. **“Record Consequences”** Discharge and dismissal per deferred adjudication results dismissal of the charge, not related criminal records. Records can be subject to nondisclosure unless: (1) the defendant has never been convicted of or placed on deferred adjudication probation for another offense (other than a Class C misdemeanor) or (2) there is sufficient evidence to show that offense resulted in a motor vehicle accident involving another person (including a passenger in the motor vehicle operated by you.) **Note:** There is a two-year waiting period after discharge from probation to petition the court for a nondisclosure.

D. **“One for the Road?”** Under amended Sec. 49.09, Penal Code a subsequent DWI (BWI) charge can be enhanced even if the defendant has no prior convictions. A deferred under Article 42A.102(b) will suffice.

#### For Your Further Consideration:

Hon. Karl B. Grube, “Florida’s Non-Statutory, De Facto DUI/DWI Diversion Program: Diverting Justice for Judicial and Prosecutorial Expediency?” 8 *Stetson L. Rev.* 547 (July 2019)

<https://www.stetson.edu/law/lawreview/media/2019-summer-Grube.pdf>

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