

JUVENILE JUSTICE

PRINCIPLES OF PRETRIAL DIVERSION DEFERRED PROSECUTION

BY BRADLEY P. TEMPLE

In Texas, each county determines how its pretrial 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. This article will focus on deferred prosecution.

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. 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.² 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; and
- 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.³ Additionally, the 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.⁴ The probation department can set the length of deferred prosecution for "a reasonable period of time" not to exceed six months.⁵

REFERRAL TO DEFERRED PROSECUTION BY THE PROSECUTING ATTORNEY

The Family Code empowers the prosecutor with the ability to defer prosecution for any child and in any case except for certain alcohol-related offenses. 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." 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 overrule 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 Texas 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; and
- 3. The child pleads true or agrees to a stipulation of evidence.⁹

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 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. Finally, the court can add to a previous order of deferred prosecution so long as the combined period does not exceed one year.

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 extracurricular 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 have a significant impact on 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 vour client;
- Paperwork confirming your client's participation in extracurricular 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; and
- · 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 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 of the information, prepared the client, and 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.

CONCLUSION

Diversion is an important part of the juvenile justice system. Most juveniles referred to juvenile court never return for a new referral.¹² 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.

NOTES

- 1. See Tex. Fam. Code \$59.005.
- Tex. Fam. Code §53.03(a).

- 3. Tex. Fam. Code \$53.03(e)(1).
- 4. Tex. Fam. Code \$53.03(e)(2).
- 5. Tex. Fam. Code §53.03(a).
- 6. Tex. Fam. Code §53.03(e).
- 7. Tex. Fam. Code §53.03(g).
- 8. Tex. Fam. Code \$53.012.
- 9. Tex. Fam. Code §53.03(i)
- 10. Tex. Fam. Code \$53.03(k).
- 11. Tex. Fam. Code §53.03(j).
- 12. Snyder, H., and Sickmund, M. (1999). Juvenile Offenders and Victims: 1999 National Report. Washington D.C.: Office of Juvenile Justice and Delinquency Prevention.

BRADLEY P. TEMPLE

is an assistant juvenile public defender in the Travis County Juvenile Public Defender's Office.

This article is an excerpt from the author's presentation, "Principles of Pre-Trial Diversion," at the TexasBarCLE Juvenile Law Conference in February 2011. The full article is available on the TexasBarCLE Online Library at texasbarcle.com.



Let Houston Lawyer Referral Service

be your #1 source for new business!

Join our team and be part of the 2000 legal cases we refer to members each month. We spend marketing dollars to attract the clients with legal needs and we pass them directly on to you.

You don't pay us until you get paid! Bi-lingual attorneys are in high demand with Houston's diverse community.

Call today and bring your business from drought to plentiful.

HOUSTON LAWYER REFERRAL SERVICE

(713) 237-9429 or sign up at hirs.org

