While expunctions are the gold standard for cleaning up a client's criminal history, orders of non-disclosure are a helpful, lucrative, and easy add-on service for many of our clients. Moreover, non-disclosures are likely to grow in popularity because judges are now required to inform eligible defendants that their records may be non-disclosed and notify them of the first date they are eligible. The imprimatur of the court's notice may do a great deal to encourage clients to seek non-disclosure, especially since many courts have not only incorporated notices into their paperwork but also mailing reminders when defendants are eligible. This article summarizes when clients are eligible for non-disclosure, the basic procedure, and the likely effects.

I. Eligibility for Non-Disclosure

A person may petition the court for non-disclosure of an offense if the statutory waiting period for that offense has expired, they have not rendered themselves ineligible as a result of other offenses, and it is in the interest of justice. Courts are now required to inform defendants if they will be eligible for non-disclosure and of the first date they will be eligible to file a petition, although no penalty is prescribed for failure to do so. CCP art. 42.12 §5(c-1).

Eligibility for non-disclosure is based on the type of underlying offense for which deferred adjudication was granted. The Government Code establishes three categories of eligibility: general misdemeanors, certain specified misdemeanors, and felonies, including state jail felonies. Presently, the second category, specified misdemeanors, includes misdemeanors under Penal Code chapters 20 (Kidnapping and Unlawful Restraint), 21 (Sexual Offenses), 22 (Assaultive Offenses), 25 (Offenses against the Family), 42 (Disorderly Conduct), and 46 (Weapons). Misdemeanors outside of these listed chapters are treated as general misdemeanors and all felonies are treated the same, regardless of type.

For general misdemeanors, a person is eligible on the date they are discharged from deferred and their case is dismissed. This means that a petition for non-disclosure can be filed on the same date as an early termination. For specified misdemeanors, however, a client will not be eligible until the second anniversary of the discharge and dismissal. Clients on felony deferred must wait until the fifth anniversary of their discharge and dismissal to be eligible to file a petition.

Even when a person would be eligible based on the waiting period after the discharge and dismissal of his case, there are certain disqualifying conditions which prevent non-disclosure. These fall into two categories: convictions or other deferred sentences during community supervision or the waiting period to file and convictions or deferred sentences for certain listed offenses. For the first category, any subsequent conviction or new deferred adjudication community supervision will render a defendant ineligible for non-disclosure. So, defense counsel

must be aware that if they place a defendant on deferred adjudication for a new offense while a defendant is either on deferred or within the waiting period to become eligible to file a petition for non-disclosure, then that defendant will permanently lose his eligibility to seek non-disclosure. However, this section does not appear to be triggered by unsupervised deferred adjudication, although the courts have interpreted broadly what constitutes "community supervision" under art. 42.12.

The second category of disqualification concerns convictions or deferred for certain listed offenses. A defendant convicted of or placed on any deferred adjudication (including unsupervised deferred) for these offenses may not petition for non-disclosure of any offense. The offenses for this category are:

1. Offenses requiring registration under CCP ch. 62 (registered sex offenders),
2. Offenses under Pen §20.04 (aggravated kidnapping)
3. Offenses under Pen §19.02 (murder)
4. Offenses under Pen §19.03 (capital murder)
5. Offenses under Pen §22.04 (injury to child, elderly, or disabled person)
6. Offenses under Pen §22.041 (abandoning or endangering a child)
7. Offenses under Pen §25.07 (violation of protective order)
8. Offenses under Pen §42.072 (stalking)
9. Any offense involving family violence as defined in Fam §71.004.

In summary, a person is eligible for non-disclosure if he has waited the statutory length of time, has not been disqualified by convictions/deferreds before the waiting period has expired, and has no convictions/deferreds for listed offenses.

I. Procedure

Although practice in Bexar County varies among defense counsel, the Government Code specifies a more rigorous procedure. The petition for non-disclosure must be filed in the court where the charge was dismissed and deferred adjudication discharged. Further, it appears that a separate petition will be required for each charge a defendant seeks to have sealed. Defense counsel should take this into account when setting fees. The county clerk will charge $212 per petition without the cost of service and the District Clerk charges $270. The statute also requires a separate $28 fee to be paid to the clerk of the court. The Bexar County District Attorney's Office must be served and given notice at least three days before a hearing is set. Although orders of non-disclosure are not discretionary, they must still be set for a hearing.

The Bexar County District Attorney's Office has established its own policies in regards to non-disclosures. Namely, they want all petitions submitted to them for review prior to setting a hearing so that they may proceed in an "agreed" fashion. There is no statutory requirement to do so nor any benefit conferred by seeking agreement. In fact, it may take up to a month for the DA's Office to review and sign off on an agreed petition, so seeking their agreement really only has the effect of delaying the order to non-disclosure. Additionally, unlike an expunction, the Department of Public Safety does not need to be given notice.

The petition should contain the cause number of the original case (and may be filed under that cause number), the date of the original plea, that the defendant pled no contest or guilty, the offense for which the defendant was charged, that the defendant was granted deferred adjudication (that the judge deferred a finding of guilt), the date on which the case was discharged and dismissed, and that the non-disclosure will be in the interest of justice. The defendant will need to prove each of the above elements by a preponderance of the evidence but should also be prepared to prove that he is not ineligible by providing a copy of his criminal history with the relevant dates.

II. Effect

Once granted, an order of non-disclosure will prevent the clerks from sharing with the general public any information about the case or cases sealed and require the clerks to notify the criminal records section of DPS. Once DPS has received the order, it has ten (10) days to seal its own records AND inform other entities (including state, federal, and private) that it has reason to believe may have possession of the sealed information. Those entities then have 30 days to seal their records. Persons with sealed records "are not required in any application for employment, information, or licensing to state that the person has been the subject of any criminal proceeding related to the information that is the subject of an order" of non-disclosure. Govt §411.081(g-2).

There are exceptions. First, the statute clearly allows continued sharing between "criminal justice agencies" for "criminal justice or regulatory or licensing purposes." Govt §411.081(d). This is itself a broad exception which would seem to except nearly every important state agency, but the statute specifically excepts 22 agencies categories categories of entities, too. They are:

1. The State Board for Educator Certification
2. Schools (including private schools) and school districts, regional education-service centers, and"education shared-service arrangements"
3. The Dept. of State Health Services, local mental-health services, local mental-retardation authorities, community centers which provide services to people with mental illness or retardation
4. Public or non-profit hospitals and hospital districts
5. Commercial-transportation companies
6. The Texas Medical Board
7. The Texas Board of Nursing
8. The Texas School for the Blind and Visually Impaired

9. The Texas School for the Deaf
10. The Board of Law Examiners
11. The State Bar of Texas
12. District Courts regarding petions for name changes under Fam. Ch.45, subch. B
13. Texas Dept. of Family and Protective Services
14. Texas Youth Commission
15. The Dept. of Assistive and Rehabilitative Services
16. The Texas Private Security Board
17. Fire departments
18. Safe houses accepting children
19. Texas Juvenile Probation Commission
20. The securities commissioner, banking commissioner, savings-and-mortgage-lending commissioner, consumer credit commissioner, and the credit-union commissioner
21. Texas State Board of Public Accountancy
22. Texas Dept. of Licensing and Regulation

Second, there are a few non-specific exceptions. Federal agencies and entities, while they must be notified by DPS, have no legal obligation to comply. More importantly, given that these orders are sought mostly for employment purposes, the section requiring entities given notice notice by DPS to seal their records does NOT include private entities. While it does not exclude them, the omission is significant because they are specifically listed under the notice provision.

Fortunately, Govt §552.1425 provides that a private entity may not compile or disseminate information subject to an order of non-disclosure. That section only allows prosecution by the Attorney-General or a prosecutor's office. A District court may give non-compliant private entities a warning, and if the entity has been warned previously, it may assess a up to a $500 penalty for each subsequent violation. However, Govt §411.081(j) specifies an additional penalty for companies that violate Govt §552.1425. DPS is required to stop releasing information to companies which have been found by a court to be non-compliant on 5 or more occasions. The ban lasts until the first anniversary of the last violation. Possibly, private lawyers might be able to get a judge to issue a show cause order and cite non-compliant entities for contempt, but there is no authority for that position. So, while we know that private entities are subject to an order of non-disclosure, enforcement is sorely lacking.

Clients must be warned that sealing their records is no panacea. It will generally do the job for employment or housing, but law enforcement and nearly any state agency dealing with licensing of any profession, education, or regulation of specific fields will still see the information. Further, we cannot guarantee that private entities will stop reporting sealed information and we have no real means of stopping them.

Knowing when a client can get their record sealed, how easy it can be to achieve, and the limits of its effectiveness can be a powerful tool to add value to a criminal defense practice. As this area grows, both because courts will promote the idea of non-disclosure and as the employment situation improves, the defense community is well situated to give our clients a second chance not only in the courtroom, but in their daily lives. Non-disclosure is, presently, only a second-best option for that second chance but it is the best that we can do for many of our clients and worth our fee to help them.