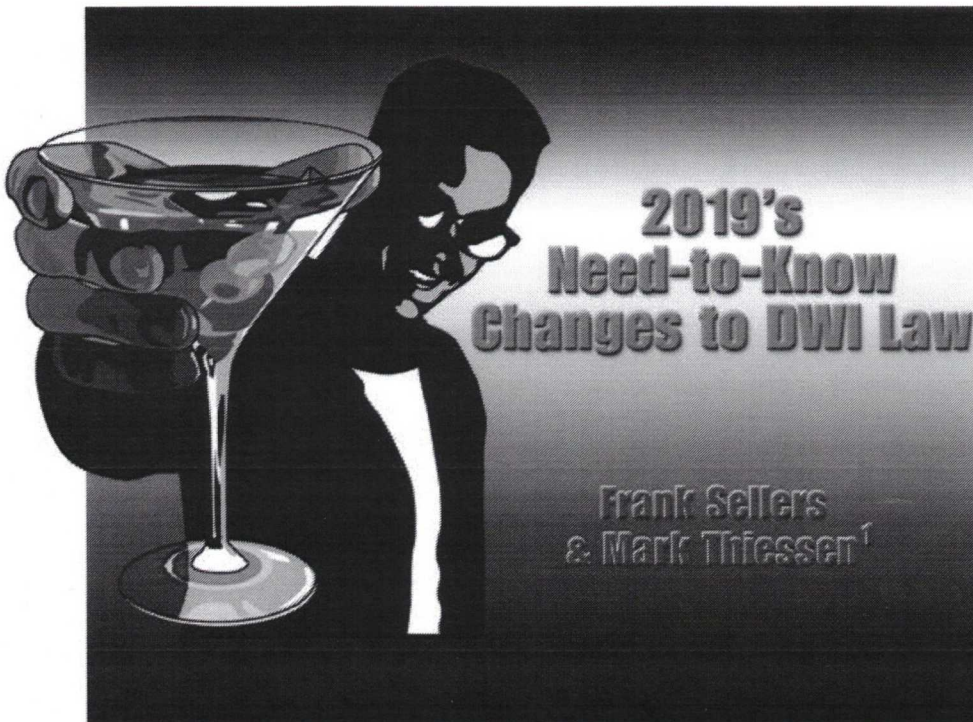




Online



2019's Need-to-Know Changes to DWI Law

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Together, House Bills 2048² and 3582³ refashioned Texas DWI law and punishment—and finally abolished surcharges. Kind of.

Now, a person “finally convicted” of DWI “shall” pay a fine of \$3,000 for a first conviction, \$4,500 for a second, and \$6,000 for all DWI convictions over 0.15. Presumably, a person is not finally convicted if they receive a newly created “deferred adjudication” on their DWI. The legislature also slightly altered and expanded nondisclosure eligibility. This paper overviews the changes to the new DWI laws.

New Interlock Bond Requirements

For the following DWI accusations, the judge or magistrate shall order both 1) that defendant’s vehicle be equipped with an interlock device, and 2) that defendant not operate any motor vehicle unless equipped with an interlock device:⁴

Subsequent offenses under

- 49.04 [Driving While Intoxicated];
- 49.05 [Flying While Intoxicated]; or
- 49.06 [Boating While Intoxicated].

Any offense under

- 49.045 [DWI w/ Child Passenger],
- 49.07 [Intoxication Assault], or
- 49.08 [Intoxication Manslaughter].

If ordered, the defendant must have the interlock installed within 30 days.⁵

If the magistrate finds, however, that an interlock device is not in the best interest of justice, the magistrate “may not” order one installed.⁶

“Deferred Adjudication”

Dubbed “DINO” (deferred in name only), HB 3582 creates deferred adjudication for qualifying DWIs. Specifically, it

amends Article 42A.102(b) of the Code of Criminal Procedure to allow judges to grant deferred adjudication.⁷

A person is eligible for deferred unless the person:

(1) is charged with an offense under 49.04 or 49.06 [DWI or BWI], and at the time of the offense either:

- Held a commercial driver's license or learner's permit; or
- The defendant's alcohol concentration was 0.15 or more;

(2) is charged with an offense under

- 49.045 [DWI w/ Child Passenger];
- 49.05 [Flying While Intoxicated];
- 49.065 [Assembling/Operating Amusement Ride While Intoxicated];
- 49.07 [Intoxication Assault]; or
- 49.08 [Intoxication Manslaughter];

(3) is charged with an offense for which punishment may be increased under Section 49.09 [Enhancements for Prior Intoxication Convictions]; or

(4) is charged with an offense for which punishment may be increased under Section 481.134(c), (d), (e), or (f) [School Zone Enhancements], Health and Safety Code, if it is shown that the defendant has been previously convicted of an offense for which punishment was increased under any one of those subsections[.]

But, like in family violence cases, this is not a true deferred. Now, under Penal Code section 49.09(g), "a person is considered to have been convicted of [DWI or BWI] if the person was placed on deferred adjudication community supervision for the offense[.]" In other words, the deferred may still be used for enhancement purposes.

Under disqualification three above, a person is not eligible for deferred on a DWI second. But—as some on the listserve have noted—if a prosecutor would be willing, a person could potentially obtain a deferred by pleading a second DWI as another DWI-First—i.e., by striking the enhancement language under Tex. Penal Code §49.09 at the time of the plea.

Deferred Adjudication Interlock Requirements

HB 3582 also amended Article 42A.408, which requires ignition interlock devices as a condition of supervision.⁸ The new law makes three additions.

First, new subsection (e-1) makes ignition interlock devices a mandatory condition (subject to a financial exception, discussed below) when the judge grants a defendant deferred adjudication community supervision for an offense under 49.04 or 49.06 [DWI or BWI].

- The device must be “installed on the motor vehicle owned by . . . **or** . . . most regularly driven by the defendant”; and
- “the defendant [must] not operate any motor vehicle that is not equipped with that device.”

Second, (e-1) discounts interlock costs to indigent defendants. Upon a proper showing, the judge may find indigence and reduce interlock costs by:

- waiving the installation fee; and
- reducing monthly monitoring fees by half.

These discounts do not apply if your client blows hot. Any additional fees incurred if the device detects alcohol on the breath of the person attempting to operate the vehicle will not be reduced.⁹

Third, (e-2) provides an exception to the mandatory interlock condition. This exception applies if the judge:

- based on a controlled substance and alcohol evaluation of the defendant,
- finds and enters in the record,
- that restricting the defendant to the use of an interlock is not necessary for the safety of the community.

Deferred Adjudication Nondisclosure Eligibility

HB 3582 amended the nondisclosure statutes to make a separate section governing deferred adjudications for certain intoxication offenses.¹⁰ The new statute, Government Code §411.0726, applies exclusively to DWI and BWI deferred adjudications—without an affirmative finding described in Article 42A.105(f).¹¹

Now, to receive a DWI or BWI nondisclosure, a person must

- receive a discharge and dismissal under Article 42A.111, Code of Criminal Procedure;
- satisfy the requirements of Section 411.074 [basic qualifications for all nondisclosures];
- have zero prior convictions or deferred adjudications (except for traffic offenses punishable by fine only);¹²
- wait two years from the date of completion of the deferred adjudication community supervision and the discharge and dismissal of the case;¹³ and
- not have evidence presented “sufficient to the court demonstrating that the commission of the offense for which the order is sought resulted in a motor vehicle accident involving another person, including a passenger in a motor vehicle operated by the person seeking the order.”¹⁴

Mandatory Fines for Those “Finally Convicted”

Described as a “superfine,” HB 2048 adds new §709.001 to the Transportation Code (Traffic Fine for Conviction of Certain Intoxicated Driver Offenses), which financially disincentivizes people “finally convicted” of an “offense relating to the operating of a motor vehicle while intoxicated”:¹⁵

- \$3,000 for the first conviction within a 36-month period;
- \$4,500 for a second or subsequent conviction within a 36-month period; and
- \$6,000 for a first or subsequent conviction if it is shown on the trial of the offense that an analysis of a specimen of the person's blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed.

What “finally convicted” means is less clear. According to the TCDLA Legislative Committee, both TDCLA and TDCAA agree the superfine only applies to final convictions—adjudicated jail sentences only.

But the actual language of the new statute suggests otherwise. Unlike other sentencing enhancements, simply probated—but not deferred—sentences still mean final convictions.¹⁶ Your client will still be assessed the fine on a straight probation. In short, if you plead your client guilty or a jury finds your client guilty of DWI, they could be facing a minimum mandatory fine of \$3,000—at least until the “finally convicted” issue is settled.

Interestingly, the counties now responsible for enforcing these impressive fines keep only 4% of the money.¹⁷

Upon Showing of Indigence, Court Shall Waive Fines and Costs

Upon a finding of indigence, under §709.001, the court **shall** waive all these new fines and costs.¹⁸ The statute specifically provides that the following documents can support a finding of indigence:¹⁹

- Most recent federal income tax return showing the person's household income does not exceed 125 percent of the applicable income level established by federal poverty guidelines;
- Most recent pay stub showing the person's household income does not exceed 125 percent of the applicable income level established by federal poverty guidelines; or

- Proof of state, federal, or school assistance, including:
 - Food stamp program;
 - Special supplemental nutrition program for women, infants, and children;
 - Medical assistance program under Tex. Hum. Res. Code ch. 32;
 - Child health plan program under Tex. Health. Saf. Code ch. 62; and
 - National free or reduced lunch program.

Sayonara Surcharges (and Related Suspensions)

HB 2048 deletes the driver responsibility program from the Transportation Code.²⁰ It both forgives all unpaid surcharges and reinstates licenses suspended due to unpaid surcharges.

- The repeal by this Act of Chapter 708, Transportation Code, applies to any surcharge pending on the effective date of this Act, regardless of whether the surcharge was imposed before that date.²¹
- The Department of Public Safety shall reinstate any driver's license that is suspended under Section 708.152, Transportation Code, as of the effective date of this Act if the only reason the driver's license was suspended is a failure to pay a surcharge under Chapter 708, Transportation Code.²²

Effective Dates

Both HB 3582 and 2048 took effect on September 1, 2019.²³ The punishment amendments apply only to offenses committed on or after that date.²⁴ Because the nondisclosure amendments are silent about their operation, unfortunately they are “presumed to be prospective in operation.”²⁵

Important Takeaways

- Interlock now required on all felony DWI-related offenses, and subsequent DWIs, but magistrates may not require if not in the interest of justice;

- Deferred adjudication available only on DWI-first and under 0.15 offenses (plus numerous other disqualifying factors);
- Changes to nondisclosure eligibility;
- Mandatory massive fines upon “final convictions” for DWI; and
- Surcharges and related suspensions are eliminated.

Footnotes

1. The authors would like to thank Dustin Hoffman, Law Clerk at Westfall Sellers and 2020 Texas A&M School of Law J.D. Candidate, for helping to write this article. ↵
2. Acts 2019, 86th Leg., R.S., 2019 Tex. Sess. Law Serv. ch. 1094 (West, Westlaw) (hereinafter HB 2048). ↵
3. Acts 2019, 86th Leg., R.S., 2019 Tex. Sess. Law Serv. ch. 1298 (West, Westlaw) [hereinafter HB 3582]. ↵
4. HB 3582 §1 (codified at Tex. Code Crim. Proc. Ann. art. 17.441(a)). ↵
5. Tex. Code Crim. Proc. Ann. art. 17.441(c) (West 2019). ↵
6. Id. art. 17.441(b). ↵
7. HB 3582 §2 (codified at Tex. Code Crim. Proc. Ann. art. 42A.102(b)). ↵
8. Id. §3 (codified at Tex. Code Crim. Proc. Ann. art. 42A.408(e-1)–(e-2)). ↵
9. Id. ↵
10. See id. §§4–6. ↵
11. Id. §6 (codified at Tex. Gov’t Code §411.0726(a)). The cross-referenced provision reads: “If a judge places on deferred adjudication community supervision a defendant charged with a misdemeanor other than a misdemeanor under Chapter 20 [kidnapping, unlawful restraint, & smuggling of persons], 21 [sexual offenses], 22 [assaultive offenses], 25 [offenses against the family], 42 [disorderly conduct & related offenses], 43 [public indecency], 46 [weapons offenses], or 71 [organized crime], Penal Code, the judge shall make an affirmative finding of fact and file a statement of that affirmative finding with the papers in the case if the judge determines that it is not in the best interest of justice that the defendant receive an automatic order of nondisclosure under Section 411.072 [Procedure for Deferred Adjudication Community Supervision; Certain Nonviolent

Misdemeanors], Government Code.” Tex. Code Crim. Proc. Ann. art. 42A.105(f). ↵

12. HB 3582 §6 (codified at Tex. Gov’t Code §411.0726(b)). ↵
13. Id. (codified at Tex. Gov’t Code §411.0726(f)). ↵
14. Id. (codified at Tex. Gov’t Code §411.0726(e)). ↵
15. See HB 2048 §14 (codified at Tex. Transp. Code §709.001 et seq.). ↵
16. Cf. *Ex parte Pue*, 552 S.W.3d 226, 235 (Tex. Crim. App.), reh’g denied (May 23, 2018) (“In this case, because Applicant had been placed on probation for his 2007 California felony conviction, and probation had not been revoked at the time that he was sentenced in this case in 2008, his 2007 California conviction was not “final” under Texas law, and thus it could not be used to enhance his sentence in this case.”). ↵
17. See House Comm. on Homeland Sec. & Pub. Safety, Bill Analysis, Tex. H.B. 2048, 86th Leg., R.S., at 4 (2019) (“A county or municipality could retain 4 percent of the collected money as a service fee and could retain any accrued interest. . . Out of the fines collected for the offense of driving while intoxicated, 80 percent would be deposited to the general revenue fund and 20 percent would be deposited to the Designated Trauma Facility and EMS Account.”). ↵
18. HB 2048 §14 (codified at Tex. Transp. Code §709.001(c)). ↵
19. Id. (codified at Tex. Transp. Code §709.001(d)). ↵
20. Id. §15. ↵
21. Id. §16(a). ↵
22. Id. §16(b). ↵
23. HB 3582 §9; HB 2048 §17. ↵
24. HB 3582 §8(b). ↵
25. Tex. Gov’t Code §311.022 (West 2019). ↵

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