

## **Consideration of Amendments to the Board's Criminal History Review Policy**

**Summary of Request:** Consider amending the Board's current process for reviewing minor criminal history.

**Background:** At its January and July, 2008, meetings, the Board considered and approved a process for reviewing an individual's minor criminal history. The Board determined that certain misdemeanor offenses, which historically had little impact on the ability of an individual to practice nursing safely and that rarely led to a Board investigation or probationary order, could be reviewed by Board Staff and, if certain conditions were met, could be closed without further investigation or Board action.

At its April, 2010, meeting, the Board again considered its process for reviewing minor criminal history and determined that the policy should be expanded to include two additional categories of offenses that could be closed without further investigation or Board action, if certain conditions were met. A copy of the Board's current policy for reviewing minor criminal history, which includes the revisions from the April, 2010, Board meeting, is attached hereto as Attachment "A" for reference.

During the current legislative session, the Board's process for reviewing minor criminal history has been questioned by the Texas Nurses Association (TNA). TNA originally wished to pursue legislation that would limit the Board's ability to review an individual's minor criminal history, including certain Class A, B, and C misdemeanors, and which would prohibit the Board from taking action against an individual for the non-disclosure of said minor criminal history. Although Board Staff agrees that certain class B and C misdemeanors could be closed without further investigation or Board action, Staff feels that certain Class A misdemeanors should continue to be reviewed by the Board, that certain patterns of conduct should continue to be identified and reviewed by the Board, and that the Board should maintain its ability to take action against an individual for the non-disclosure of prior criminal history.

TNA representatives and Board Staff met to discuss these issues and discussed legislation, as well as alternatives that did not involve the passing of new legislation. The parties agreed to present a proposed revised criminal history review policy to the Board for its consideration. The proposed criminal history review policy mirrors in some respects the proposed legislation wanted by TNA and is attached hereto as Attachment "B".

Under the proposed policy, an individual must disclose all prior criminal history, including convictions and deferred adjudications, to the Board on all applications and renewal forms. The Board will not take action against an individual for any Class B or C

misdemeanor for which a judicial order of conviction or deferred adjudication was entered more than five years before the individual applies for initial licensure or before the Board learns of a licensee's conviction or deferred adjudication.

The Board will not take action against an individual for any Class A misdemeanor for which a judicial order of conviction or deferred adjudication was entered more than ten years before the individual applies for initial licensure or before the Board learns of a licensee's conviction or deferred adjudication. A list of Class A, B, and C misdemeanors is attached hereto as Attachment "C" for reference.

There are several exceptions to the proposed policy. First, the Board retains its right to take action against an individual for any Class A, B, or C misdemeanor, *regardless of its age*, if the misdemeanor is part of a pattern of conduct, which shall be determined by the Board. Second, because Class A misdemeanors can be serious in nature, the Board retains its right to take action against an individual for any Class A misdemeanor identified in Board rule, *regardless of the age of the offense*. Third, the Board retains its right to take action against an individual for the non-disclosure of *any criminal offense*, regardless of when the offense occurred.

Finally, individuals will not be required to provide documentation, such as court records, to the Board regarding an offense, unless the Board requests such documentation for good cause, as determined by the Board.

Staff believes the proposed policy is a good compromise that will:

- alleviate TNA's concern that minor criminal offenses that have little impact on an individual's ability to practice nursing safely will impede an individual's ability to become licensed or retain a license;
- allow the Board to review and take action on patterns of conduct that could impede an individual's ability to practice safely;
- allow the Board to determine if any Class A misdemeanors should be exempted from the policy;
- and allow the Board to take action for an individual's non-disclosure of criminal history.

**Staff's Recommendation:** Approve the revised criminal history review policy attached hereto as Attachment "B", effective immediately.

## Attachment "A"

### Minor Criminal History Review Policy

Below is the list of the criminal behavior (conviction/deferred adjudication) which rarely results in an investigation or further Board action:

1. One misdemeanor DWI/DUI (not on probation)
2. One misdemeanor offense of possession of marijuana
3. Up to two misdemeanor theft by check
4. One misdemeanor domestic/ family violence
5. One misdemeanor theft over \$20 less than \$250 (normally assoc. with shoplifting)
6. One misdemeanor shop lifting
7. One misdemeanor criminal mischief
8. Misdemeanor graffiti
9. One misdemeanor criminal trespass
10. One misdemeanor disorderly conduct
11. Up to two misdemeanor Public Intoxication
12. Up to two misdemeanor Pan handling
13. Misdemeanor "loud noise" violations
14. One misdemeanor Reckless driving
15. Misdemeanor minor in possession of tobacco
16. One misdemeanor selling alcohol to a minor
17. Failure to appear
18. Vehicular molestation (slashing tires)
19. An arrest for a misdemeanor (must be a misdemeanor included in this list) that has been dismissed outright or where prosecution has been denied
20. Up to three prior misdemeanors (each misdemeanor must be a misdemeanor included in this list), where the most recent misdemeanor is at least 10 years old

Each positive hit for criminal behavior will not be closed until such time as the individual has provided a copy of the underlying court documents or an explanation as to why the documents are not available. The individual must provide a letter of explanation regarding the criminal charge, along with any other material to verify the minor nature of the conduct or the lack of nexus to nursing practice.

Before a matter is closed without further investigation or action, Staff will review the documents, information, and explanation. From a cumulative review, the matter will not be closed unless it is established:

1. There appears to be no material omissions or misrepresentations;
2. The incident is isolated or minor;
3. There is no recency of conduct or other evidence of a failure to rehabilitate; and
4. There is no reasonable basis to conclude the behavior will affect the individual's ability to practice nursing safely.

## Attachment "B"

### Texas Board of Nursing Criminal History Review Policy (Proposed for Adoption April 28, 2011)

The Board has determined that certain misdemeanor offenses have little impact on the ability of an individual to practice nursing safely and pose little risk of harm to the public. In such cases, the Board believes it is appropriate to close the matter without action against the individual, provided that the individual fully discloses the conviction or deferred adjudication to the Board on all relevant application and renewal forms.

#### Class B and C Misdemeanors

The Board will not take disciplinary action against an applicant/petitioner for a Class B or C misdemeanor for which a judicial order for a conviction or deferred adjudication was entered more than five years before the individual applies for initial licensure.

The Board will not take disciplinary action against a licensee for a Class B or C misdemeanor for which a judicial order for a conviction or deferred adjudication was entered more than five years before the Board learns of the conviction or deferred adjudication.

#### Class A Misdemeanors

The Board will not take disciplinary action against an applicant/petitioner for a Class A misdemeanor for which a judicial order for a conviction or deferred adjudication was entered more than ten years before the individual applies for initial licensure.

The Board will not take disciplinary action against a licensee for a Class A misdemeanor for which a judicial order for a conviction or deferred adjudication was entered more than ten years before the Board learns of the conviction or deferred adjudication.

#### Exceptions

The Board may take disciplinary action against an applicant/petitioner or licensee for a Class A, B, or C misdemeanor, regardless of when the judicial order for the conviction or deferred adjudication of the misdemeanor was entered, if the misdemeanor is part of a pattern of conduct.

The Board may take disciplinary action against an applicant/petitioner or licensee for a Class A misdemeanor identified in Board rule, regardless of when the conviction or deferred adjudication for the misdemeanor offense occurred.

#### Non-disclosure

This policy does not prevent the Board from taking disciplinary action against an applicant/petitioner or licensee for the non-disclosure of any criminal offense in violation of the Occupations Code §301.452(b)(2), regardless of when the offense occurred.

#### Providing Documentation

An individual will not be required to provide documentation relating to a misdemeanor offense unless the Board requests such documentation for good cause.



**TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION**

**TDCAA Quick Law 2009 by Ken Anderson and John Bradley**

**CRIME CLASSIFICATIONS**

\* indicates new laws for crimes committed after August 31, 2009

**Capital Felonies**

Agg. Sexual Assault w/enhancing facts (2nd offender)  
Capital Murder

**First Degree Felonies**

Agg. Assault (of public servant)  
Agg. Assault (dw + sbi + fv)  
Agg. Kidnapping (no voluntary safe release)  
Agg. Robbery  
Agg. Sexual Assault (adult or child) (min. 25 yrs w/enhancing facts)  
Attempted Capital Murder  
Arson (of habitation or place of assembly or worship)  
Bigamy (if V < 16)  
Burg. of Habitation (with intent to commit felony other than theft)  
Continuous Sexual Abuse of Child (min. 25 years)  
\*Directing Activities of Crim. Street Gang  
Escape (dw or sbi)  
Fraudulent Use or Possession of Identifying Info (≥50 items)  
Injury to Child, Elderly, or Disabled (int. or knowing sbi)  
Murder (no sudden passion)  
Sexual Assault (if marriage to V would be bigamy)  
Sexual Performance by Child (by inducing, child <14)  
Solicitation of Capital Murder  
Tampering w/Elec. Voting Machine  
Trafficking of Persons (if <14 or death)

**Second Degree Felonies**

Agg. Assault (not of public servant)  
Agg. Kidnapping (safe release)  
Arson (not place of worship or home)  
\*Assault (fv + 2nd off. + suffocation/strangulation)  
Bigamy (if V ≥16)  
Bribery  
Burg. of a Habitation (intent to commit, commit, or attempt theft or assault)  
Escape (by causing bi)  
Evading (death of another)  
\*Firearm Smuggling (>3)  
Fraudulent Use or Poss. of Identifying Information (10-≤50 items)  
Improper Relationship (teacher/student)  
Improper Sexual Activity (in cust. w/juv.)  
Indecency w/Child (contact)  
Injury to a Child, Elderly, or Disabled (reckless sbi or \*int. or kn. bi to disabled by employee)  
Intoxication Manslaughter  
Kidnapping (risk of sbi)  
Manslaughter (recklessly)  
Murder (w/sudden passion)  
Online Solicitation (if V ≤ 14 or w/intent to engage in sex)  
\*Prohibited Sexual Conduct (if V is direct ancestor or descendant)  
Robbery  
Sexual Assault  
Sexual Performance (by inducing child 14-18; or by directing child)  
Stalking-2nd  
Tampering w/Evidence (human corpse)  
Trafficking of Persons

**Third Degree Felonies**

Assault (of ps, 2nd FV, or \*by strangulation/suffocation)  
Agg. Perjury  
Arson (reckless + MCS + bi or death)  
Bail Jumping (felony arrest)  
\*Continuous Violence against Family  
Deadly Conduct (w/firearm)  
DWI-3rd  
Enticing Child (int. felony)  
Escape (from felony offense)  
Evading (2nd w/vehicle or sbi)  
Failure to Stop & Render Aid (sbi or d)  
\*Firearm Smuggling (≤3)  
Fraud. Poss. of Ident. Info. (5-<10 items)  
Harassment (by prisoner)  
Impropr. Cont. w/Victim (while confined)  
Indecency w/Child (exposure)  
Injury to Child, Elderly, or Disabled (int. or kn. bi or crim. neg. omission + exploit.)  
Intoxication Assault  
Kidnapping  
Obstruction/Retaliation  
\*Online Harassment (by internet impersonation)  
Online Solicit. of Minor (by comm. or distrib. of material)  
Poss. of Child Pornography  
Poss. of Firearm (by felon)  
Poss. of Proh. Weap. (not swblade/knuckles)  
Poss. of Weapon (prohibited place)  
Prohibited Sexual Conduct  
Prohibited Sub./Item in Correctional Facility  
Sex. Perform. by Child (directing, V ≥14)  
Stalking-1st  
Tampering with Evid. (other than corpse)  
Terroristic Threat (if public utility, public in fear of sbi or influence gov't)  
UCW (on licensed premise)  
Unlawful Restraint (risk of sbi or of ps or by inmate)  
Violation of Ct. Order/Bond in FV Case-3rd

**State Jail Felonies**

\*Arson (reckless damage or bi)  
Burglary of a Building  
Burglary of a Vehicle (3rd)  
Credit/Debit Card Abuse  
Criminal Nonsupport  
Criminally Negligent Homicide  
DWI (w/child passenger)  
Evading (w/vehicle or \*2nd offense)  
False Alarm or Report  
Forgery (commercial instrument)  
Fraudulent Use or Possession of Identifying Information (<5 items)  
Improper Photography or Visual Recording  
Improper Sexual Activity (in custody w/adult)  
Injury to a Child, Elderly or Disabled (reckless bi or crim. neg. sbi)  
Interference with Child Custody  
\*Interference w/Radio Freq. (to facilitate or interfere)  
Interference with Rights of Guardian  
Prostitution-4th  
Tampering with Witness  
Terroristic Threat (if ≥ \$1,500 loss)  
Theft (3rd or firearm or from person)  
Unauth. Absence from CCF or CC  
Unauthorized Use of a Vehicle  
Unlawful Restraint (of child)

For some offenses, there are too many variations to list here. Consult the Penal Code for specific enhancing conduct (e.g., engaging in organized criminal activity).

**NOTE:** For more information on sentencing laws in Texas, see *The Perfect Plea* (TDCAA ©2008), by John Bradley. To order, go to <www.tdcaa.com>.

**Class A Misdemeanors**

Abuse of Corpse  
Assault (by causing bodily injury)  
Bail Jumping (from misd. A or B)  
Burglary of Coin Op Machine  
Burglary of Vehicle (min 6 mo. on 2nd)  
Crim. Trespass (of hab. or w/dw)  
Deadly Conduct (not firearm)  
DWT-2nd (30-day minimum)  
Escape (misd. arrest)  
Evading (no vehicle or injury)  
Failure to Identify (false info/fugitive)  
Failure to Report Felony  
Gambling Promotion  
Harassment-2nd  
Interference with 911 phone call  
\*Interference w/Radio Frequency  
Improper Contact with Victim  
Obscenity  
\*Online Harassment (by msg. spoofing)  
Perjury  
Poss./Manf. Crim. Instr. for Theft  
Poss. Firearm (prior FV conviction)  
Proh Weapon (swblade/knuckles)  
Public Lewdness  
Resisting Arrest  
Stealing Check  
Terroristic Threat (if against fam. memb. or ps or interrupts occupation)  
Unlawful Carrying Weapon  
Unlawful Restraint (not child)  
Violation of Civil Rights (in custody)  
Violation of Court Order/Bond in FV Case

**Class B Misdemeanors**

Assault (by threat or offensive contact with sports participant)  
Contraband in CF (by employee)  
Criminal Trespass (not habitation)  
Disorderly Conduct (firearm)  
DWT-1st (3-day minimum)  
Enticing a Child  
Evading (no vehicle or injury)  
Failure to Identify (false info/not fugitive or no info/fugitive)  
False Report to Peace Officer  
Fraudulent Degree  
Harassment-1st  
Illumination of Aircraft (w/impairment)  
Issuance of Bad Check (child support)  
Indecent Exposure  
Prostitution  
Riot  
Silent or Abuse Calls to 9-1-1 Service  
Terroristic Threat

**Class C Misdemeanors**

Assault (by threat or offensive contact)  
Bail Jumping (from misd. C)  
Contraband in CF (not by employee)  
Criminal Trespass (of agricultural land)  
Disorderly Conduct (no firearm)  
Driving Under the Influence of Alcohol by Minor  
Failure to Identify (no info/not fugitive)  
Gambling  
Illumination of Aircraft  
Issuance of a Bad Check  
Obscene Display or Distribution  
Leaving Child in Vehicle  
Minor in Possession of Alcohol  
Minor in Possession of Tobacco  
Possession of Alcoholic Bev. in Motor Vehicle  
Preventing Execution of Civil Process  
Public Intoxication  
Use of Laser Pointers

**Controlled Substances**

Delivery (PG - 1)  
< 1 g = SJF  
1 - < 4 g = 2nd degree  
4 - < 200 g = 1st degree  
200 - < 400 g = 10-99 or life/\$100k  
400 g + = 15-99 or life/\$250k  
Possession (PG - 1)  
< 1 g = SJF  
1 - < 4 g = 3rd degree  
4 - 200 g = 2nd degree  
200 - < 400 g = 1st degree  
400 g + = 10-99 or life/\$100k  
Delivery of Marijuana  
≤ 1/4 oz = Class B  
≤ 1/4 oz (remuneration) = Class A  
> 1/4 oz - 5 lb = SJF  
> 5 - 50 lbs = 2nd degree  
> 50 - 2,000 lbs = 1st degree  
> 2,000 + lbs = 10-99 or life/\$100k  
Possession of Marijuana  
≤ 2 oz = Class B  
> 2 - 4 oz = Class A  
> 4 oz - 5 lbs = SJF  
> 5 - 50 lbs = 3rd degree  
> 50 - 2,000 lbs = 2nd degree  
> 2,000 + lbs = 5-99 or life/\$50k  
Delivery of LSD (PG-1A)  
(by abuse units)  
< 20 = SJF  
20-79 = 2nd degree  
80-3,999 = 1st degree  
≥ 4,000 = 15-99 or life/\$250K  
Possession of LSD (PG-1A)  
(by abuse units)  
< 20 = SJF  
20-79 = 3rd degree  
80-3,999 = 2nd degree  
4,000-7,999 = 1st degree  
≥ 8,000 = 15-99 or life/\$250K

**Value Ladder (Theft, Criminal Mischief, Graffiti, Money Laundering, Insurance Fraud, Medicaid Fraud, Organized Retail Theft, etc.)**

< \$20 (theft of prop. by check)	Class C Misdemeanor
\$20 - < \$500 (theft of prop. by check)	Class B Misdemeanor
< \$50	Class C Misdemeanor
\$50 - < \$500	Class B Misdemeanor
\$500 - < \$1,500	Class A Misdemeanor
\$1,500 - < \$20,000	State Jail Felony
\$20,000 - < \$100,000	3rd Degree Felony
\$100,000 - < \$200,000	2nd Degree Felony
\$200,000 +	1st Degree Felony

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**TDCAA Quick Law 2009 by Ken Anderson and John Bradley**  
**PUNISHMENT RANGES**

**CAPITAL FELONY**

- death or life imprisonment

**COMMUNITY SUPERVISION (CS)**

Ineligible for CS

**FIRST DEGREE FELONY**

- confinement for life or a term from 5 to 99 years in prison; and
- an optional fine not to exceed \$10,000

- Up to 10 years of deferred adjudication CS
- From 5-10 years of postconviction CS
- Minimum 5 years CS for certain sex offenses (CCP 42.12, §13B(b))
- Up to 180 days in county jail as condition

**SECOND DEGREE FELONY**

- confinement for a term from 2 to 20 years in prison; and
- an optional fine not to exceed \$10,000

- Up to 10 years of deferred adjudication CS
- From 2-10 years of postconviction CS
- Minimum 5 years CS for certain sex offenses (CCP 42.12, §13B(b))
- Up to 180 days in county jail as condition

**THIRD DEGREE FELONY**

- confinement for a term from 2 to 10 years in prison; and
- an optional fine not to exceed \$10,000

- Up to 10 years of deferred adjudication CS
- From 2-10 years of postconviction CS
- Minimum 5 years CS for certain sex offenses (CCP 42.12, §13B(b))
- For drug and Title 7 offense after 8/31/07 (other than §33.021), initially from 2-5 years of postconviction CS (up to 10 years with extension)
- Up to 180 days in county jail as condition

**STATE JAIL FELONY**

- confinement for a term from 180 days to 2 years in a state jail; and
- an optional fine not to exceed \$10,000, or
- Class A misdemeanor punishment under TEX. PEN. CODE §12.44(a) (felony conviction) or §12.44(b) (misdemeanor conviction), but only if prosecutor consents

**Mandatory postconviction CS if:**

- drug possession (not delivery);
- ≤5 abuse units if LSD; or
- ≤1 lb. if marijuana; and
- no prior felony conviction, other than under §12.44(a) (for offense after 8/31/07)

**Note:** Upon violation of deferred adjudication for drug possession offense committed after 8/31/07, judge no longer must place defendant on postconviction CS. Judge may impose direct CS. Judge may impose direct sentence or post-conviction CS (CCP 42.12, §15(a)(1)).

- Up to 10 years of deferred adjudication CS
- Initially from 2-5 years of postconviction CS (up to 10 years with extension)
- Up to 180 days in county jail as condition
- From 90-180 days in state jail as condition
- From 90-365 days in state jail as condition if offense is delivery of marijuana or penalty group 1, 1A, or 2 controlled substance
- Also, 90-180 days in state jail as a condition following violation of condition of supervision

**CLASS A MISDEMEANOR**

- confinement for term not to exceed 1 year in county jail; and/or maximum \$4,000 fine

- Up to 2 years of CS or 3 years with extension, (min. 1 yr. for BMV 2nd after 8/31/07)

**CLASS B MISDEMEANOR**

- confinement for term not to exceed 180 days in county jail; and/or maximum \$2,000 fine

- Up to 2 years of CS or 3 years with extension

**CLASS C MISDEMEANOR**

- no confinement
- a fine not to exceed \$500 (up to 180 days of deferred disposition)

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**NO DEFERRED ADJUDICATION**

**Art. 42.12, §5(d), CCP**

- intoxication offenses (DWI w/child only if offense after 8/31/07)
- agg. sex. assault w/enhancing facts, continuous sexual abuse of child, repeat sex offender (offense after 8/31/07)
- indecency with a child, sexual assault, agg. sexual assault, if defendant has previously been placed on CS for one of those offenses
- second conviction for drug offense w/drug-free zone finding

**Note:** No early termination of CS (deferred or postconviction) for registered sex offender if placed on CS after 8/31/99.

**NO POSTCONVICTION CS**

• any felony if sentence exceeds 10 years

**From judge (CCP art. 42.12, §3g):**

- aggravated kidnapping
- aggravated robbery
- aggravated sexual assault
- indecency with child (contact) (offense after 8/31/93)
- murder (offense after 8/31/93)
- sexual assault of a child (offense after 8/31/95)
- sexual assault of an adult (offense after 8/31/99)
- injury to a child—1st degree (offense after 8/31/07)
- sexual performance by a child (offense after 8/31/07)
- crim. solicitation of child, 1st degree (offense after 8/31/09)
- any felony with affirmative DW finding

**From jury (CCP art. 42.12, §4):**

- any offense if prior felony conviction
- murder (offense after 8/31/07)
- sexual performance by a child (offense after 8/31/07)
- sex offenses after 8/31/07 with victim under 14 (indecency w/child by contact, agg. sexual assault, sexual assault, agg. kidnapping w/sexual intent)
- crim. solicitation of child, 1st degree (offense after 8/31/09)

**PAROLE ELIGIBILITY**

- No parole for capital felony (offense after 8/31/05), agg. sex. assault of child w/enhancing facts, or continuous sexual abuse of child
- 40 yr. minimum, without good conduct credit, for capital murder (offense 9/1/93–8/31/05)
- 40 yr. minimum for capital murder by juvenile if offense after 8/31/09
- 35 yr. minimum, without good conduct credit, for repeat sex offender (see below)
- 50%, without good conduct credit, or max. 30 yrs., for offenses listed under CCP 42.12, §3g or any felony w/affirm. DW finding (see list to left)
- 25%, including good conduct credit, for offenses not listed under CCP 42.12, §3g (see list to left)

**FELONY ENHANCEMENTS**

- 1 prior non-SJF felony conviction
- 3rd degree . . . . . 2nd degree
- 2nd degree . . . . . 1st degree
- 1st degree . . . . . 15-99 or life/\$10k
- 2 prior sequential non-SJF felony convictions
- 1st, 2nd, or 3rd degree . . . . . 25-99 or life
- 1 prior Class A or felony conviction
- Class A . . . 90 days - 1 yr. and/or max. \$4,000 fine
- 1 prior Class A, B, or felony conviction
- Class B . . . 30-180 days and/or max. \$2,000 fine

**SJF ENHANCEMENTS**

- DW finding or prior felony with DW finding, CCP 42.12, §3g felony; or PC §21.02 offense
- SJF . . . . . 3rd degree
- 2 prior final SJF convictions
- SJF . . . . . 3rd degree
- DW finding or prior 3g conviction or DW finding and one prior felony conviction
- SJF . . . . . 2nd degree
- 2 prior final felony convictions (in sequence)
- SJF . . . . . 2nd degree

**SEX OFFENDER ENHANCEMENTS**

- Repeat sex offender
- 1st or 2nd degree . . . . . life
- (See PC §12.42(c)(2) for list of eligible offenses; deferred adjudication and post-conviction CS = conviction.)
- Repeat continuous sexual abuse of child
- 25-99 or life . . . . . life (offense after 8/31/07)
- Repeat agg. sexual assault w/enhancing facts
- 25-99 or life . . . . . life (offense after 8/31/07)