

A clip-and-save guide to filing deadlines

The straightforward stuff

Filing	Notice	Mandatory?	Explanation
Joinder of offenses	30 days	Mandatory	Several offenses may be joined in a single trial if the offenses arose out of the same criminal episode and the State files written notice not less than 30 days prior to trial. Note that in <i>Sells v. State</i> , 121 S.W.3d 748 (Tex. Crim.App. 2003) the court advised that the 20-day notice requirement applied to any pre-trial hearing where the recorded statement was used in the hearing. Failure to comply with the requirement before the pretrial hearing rendered the exhibits inadmissible at that hearing, but as the State complied with the 20-day requirement with regard to trial, the exhibits were not rendered inadmissible under §3(a)(5) at trial. Texas Penal Code §3.02.
Electronically recorded statement of defendant	20 days	Mandatory	Not later than 20 days prior to the date of the proceeding, the defense must receive a complete copy of the defendant's electronically recorded statement. CCP Art 38.22. §3(a)(5).
Certificate of analysis; chain of custody	20 days	Mandatory	The State or the defense must file the certificate and/or affidavit with the clerk, not later than 20 days prior to trial, and provide a copy to opposing counsel. The opposing party must file written objections not later than 10 days prior to trial, or the certificate or affidavit are admissible in lieu of live testimony. Examples of an appropriate certificate and affidavit are provided in the statutes. CCP Arts. 38.41 & 38.42.
Outcry	14 days	Mandatory	If the child is 12 years or younger, before the 14th day prior to the proceeding, the defense attorney must receive the name of the outcry witness and a summary of the outcry statement. CCP Art. 38.072, §2(b)(1).
Business records affidavit	14 days	Mandatory	(1) the business records and accompanying affidavit must be on file with the clerk; and (2) the defense attorney is to be given notice that the records and affidavit have been filed. TRE 902(10)(a).



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Reading between the dicta

The following deadlines are “10 days, but” deadlines, meaning, each of them is best done 10 days prior to trial. But as a trial attorney myself, I recognize that what *should* be done and what actually *is* done rarely intersect. I sprinkled some caselaw into the explanations to launch your research for arguments to the bench should these circumstances arise inside of 10 days before trial. Interestingly enough, most of these statutes relate to each other. If you apply some common sense to what is and isn't fair regarding notice, you're really within the ballpark of the caselaw on every issue. We're not just prosecuting the defendant, we're protecting the conviction on appeal. Dicta suggests that the best policy is to “deliver to the defense a written list of all known incidents which are not explicitly set out in the indictment, but of which the prosecutor is aware and which might become admissible for any reason at any time.”¹ That response seems weighty for a mere advocate, but we are called to be a fiduciary to fundamental principles of fairness by the Supreme Court in *Berger v. United States*.²

Filing	Notice	Mandatory?	Explanation
Amendment to indictment	10 Days	Mandatory	An indictment may be amended at any time before the trial date; however, the defense attorney may request 10 days to respond. CCP Art. 28.10(a). Once the jury has been impaneled, the time to amend ends, regardless of when the actual trial on the merits begins. See <i>Hinojosa v. State</i> , 875 S.W.2d 339, 341-42 (Tex.App.—Corpus Christi 1994, no pet.).
404(b) extraneous offense notice	10 days	Suggested	After the defense files a motion requesting 404(b) material and secures a ruling on the motion (see <i>Espinosa</i> , 853 S.W.2d 85) or sends a request to the State asking for 404(b) information, the State must give reasonable notice in advance of trial of its intent to offer evidence of extraneous offenses in its case-in-chief; again, there is no mandatory time limit. Notice given at least 10 days prior to trial will be presumed “reasonable,” and notice should include the date, county, crime, and victim’s name. TRE 404(b).
Art. 37.07 §(3)(g)	10 days	Suggested	Notice requirements under Art. 37.07 are the same as for Rule 404(b). (CCP Art. 37.07 §(3)(g).) However, the courts have held that the notice is timely if provided prior to trial on punishment. Even though 10 days is presumed timely, the Court of Criminal Appeals, relying heavily on <i>Oyler v. Boyles</i> , held that “when a defendant has no defense to the enhancement allegation and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution.” <i>Villescas v. State</i> , 189 S.W.3d 290, 294 (Tex.Crim.App.2006).
Deadly weapon	10 days	Suggested	Notice of intent to seek an affirmative finding of a deadly weapon must be reasonable (there is no specific mandatory time limit; it has been suggested that this notice be given at least 10 days prior to trial). <i>Byrd v. State</i> , No. 2-07-167-CR, (Tex.App.—Fort Worth, August 29, 2008, pet. ref’d) (not designated for publication). If you end up in a jam for some reason, read <i>Byrd</i> and review the discussion of reasonable notice as the court looks through the relevant cases. Timeliness is not the only deciding factor. The notice must be in writing and reasonably calculated to inform the defendant that the use of a deadly weapon will be a fact issue at the time of prosecution. Whether notice is sufficient is very fact-driven. Two days notice was found insufficient with other factors considered in <i>Randle v. State</i> , No. 01-91-00793-CR (Tex.App.—Houston [1st Dist.] May 5th, 1994, writ ref’d) (not designated for publication). Remember that a deadly weapon notice is most often included as a paragraph on the indictment.
Art. 38.37 extraneous offense	10 days	Suggested	Applicable if any of the following offenses are committed against a child under 17: Chapter 21 Sex Offenses, Chapter 22 Assault Offenses; §25.02 Prohibited Sexual Contact; §43.25 Sexual Performance by Child; or an attempt or conspiracy to commit any of the above offenses. Notwithstanding Rules 404 and 405, Art. 38.37 allows the State to present evidence of extraneous offenses between the defendant and the same victim as in the indictment to show defendant’s state of mind or the defendant and victim’s relationship (the notice requirements are the same as Rule 404(b)). CCP Art. 38.37.
Rule 609(f) impeachment	10 days	Suggested	After timely written request from the defense, the State must give sufficient advance written notice of its intent to use prior convictions for impeachment; again, there is no mandatory time limit, but 10 days prior to trial should be sufficient. TRE 609(f).

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