

# 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.”<sup>1</sup> 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*.<sup>2</sup>

<b>Filing</b>	<b>Notice</b>	<b>Mandatory?</b>	<b>Explanation</b>
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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## Help from the IRS on gambling cases

The Internal Revenue Service offers training and support for law enforcement and prosecutors dealing with gambling cases. What follows is an email from IRS agent Joe Kingeter detailing what the agency can offer.

"We are making law enforcement and prosecutors aware of our program and the benefits we can provide. There is federal excise tax of 2 percent of the gross wagers accepted by an illegal bookmaker, specifically for the activities of illegal sports betting and illegal lotteries. Any old or new cases that you may be willing to submit to us would be greatly appreciated. There is no statute of limitation on these cases so it can be several years old. Some of the assistance that we offer are:

- **Training:** We have provided training to numerous law enforcement agencies as well as the FBI in the science of illegal sports betting and how to identify and interpret records, sports wagering theory, etc. I have been authorized to begin planning for a class to be held this spring. Our goal is to teach IRS agents and local law enforcement about sports betting. The IRS will pay the airfare, hotel, and food for those selected to attend.
- **Case support:** trained IRS Excise Agents for any assistance you may need with an ongoing criminal investigation of an illegal bookie.
- **Civil enforcement:** Assess the civil excise tax against any bookmaker whose case you may have (old or new). The tax applies to illegal sports betting and lotteries.
- **Contacts with law enforcement:** Excise Tax has been able to establish contacts with the FBI and numerous law enforcement agencies which we can provide if the need ever arises. We also do outreach presentations to any interested law enforcement agencies.

Please feel free to call me at 410/725-1559 or e-mail joseph.kingeter@irs.gov with any questions regarding our program. I greatly appreciate your time and consideration. ✱

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### Other notes

When deciding which material to disclose versus saving it for rebuttal, it would behoove each prosecutor to read through the concurring opinion in *Jaubert v. State*<sup>3</sup> by Justice Cochran, whose discussion includes a conversation regarding our duty not to seek a conviction but to see that justice is done, as well as a fine quote from the Supreme Court regarding U.S. Attorneys : "[H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>4</sup>

For notices of extraneous conduct we have the following language in the title of the notice as well as within the body:

The State hereby gives notice to the Court and to attorneys for the defense that the State intends to offer evidence of other crimes, wrongs and acts in the case-in-chief at the *guilt/innocence* phase in the above-numbered cause. This Notice is given pursuant to Rules 404(b) and 609(f), Texas Rules of Criminal Evidence, and Articles 37.07, § 3(g) and 38.37, § 3, Texas Code of Criminal Procedure.

The State also gives notice to the Court and to counsel for the defense that the State intends to offer evidence of other crimes, wrongs and acts in the case-in-chief at the *punishment* phase in the above-captioned cause. This evidence is to be tendered pursuant to Article 37.07, Section 3 of the Texas Code of Criminal Procedure.

Such other crimes, wrongs or acts that the State intends to introduce in its case-in-chief in the guilt phase and/or punishment phase against <defendant's name>, hereinafter "the defendant," are:

After which, we list out the appropriate acts, convictions, and offenses of the defendant.

You can also choose to add the following language at the end, if you have opened the file to the defense attorney:

The State also gives notice to the defendant and to counsel for the defendant of its intent to offer into evidence, for any purpose, at the guilt/innocence phase and the punishment phase, of every other conviction, crime, wrong and act identified by documents and records contained in the State's files, access to which the defense counsel has had since April 8, 2009.

Witness lists may also include the following language to provide proper notice before trial:

All witnesses listed in this notice may be called at trial to present evidence by the state as expert witnesses pursuant to Texas Rules of Evidence 702, 703, and 705.

Not all witnesses may be subpoenaed by the State. It is the defendant's responsibility to ensure the proper subpoena service and appearance of any and all witnesses he intends to call in his case in chief, rebuttal, or punishment phase(s) of trial. ✱

### Endnotes

<sup>1</sup> *Jaubert v. State*, 74 S.W.3d 1, 4 (Tex.Crim.App. 2002).

<sup>2</sup> 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

<sup>3</sup> 74 S.W.3d 1, 4 (Tex.Crim.App. 2002).

<sup>4</sup> *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).