The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

How Macho Man Randy Savage made me a better prosecutor

It's been more than seven years since that fateful, closed-door meeting with my boss. I've tried more cases than I can remember since then, yet I still remember this meeting like it was yesterday.

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

First, he politely asked me to close the door behind me. (That's almost never a good sign.)

"We need to talk about your closing argument," he said. "It was weak. Milquetoast. Anybody can get up there and talk about facts. You've got to get better."

His bluntness was like a punch to the gut. While he launched into needlepoint critique, I sat silently, half paying attention, half consumed by rage and embarrassment. I was really taken aback by how harshly he came down on me. But he had to—I was just that stubborn.

At that early stage of my career, I did a decent enough job of latching onto key facts and organizing them into an argument that made sense. The foundation and structure of a good closing argument was there. My delivery of that argument, however, was not. In retrospect, I would say my delivery fell somewhere between awful and uninspiring. I sounded a lot like a college professor giving a snooze-inducing lecture. What I needed to be—as my boss was trying to explain—was a storyteller.

In the weeks and months that followed, I studied. I read Thomas Mauet's *Trial Techniques* and Jim Perdue's *Winning with Stories*. I got better, but I didn't get good. I found time to observe just about every closing argument that took place in our little courthouse. I made another small improvement but still found myself a little lacking. I exhausted my local resources and began searching far and wide for something or someone to help me make the leap from fact-reciter to storyteller. Eventually, I found the help that I was looking for in an unlikely place far from the courtroom: The exaggerated and often ridiculous characters from the world of professional wrestling.

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Texas Prosecutors Society Class of 2018

On November 28, the Foundation hosted a reception honoring the newest inductees into the Texas Prosecutors Society.

By Rob Kepple
TDCAA and TDCAF Executive Director in Austin

The society was formed to lend enduring support to the training and services needed by Texas prosecutors and to honor those who have demonstrated a sustained commitment to prosecution and criminal justice. Below is a photo of those who were able to attend the TPS reception at November's Elected Prosecutor Conference.

Congratulations to you all! We are honored and humbled by your membership. ❇

Class of 2018

Traci Bennett
Grant Brenna
Celeste Byrom
Teresa Buess
Jack Choate
Keri Fuller
Dale Hanna
Jim Hicks
Michael Jarrett
Ken Magidson
Sonny McAfee
Margaret Moore
Jarvis Parsons
Kevin Petroff
Julie Renken
Erleigh Wiley
Justin Wood

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Honoring Lowell Thompson

Our profession mourns the untimely loss of **Lowell Thompson**, Navarro County Criminal District Attorney, who recently passed after a sudden illness.

By Rob Kepple
TDCAA Executive Director in Austin

He was well-respected and truly admired in his community, and he will be sorely missed.

You might recall that Lowell won the 2011 Lone Star Prosecutor award, which is given to those prosecutors "in the trenches" whose work on behalf of seeking justice might otherwise go unnoticed. (See a photo of him below, on the left, receiving the award from then-TDCAA President **Mike Fouts** on the right.) He had come to Austin to file a mandamus to prevent some proceedings by the New York Innocence Project relating to a Navarro County death penalty case. It was not something Lowell relished doing, but he felt he had an obligation to uphold the law.

It should surprise no one who knew Lowell that one of the condolences sent out to Lowell's family and community came from **Barry Scheck**, the Innocence Project Director, who went out of his way to remark about his admiration for Lowell. That tells you all you need to know about Lowell's character. He will be sorely missed.

When an office is vacant

What happens when an elected prosecutor office is vacant? Under §601.002 of the Texas Government Code, when there is a physical vacancy, the first assistant or chief deputy conducts the affairs of the office until a successor qualifies for it. If that vacancy occurs during a legislative session and the office is subject to Senate confirmation (such as a criminal district attorney position), then the authority of the first assistant to run the office ceases 21 days after the assistant took over the duties. As a practical matter, that means if an office has a physical vacancy when the legislature is *not* in session, the governor has until the 21st day of the next legislative session to make an appointment. Note, however, that if the officeholder resigns and is not otherwise disqualified from holding office (think conviction for official misconduct or felony), the office holder must continue to serve as a "holdover" until such time as a successor is qualified.[1] Questions? Give me a call at 512/474-2436.

Welcome to newly elected prosecutors

At the Newly Elected Boot Camp held in conjunction with the Elected Prosecutor Conference in late November, we welcomed 23 new prosecutors who took office in 2018 or on January 1, 2019 (out of our current 334 elected prosecutors). Generally, criminal district attorneys stand for election with the governor, so the turnover in the 2018 election cycle is not as big as the turnover when all of the county attorneys and district attorneys run during the presidential cycle. Turnover from all sources (retirement, election defeat, etc.) for eligible offices this cycle was 34 percent, which is about typical. Our observations from the last few election cycles: 1) primary contests are where you find the most "action"; 2) roughly a quarter of all prosecutor offices change hands every four years; and 3) the average term in office for current elected prosecutors is seven years.

Please take a look at the list below of our new

elected prosecutors. If you are near them, make sure to welcome them and let them know you are there to help them "drink from the firehose" that is the first year in office. And if you are one of our new folks reading your *Texas Prosecutor* journal for the first time, we are glad you are on the job, and we are here to help!

Newly elected prosecutors who took office January 1

Lucas Babin, CDA in Tyler County
Aaron Clements, CA in Dickens County
John Creuzot, CDA in Dallas County
Tonda Curry, CDA in Van Zandt County
Will Durham, CDA in Walker County
John Gillespie, CDA in Wichita County
Joe Gonzales, CDA in Bexar County
Barry Johnson, CDA in McLennan County
Constance Filley Johnson, CDA in Victoria County
Robert Love II, CDA in Randall County
Reid McCain Jr., CDA in Harrison County
Brian Middleton, DA in Fort Bend County
Alan Nicholas, Ward County Attorney
Angela Overman, Cochran County Attorney
Anne Pickle, CDA in Jasper County
Jacob Putman, CDA in Smith County
Austin Rawls, CA in Crane County
Courtney Holland Shelton, CDA in Cass County
Steve Simonsen, Loving County Attorney
Sunshine Stanek, CDA in Lubbock County
Chris Strowd, CDA in Deaf Smith County
Tom Watson, CDA in Gregg County

The 21st-Century prosecutor

I recently attended a conference sponsored by the Prosecutors' Center for Excellence and co-sponsored by the Salt Lake County (Utah) District Attorney's Office. There are plenty of opportunities to gather with prosecutors from around the country to talk about innovative ideas and solutions and to discuss nothing less than the evolution of prosecution as we know it.

There were too many great folks there to name them all, but the tenor of the conference was that although prosecutors remain committed to protecting the public from violent and dangerous offenders and serving crime victims, we can take the lead when criminal justice intersects with issues such as mental illness, poverty, and lack of social services. Some of the many programs, ideas, and innovations we discussed: community advisory committees, strategy units to address crime in individual neighborhoods in larger cities, mental health diversion, fast-track drug diversion programs, pretrial release, juvenile firearm courts, and data-driven crime policies.

Cy Vance, the Manhattan (New York) DA, had a very interesting take on the evolution of the job of today's prosecutors. A former Manhattan DA had pioneered the "broken windows" philosophy of crime-fighting, but Vance believes that today we are experiencing a "peace dividend" that justifies an examination of current systems. How that looks in his jurisdiction is a ban on the former stop-and-frisk policies and the end of prosecution for small amounts of marijuana and subway turnstile jumping (not an issue in Texas). He freely acknowledged that he was "ceding the outer barrier" (his exact words) to crime, and that we would all see in the future if this has an overall impact on criminal behavior. This is interesting stuff that may have wide-ranging impact on what we do in Texas, so keep your eye out for what is happening around the country. I like to think we have a lot of good things going on in Texas, and our profession can continue to lead.

Note that not all the discussion was about diversions and practices that might lead to less incarceration. A decent amount of time was spent on enhancing victim services and emerging trends in crime. Indeed, Cy Vance was most concerned about cybercrime. More on that in the future.

The tenor of the conference was that although prosecutors remain committed to protecting the public from violent and dangerous offenders and serving crime victims, we can take the lead when criminal justice intersects with issues such as mental illness, poverty, and lack of social services.

Welcome to new TDCAA Leadership

At our annual business meeting at the Elected Prosecutor Conference in November, members elected leadership for 2019. Under the bylaws, **Jennifer Tharp** (CDA in Comal County) will serve as Chair of the Board of Directors, and **Jarvis Parsons** (DA in Brazos County) will serve as President. **Kenda Culpepper** (CDA in Rockwall County) was elevated to the President-Elect position, and **John Dodson** (CA in Uvalde County) was elected to serve as Secretary/Trea-

Tom Hanna said it best when he explained why the 1974 Penal Code effort became the model for how Texas prosecutors do business at the capitol. To paraphrase: "No campaign contributions–just honest answers about a proposal's impact on law enforcement and criminal jurisprudence."

surer. **Bill Helwig** (CDA in Yoakum County) was elected the Criminal District Attorney-at-Large, and **Landon Lambert** (CA in Donley County) will serve as the County Attorney-at-Large.

Regional caucuses also elected directors in four of the eight TDCAA regions. Our new regional directors (with the outgoing director in parenthesis): Region 1: **Leslie Standerfer,** CA in Wheeler County (**Landon Lambert**, CA in Donley County); Region 2: **Hardy Wilkerson**, 118th Judicial District Attorney, Howard County (**Dusty Gallivan**, CA in Ector County); Region 4: **Isidro Alaniz**, 49th Judicial District Attorney in Webb County (**Steve Tyler**, CDA in Victoria County); and Region 7: **Sharen Wilson**, CDA in Tarrant County (**Kriste Burnett**, DA in Palo Pinto County).

Baylor's trial advocacy training and prosecutor offices

Many of you stopped by the Baylor School of Law reception at the Annual Update in September. The law school, led by Dean Brad Toben, has launched a new initiative to educate prosecutor offices that Baylor has a great crop of newly minted lawyers ready, willing, and able to join prosecutorial ranks. The school is proud of its trial advocacy training and has recently expanded its advocacy curriculum to include criminal cases. And the outreach might be taking hold: I am told that recently a DA had an opening and just called Dean Toben directly to get some Baylor résumés!

TDCAA and the legislature

By the time you read this, the 86th Regular Session of the Texas Legislature will be in full swing, so now is a good time to talk about how TDCAA fits in at the capitol.

A little history as recounted by our most senior alumni: The involvement of Texas prosecutors in the legislative process through TDCAA began in 1973. Prior to that, legislators had no single "point of contact" for Texas prosecutors, and that lack of communication led prosecutors to unexpectedly (from the legislature's perspective!) but successfully defeat a 1971 draft of a new Penal Code. In response, legislative leadership engaged with the state's elected prosecutors (through TDCAA) and tasked them writing the 1974 Penal Code (a photo of the cover is at right, and a photo of some of the writers is on the opposite page) and coming to the capitol to work with legislators regularly—rather than showing up every now and again. Thus, TDCAA became the "middleman" between legislators and elected district and county attorneys. To this day, TDCAA has maintained that role, which benefits both legislators and prosecutors because legislators need to know what *their* attorneys for the State think on many subjects impacting their communities.

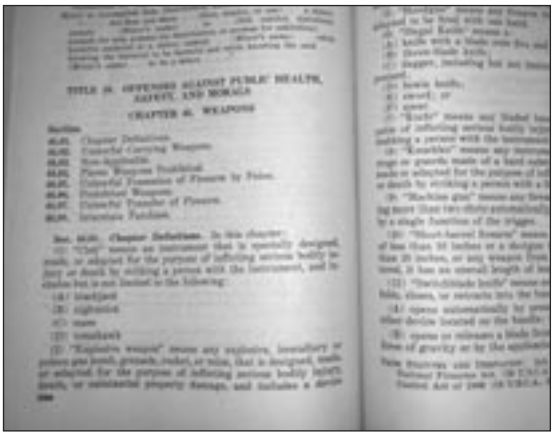
Two other important points: First, unlike many other states' prosecutor associations, TDCAA generally does not take public positions on legislation. Texas has 334 independently elected prosecutors who are free to take positions on their own and be as active at the capitol as they would like, even to the point of opposing each other. (A famous example of this was in the 1990s and 2000s, when the Harris County District Attorney's Office opposed life without parole as an alternative in capital cases, while the Tarrant County Criminal District Attorney's Office supported it and actually drafted the legislation.) This "big tent" model allows us to best serve our members as their eyes and ears in Austin so that they can make informed decisions on the important policy issues of the day.

Second, TDCAA encourages legislators to check in with their local district and/or county attorneys on criminal justice matters. TDCAA can help your voice be heard at the capitol if you want it to be, but we aren't going to speak for you because you are the legislators' constituents, and they need to know what *you* think. Indeed, former Jefferson County Criminal District Attorney Tom Hanna said it best when he explained why the 1974 Penal Code effort became the model for how Texas prosecutors do business at the capitol. To paraphrase: "No campaign contributions—just honest answers about a proposal's impact on law enforcement and criminal jurisprudence."

Our job at TDCAA is to help any prosecutor who is going to the capitol understand and navigate the lay of the land. (Not least importantly, we can also tell you where to find the elevators and bathrooms.) I am not sure you can call going to the capitol fun, but if you get involved during the session, you will certainly learn a lot. And there can be fun moments. For instance, I have it on good authority that during a 1973 late-night redrafting session of Penal Code Chapter 46's section on prohibited weapons, some folks

Above is a snapshot of the drafting process. Moving clockwise from the head of the table at the top left (with their post at the time) are: Tom Hanna, CDA in Jefferson County; Dain Whitworth, TDCAA Executive Director; Rusty Ormisher, Assistant CDA in Dallas County; J. Taylor Brite, DA in Atascosa County; John Quinlan, Assistant CDA in Bexar County; Michael McCormick, TDCAA Staff Counsel; Jack DeWitt, Assistant CDA in Jefferson County; George Dowlen, DA in Randall County; and Jim Vollers, State Prosecuting Attorney. Not pictured but part of the drafting process: Mike Hinton, Assistant DA in Harris County; Tom Curtis, DA in Potter County; Robert Smith, DA in Travis County; Tully Shahan, CA in Kinney County; Carol Vance, DA in Harris County; Bob Barton, DA in Kerr County; Ted Butler, CDA in Bexar County; and Bill Westmoreland, Assistant CDA in Dallas County.

thought it would be funny to just start listing every type of weapon they could think of, including silly things like tomahawks, dirks, stilettos, swords, and spears. That got out of hand quickly, but as a result, tomahawks are still covered in the code today! (See the scan of the 1973 Penal Code's Chapter 46 at right for proof.) ❇



Endnote

[1] Tex. Const. Art. XVI, §17.

Stop, collaborate and listen

I first want to say thank you to the members of TDCAA for the privilege to serve as your new TDCAA President.

By Jarvis Parsons
District Attorney in Brazos County and TDCAA President of the Board

When I started my prosecutorial career in 2002, I never thought that I would be in the position of writing an article about my thoughts on prosecution, but I guess God had other plans. TDCAA has been a resource to my office in countless ways, from the relationships built, to the case summaries and user forums, and everything in between.

I feel it's only right for me to give back in my own unique way by talking about something near and dear to my heart: prosecuting domestic violence.

In March of 2009, I received a call from one of my good friends in the office, Brian Baker (who is now my first assistant). He had been asked by College Station Police Department to come to the scene of a double homicide where a young college student had been murdered in her home by her ex-boyfriend. Her older brother, who lived with her, had also died trying to save his sister's life.

Less than a month later, my daughter Erin was born, and about 24 hours after that, I first met the parents of the murdered siblings. I remember the meeting vividly because I had experienced one of the happiest moments in my life just a day earlier—and then I found myself staring at a mother and a father at the lowest point in their lives. It was a helpless feeling to know there was nothing I could do to take away their pain. I remember their faces that day. I remember their tears.

During the next year, I got to know the family well. We even traveled to their home and spent a couple of days going through old photos, talking to family and friends, and seeing how the siblings grew up. During the trial, I was talking with the mother about her testimony right before the last day of punishment. I asked her to speak from her heart about the pain and heartache she was experiencing. I told her that I knew how hard it would be and I apologized for bringing up these painful memories. She looked at me with tears welling up in her eyes and said, "Don't worry. It comes back every morning." Parents should never bury their children. I had heard that saying before, but on that day, I caught a glimpse as to why.

I have never forgotten that family. I prosecuted that case in 2010. When I became the elected district attorney in 2013, we decided to make domestic violence a priority in our office, primarily because of my experience with that case. I wanted to do everything I could to ensure no other family has to go through that experience in my county. What I later learned was that there were many families around the country who experienced the devastating effects of domestic violence.

Nationwide, nearly 20 people per minute are physically abused by an intimate partner in the United States. That is more than 10 million victims per year. One in three women have experienced some form of physical violence by an intimate partner. In strictly economic terms, the cost of domestic violence exceeds $8.3 billion per year, and victims lose a total of eight million days of paid work per year.

Statewide, the numbers are also staggering. According to the Texas Council on Family Violence, 136 women were killed by their male partner in 2017, and 211 children lost a parent due to domestic violence. Seventy percent of perpetrators killed their partners in their own home. In the Brazos County District Attorney's Office, 66 percent of our violent crime is related to domestic violence. These statistics were eye-opening to me in a community that has been voted one of the best places to live in the state of Texas.

It was with this understanding of domestic violence at a national, statewide, and local level that we began to aggressively prosecute domestic violence offenders. We received a grant from the Criminal Justice Division of the Governor's Of-

fice for a domestic violence prosecutor and investigator, but we quickly realized that there were simply too many cases for one person to manage, so we tasked two prosecutors in each court specifically with assisting in the prosecution of domestic violence cases. Initially this strategy worked well. It eased the burden on the domestic violence chief prosecutor, and cases were tried and resolved with pleas that addressed the underlying issues. However, as we monitored our processes, we realized a couple of things. First, our trial prosecutors were on an island by themselves when it came to case evaluation and plea offers, and there were myths concerning domestic violence that created an inequity in plea offers. Second, the domestic violence intake prosecutor was isolated when it came to determining whether a domestic violence case was prosecutable. While our office is essentially the biggest law firm in the county, we were not using our collective experience and talents to our advantage. That needed to change. Collaboration to the rescue.

Collaboration, collaboration, collaboration

In the educational world, collaboration has been around for decades. Collaborative learning is an educational approach to teaching and learning that involves groups of people working together to solve a problem, complete a task, or create a product. Collaborative learning is based on the idea that learning is a naturally social act in which participants talk among themselves and, through that process, learning occurs. In that environment, people benefit when they are exposed to diverse viewpoints from people with varied backgrounds. Additionally, learners are challenged and benefit when they are required to articulate and defend their ideas. Collaboration also creates an "all for one and one for all" attitude that emphasizes the team over the individual.[1]

Historically, our office has used elements of collaboration getting ready for trial. We routinely "board" cases, a process where the prosecutors on a given case lay out the witnesses and strategy for the rest of the office (including other attorneys, investigators, support staff, and victim assistance coordinators), who in turn ask questions, evaluate the strength of the case, and try to poke holes in the prosecutors' strategy. We have found this to be a helpful tool because it strengthens our cases before trial by using the wisdom of everyone in the office to build a better case.

The "Lunch and Learn"

Building on that success, we looked at other problems where collaboration could make prosecutors more effective. We realized that most of our domestic violence prosecutors had two years or less of experience. We also realized that very experienced chief prosecutors could be leveraged to train younger prosecutors in settings other than just trial where the stakes are extremely high. Lastly, we knew from prior experience that food will usually get anyone to a meeting! So we started regular "Lunch and Learns" where the office buys lunch, and we go over different topics and create interactive learning experiences.

Some of our Lunch and Learn topics have included domestic violence bond hearings, direct- and cross-examining experts, trial preparation, and cognitive and implicit bias, just to name a few. We also worked in-house with prosecutors doing mock direct examinations and cross examinations of uncooperative victims using our domestic violence victim assistance coordinator as our "uncooperative victim."

These Lunch and Learn ideas allowed us to engage in the process of learning from others and practicing skills in a way that fostered "team first" mentality, which is important to the health and culture of our office.

Partnering with the community

We also collaborate with people in the community, including our local junior colleges. Our new attorneys travel to Blinn Junior College criminal law classes in Bryan to conduct mock voir dires. (One of our experienced assistants, Ryan Calvert, wrote an excellent article on it here: www.tdcaa.com/journal/getting-creative-train-voir-dire.) This has provided us great feedback and allowed us to evaluate our prosecutors while they are getting chances to do jury selection with different sets of individuals. At the same time, young college students get a chance to get to know our prosecutors and what we stand for. I believe this can only help when those students become jurors in our county, or even prosecutors someday.

We also teamed with Baylor Scott and White Hospital forensic nurses in College Station to do an all-day teaching module where forensic nurses taught our prosecutors about their job du-

In strictly economic terms, the cost of domestic violence exceeds $8.3 billion per year, and victims lose a total of eight million days of paid work per year.

ties, and we conducted mock direct examinations and cross examinations with their team of nurses. Our prosecutors loved the training and said they learned so much in that one day working with these forensic experts. On the flip side, the nurses were thankful to get experience on the witness stand in a friendly environment. It was a win-win situation, which is the point of the collaborative process.

The El Paso experience

These collaborative successes paved the way for our office to not only brainstorm new ideas but also to gather ideas from other jurisdictions and integrate them in our own practices. Members of our DV prosecution staff and I flew to El Paso to observe the DA's Office's domestic violence protocol (read more about it at www.tdcaa.com/journal/why-we-fight-against-domestic-violence), where they respond to every victim within 24 hours and then staff the case. (Big thank you to District Attorney Jaime Esparza and his team for hosting us!) When we saw the sheer magnitude of that office's program, we realized we didn't have the staff to replicate their process. But the El Paso experience did spur another idea: What if we could discuss cases as a team *before* indictment? Would that get cases more trial-ready when the case is indicted? Would it dispose of cases more quickly if we did more collaboration on the front end as opposed to a week before trial in the "boarding" session?

Historically, our office has used elements of collaboration getting ready for trial. We routinely "board" cases, a process where the prosecutors on a given case lay out the witnesses and strategy for the rest of the office (including other attorneys, investigators, support staff, and victim assistance coordinators), who in turn ask questions, evaluate the strength of the case, and try to poke holes in the prosecutors' case strategy.

We tried staffing our domestic violence cases pre-indictment to see if that would lead to better outcomes. We started to hold weekly meetings involving myself as the elected DA, the DV VAC Melissa Carter, DV Chief Jessica Escue, DV Intake Prosecutor Nathan Wood, and DV Investigator Mike Johse. Melissa sends out a list of cases each week, and everyone is expected to read the file and come to the meeting ready to discuss: 1) whether to indict the case, 2) what charge to file, and 3) whether more follow-up is needed. Follow-up could include witness interviews, subpoenaing hospital records, getting 911 phone calls, investigating the social media accounts of victims and witnesses, and the like. The most important part of the weekly meeting is that everyone is expected to participate, and everyone has a voice. We discuss, argue, and laugh our way through the Tuesday morning meetings, and it is in the free flowing conversation that we get the best ideas on how to gather evidence, charge cases, and prosecute offenders.

The success of those meetings is evident in the cases we end up indicting: They are more trial-ready than ever! Cases plead faster, and those that don't plead have resulted in more guilty verdicts and higher punishments from jurors, even when a victim is uncooperative. We are also dismissing more cases pre-indictment, cases that shouldn't have been filed. I never would've expected our cases and our domestic violence team to get stronger from adding these weekly staffing meetings, and now I wouldn't change it for the world. It has been time well spent.

High-Risk Team

Building on the success of our collaborative weekly meeting, our next step was to bring together community partners to establish a Domestic Violence High Risk Team (DVHRT). The DVHRT model allows community partners to stop domestic violence by 1) identifying high-risk cases, 2) using a multi-disciplinary team approach to monitor and contain high risk offenders, and 3) extending victim services quickly to the most vulnerable survivors of domestic violence. Studies show that the majority of victims and abusers have had previous contact with the criminal justice system, victim assistance, and/or health care agencies in the year prior to a domestic violence homicide.[2] That information indicates that there are multiple opportunities to prevent DV homicides if we can spot signs of abuse earlier and intervene.

I feared we would get pushback from our community partners when we introduced the idea because it meant "another meeting." I was wrong. When Jessica, the DV chief prosecutor, and Melissa, the DV VAC, explained our vision to representatives from all local police departments, the domestic violence shelter, County Attorney's Office, Child Protective Services, the child advocacy center, Mental Health Mental Retardation center, adult probation, hospitals, and medical care providers, we got immediate buy-in. We now meet once a month at lunchtime in our office, and the local domestic violence shelter, Twin City Mission, provides lunch. ("If you feed them, they will come!") We just started this program in October 2018, and it is already paying dividends.

For example, we dealt with an abuser who had been to prison for domestic violence assault

and now has warrants for domestic violence against another victim. We discussed this defendant at our DVHRT meeting and asked law enforcement to try to find him because he had been eluding us for months—we could not track him down to arrest him. We gave everyone at the meeting a description of the defendant and his vehicle so law enforcement could find him. It turned out that one of our community partners (not law enforcement) just happened to see the defendant's car in a neighborhood and called our domestic violence VAC Melissa Carter on her cellphone at 9 o'clock on a Tuesday night. Melissa then contacted local police, and the defendant was arrested that night! He had been on the run for more than two months. While this success may seem small, I look at it as the start of a great relationship that will build over the years and help thousands of women in domestic violence relationships.

When we started this journey a few years ago of trying to aggressively prosecute domestic violence cases, I never dreamed we would have a High-Risk Team that involved agencies from all over my county working together to identify and protect victims. I don't think that was my team's dream either—but I guess that's the point. Working together for a common goal creates dreams, ideas, and results that you could never have thought possible. You become greater than the sum of your parts. You become a team with a mission. And that is an unstoppable force.

As I am finishing up writing this column, I spoke with the family I mentioned at the beginning, the parents who lost their son and daughter to domestic violence. They were in town for our Tree of Angels celebration where we honor victims who have died because of violent crime. I told them about this article and what we were doing to stop domestic violence, and I asked if I could use their story because of how it impacted my life and our office's mission to combat domestic violence. The same mom whom I met at one of the lowest points in her life almost a decade ago looked at me and replied, "If this helps one person, it's worth it."

I couldn't have said it better myself. ❇

Endnotes

[1] See *Why Collaborative Learning Works*, http://archive.wceruw.org/cl1/cl/moreinfo/MI2C.htm; B.L Smith and MacGregor, J.T. (1992). "What is Collaborative Learning: A Sourcebook for Higher Education." National Center on Postsecondary Teaching, Learning, & Assessment, Syracuse University.

[2] For more information on Domestic Violence High-Risk Teams, please visit the Jeanine Geiger Crisis Center Website at http://dvhrt.org/about. You can also visit the Texas Council of Family Violence website,www.tcfv.org.

When we started this journey a few years ago of trying to aggressively prosecute domestic violence cases, I never dreamed we would have a High-Risk Team that involved agencies from all over my county working together to identify and protect victims. I don't think that was my team's dream either. But I guess that's the point.

Function over form in charging-instrument law

What makes a chair a chair? Is it the form? It has four has legs, a seating surface, and a back.

By Clinton Morgan
Assistant District Attorney in Harris County

Or is it the function? Is it merely anything that you sit on? What if you sit on a pile of sticks? Is that a chair?

For nearly a century and a half, Texas appellate courts have wrestled with a similar metaphysical question: What makes an indictment an indictment? The Court of Criminal Appeals's most recent offering, *Jenkins v. State*,[1] continues the court's trend of focusing on function, rather than form, which allows increasingly defective documents to count as indictments. In chair terms: A defendant is entitled to a chair with four legs, a seating surface, and a back, but if he doesn't complain prior to trial about sitting on a pile of sticks, we'll call it a chair.

It was not always this way. From 1876 until 1985, Texas courts focused on the form of an indictment. Any serious deviation in form would result in an indictment being declared not an indictment. Omit an element? Not an indictment.[2] Fail to name a complainant? Not an indictment.[3] Fail to allege the acts that constituted recklessness? Not an indictment.[4] And the consequences of an indictment failing to be a *real* indictment were severe: A defendant could raise a complaint for the first time on appeal, when there was no chance to fix the indictment, and the appellate court would hold the indictment "fundamentally defective," hold that the trial court never acquired jurisdiction over the case, and declare the conviction void.

This created a perverse incentive for defense attorneys to not raise trial court objections. If they objected at trial, the trial court could just fix the indictment, which is not the sort of relief most defendants want. But if counsel waited to raise the matter for the first time on appeal, he could get everything overturned. "Untold thousands of judgments were reversed or set aside for pleading errors which had not been pointed out to the trial court."[5]

Fed up with this ridiculous state of affairs, in 1985 the people of Texas amended the state constitution to clarify that any written instrument presented by a grand jury to a court charging "a person" with "an offense" was an indictment. Defendants could still complain, pretrial, about any defects in the indictment, but absent a trial objection, appellate courts stopped throwing out convictions based on pleading errors, because even defective indictments conferred jurisdiction on the trial court.[6]

Charging 'a person'

Was there anything left that would render an indictment so fundamentally defective as to not be an indictment? In 1995, in *Cook v. State*,[7] the Court held there was: failure to name the defendant in the indictment. Absent a name, the Court held, the indictment did not charge "a person."

To be fair, an indictment that doesn't name a defendant sounds pretty bad. But on the other hand, the defendant seems to have known he was charged. He showed up to trial and entered a plea. If a defendant were actually unaware he was the subject of prosecution, or if a trial court was unaware of who it was supposed to try, you'd expect someone to mention that before trial.

Cook remained the baseline of when an indictment was not really an indictment, but on other fronts the functionalists on the Court of Criminal Appeals made headway against old-style formalism. In *Teal v. State*,[8] the indictment

omitted the element that turned a misdemeanor into a felony. The court of appeals held that, even though the defendant didn't object in the trial court, the omission of the aggravating element meant the district court never acquired jurisdiction. On discretionary review, the Court of Criminal Appeals reversed and held that because the offense *could* be a felony, the fact that the indictment was filed in a district court adequately notified the defendant it *was* a felony; thus, the indictment was sufficient to vest the district court with jurisdiction.

The *Teal* Court's decision to take into account something other than bare terms of the formal part of the indictment was a big step toward functionalism. The court took another step in that direction two years later in *Kirkpatrick v. State*.[9] There, the formal part of the indictment omitted an element that made a misdemeanor into a felony, but the Court of Criminal Appeals considered the caption at the top of the indictment—which said the case was a felony and cited to a section of the Penal Code dealing with a felony offense—and held that the indictment vested the district court with jurisdiction.

Which brings us to *Jenkins*. Jenkins was indicted for continuous trafficking of persons. The State seems to have gotten the indictment for this complicated charge correct *except* it omitted Jenkins's name from the formal part of the indictment. Rather than complaining about this pretrial, when it could have been fixed easily, Jenkins waited until the second day of trial and moved to dismiss on the basis that the indictment was fundamentally defective. The trial court denied this motion. After conviction, Jenkins appealed.

On appeal the State pointed out that, while the formal part of the indictment charged merely "the defendant," the caption at the top of the indictment began: "Defendant: Deondre J. Jenkins," followed by, apparently, Jenkins's home address. The State argued that, under *Kirkpatrick*, the court should consider the caption in determining if the indictment charged a person.

The Fourth Court rejected this argument.[10] The Fourth Court believed the Court of Criminal Appeals had established different standards for what it meant to charge "a person" and what it meant to charge "an offense." According to the Fourth Court, cases such as *Teal* and *Kirkpatrick* established a liberal standard for what might constitute an "offense," but *Cook* still established a strict standard for what it meant to charge "a person." Citing to a treatise and a 1935 case (and its progeny) holding that a caption was not part of an indictment,[11] the Fourth Court held Jenkins's indictment was fundamentally defective and overturned the conviction.

The Court of Criminal Appeals granted review and determined that the formalism of *Cook* had been implicitly disavowed by the functionalism of *Teal* and *Kirkpatrick*.[12] Writing for an eight-judge majority, Judge Richardson held that the import of *Teal* and *Kirkpatrick* was that appellate courts should look at the indictment "as a whole." In *Teal*, the indictment was "certainly defective," but the court had held that "as a whole" it vested the district court with jurisdiction. In *Kirkpatrick*, the court had further clarified that the "whole" of the indictment included the caption. If one considered the caption, which named Jenkins and gave his home address, it was plain that the indictment "as a whole" charged "a person" with the offense.

The Court of Criminal Appeals addressed the Fourth Court's conclusion that there was a "liberal" standard for determining if the indictment charged an offense and a "strict" standard for determining if it charged a person. This was a misreading of the caselaw due to the simple fact that the Court of Criminal Appeals had not been called upon to address the "person" requirement since *Cook*. Although Jenkins's indictment was defective and subject to a pretrial objection, the indictment as a whole, including the caption, sufficiently charged a person with an offense; therefore, the trial court had jurisdiction to try the case.

There were two concurrences. While both are interesting, they are of little practical value. Presiding Judge Keller concurred, without joining the opinion of the Court, because she disagreed with the Court's description of the holding in *Cook*. Judge Yeary concurred, while joining the opinion of the Court, to disagree with the Court's characterization that the indictment "did not 'contain the name of the accused.'"[13]

Going forward

Jenkins marks a major step in the Court's move toward functionalism in its charging instrument jurisprudence. But make no mistake, *Jenkins* is not an endorsement of defective indictments. A defendant who raises a valid pretrial objection to an indictment is entitled to have it corrected.[14]

In chair terms: A defendant is entitled to a chair with four legs, a seating surface, and a back, but if he doesn't complain prior to trial about sitting on a pile of sticks, we'll call it a chair.

As bad as any indictment looks in the caselaw, it is worth remembering it was filed by a prosecutor who tried to do right.

The point is to force these matters to be litigated pretrial, where the errors can be fixed, instead of allowing a defendant to lay behind the log and gain an appellate reversal for an error that did not functionally impact his rights.

Of course, no one intentionally omits the defendant's name from an indictment. As bad as any indictment looks in the caselaw, it is worth remembering it was filed by a prosecutor who tried to do right. *Jenkins*—which continues the revolution started by the 1985 constitutional amendments—serves to focus the criminal law of this state on the rights of defendants rather than the formal errors of prosecutors. ❇

Endnotes

[1] ___ S.W.3d ___, No. PD-0086-18, 2018 WL 6332219 (Tex. Crim. App. Dec. 5, 2018).

[2] *White v. State*, 1 Tex.App. 211, 215 (1876).

[3] *Ex parte Munoz*, 657 S.W.2d 105, 106 (Tex. Crim. App. 1983).

[4] *Gengnagel v. State*, 748 S.W.2d 227, 229 (Tex. Crim. App. 1988).

[5] *Duron v. State*, 956 S.W.2d 547, 554 (Tex. Crim. App. 1997) (Womack, J., concurring).

[6] See *Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990) (holding indictment not fundamentally defective where it failed to allege acts constituting recklessness).

[7] 902 S.W.2d 471 (Tex. Crim. App. 1995).

[8] 230 S.W.3d 172 (Tex. Crim. App. 2007).

[9] 279 S.W.3d 324 (Tex. Crim. App. 2009).

[10] *Jenkins v. State*, 537 S.W.3d 696 (Tex. App.–San Antonio 2017).

[11] *Id*. at 704-05 (citing *Stansbury v. State*, 82 S.W.2d 962 (Tex. Crim. App. 1935)). Ironically, the holding in *Stansbury* was the court's effort to escape its own formalism. The defendant in that case complained of a defect in the caption of the indictment. Had the court of that time not been so bound to formal requirements, it would not have been required to address this point.

[12] *Jenkins*, 2018 WL 6332219 at *1.

[13] *Id*. at *8 (Yeary, J., concurring).

[14] As a practical matter, will any defendant ever file an objection to an indictment that omitted his name if the only relief is to have his name added? Perhaps Navin R. Johnson–the hero of *The Jerk*, who so desired to see his name in print–but probably few others.

Key Personnel-Victim Services Board elections

The Key Personnel-Victim Services Board assists in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

At the Key Personnel-Victim Assistance Coordinator Seminar at the Inn of the Hills in Kerrville, elections for the North Central Area and West Area were held. Amber Dunn will be the North Central Area (Regions 3 & 7) representative; she works in the Denton County CDA's Office. The West Area (Regions 1 & 2) representative will be Raquel Luker, who works in the Swisher County & District Attorney's Office. Amber and Raquel were elected to serve on the KP-VS Board beginning January 1, 2019 for a term of two years. Two additional board members (one KP and one VAC) will be appointed by the chairs of the TDCAA board of directors and the KP-VS Board.) Welcome to them both!

KP-VS Board Officers for 2019 were elected as follows: Chairperson Laurie Gillispie of the Erath County DA's Office; Vice-Chair Kristie Ponzio Pressler of the Kendall County Criminal DA's Office; and Secretary Sherry Magness of the Smith County District Attorney's Office.

KP-VAC Seminar highlights

The Inn of the Hills in Kerrville was the venue for a very successful seminar for key personnel (prosecutor office staff) and victim assistance coordinators (VACs) from across Texas in November. More than 200 members gathered for training for support staff and VACs who work in prosecutor offices, as well as to network with others across the state. Many, many thanks to our very informative speakers! We appreciate your time and valuable assistance.

Mark your calendar for next year's Key Personnel & Victim Assistance Coordinator Seminar to be held November 6–8 at the Embassy Suites Hotel & Conference Center in San Marcos.

Suzanne McDaniel Award winner

Laney Dickey, Victim Assistance Coordinator (VAC) for the Lubbock County Criminal District Attorney's Office, was honored with TDCAA's 2019 Suzanne McDaniel Award for her work on behalf of crime victims and prosecution and for her service to TDCAA. She is pictured below (in the center) with Brian Klas, TDCAA Training Director (at left) and me (at right).

Laney has spent 25 years helping crime victims. She served for 20 years as the only VAC in the Lamb County & District Attorney's Office in Littlefield. When then-County & District Attorney Mark Yarbrough retired, Laney continued in her role as VAC with new elected Scott Say. When Lubbock County CDA Matt Powell learned that Laney was looking to move closer to her grandchildren, he quickly hired her as a VAC for his office. Nominations for this award were received from all three DAs for whom Laney has worked.

When TDCAA started the Professional Victim Coordinator (PVAC) program, Laney was one

When TDCAA started the Professional Victim Coordinator (PVAC) program, Laney Dickey, Victim Assistance Coordinator in the Lamb County and District Attorney's Office at the time, was one of the original handful of coordinators to gain PVAC status. She has also been a devoted member of TDCAA's Victim Services Board and was Region 1's first TDCAA Victim Services Board representative.

of the original handful of coordinators to gain PVAC status. She has also been a devoted member of TDCAA's Victim Services Board and was Region 1's first TDCAA Victim Services Board representative.

The Suzanne McDaniel Award is given each year by the KP-VS Board to an employee of a county attorney, district attorney, or criminal district attorney's office whose job duties involve working directly with victims and who has demonstrated impeccable service to TDCAA, victim services, and prosecution.

Laney exemplifies the qualities that were so evident in Suzanne McDaniel herself: advocacy, empathy, and a constant recognition of the rights of crime victims. Congratulations, Laney!

Oscar Sherrell Award winner

The 2018 Oscar Sherrell Award is given by each section of TDCAA to recognize those enthusiastic folks who excel in TDCAA work. This award may recognize a specific activity that has benefited or improved TDCAA or a body of work that has improved the service that TDCAA provides to the profession.

This year's recipient is Rosa Maria Cervantes of the Nueces County DA's Office. Rosa Maria joined that office in January 1985 and has devoted her life to helping women and children victims of domestic violence. Rosa Maria was the original counselor at the local women's shelter from 1977 to 1985. Congratulations, Rosa Maria!

PVAC application deadline

The Professional Victim Assistance Coordinator recognition is a voluntary program for Texas prosecutor offices that recognizes professionalism in prosecutor-based victim assistance and acknowledges a minimum standard of training in the field.

The deadline for applications is January 31, and detailed requirements and the PVAC application may be found on our website at www.tdcaa.com/victim-services.

Recent recipients of PVAC recognition are (at left, left to right) Serena Payne of the Andrews County Attorney's Office, Jane Adams of the Lamar County and District Attorney's Office, and Lauren Hay of the Williamson County Attorney's Office. Congratulations Serena, Jane, and Lauren!

In-office VAC visits

TDCAA's Victim Services Project is available to offer in-office support to your victim services program. We at TDCAA realize the majority of VAC's in prosecutor offices across Texas are the only people in their office responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure, and VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support. This project is especially helpful to new VACs.

If you are a new VAC and would like to schedule an in-office one-on-one visit, please email me at Jalayne.Robinson@tdcaa.com. I am available for inquiries, support, in-office consultations, or group presentations.

National Crime Victims' Rights Week

Each April communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 7–13, 2019. This year's theme is "Honoring Our Past. Creating Hope for the Future." Check out the Office for Victims of Crime (OVC) website at https://ovc.ncjrs.gov/ncvrw for additional information.

If your community hosts an event, we will publish photos and information from it in a future issue of *The Texas Prosecutor* journal. Please email me at Jalayne.Robinson@tdcaa .com with information and photos of your event. ❇

Photos from our KP-VAC Seminar

Photos from our Elected Conference

Training on tap for 2019

As 2018 petered to a halt, I found myself welcoming the new year in the same fashion as one year prior: sitting alone in a dark room and contemplating TDCAA training as I was regaled by the sounds of illegal fireworks (seriously, it was a lot this year).

By Brian Klas
TDCAA Training Director in Austin

I know that sounds depressing. That is, it sounds depressing unless you know how exciting the 2019 training calendar looks! What better way to bring in the new year than to reflect on the hard work our boards and committees put in to make sure we have a slate of outstanding training to look forward to? I can't think of one, so let's get future-focused and talk about what lies on the horizon.

By now the first of our two **Prosecutor Trial Skills Courses (PTSC)** will have been held. We've made some shifts in the agenda and are trying out new content, but the course remains the same dive into what it takes to be a professional prosecutor. Whether you are new to the job or looking for a refresher, you will learn something of value during this week working with your peers from across the state and hearing from some of the best prosecutors in the country. If you missed the January school, don't fret—we are back in Austin to do it again in July.

This year's **Investigator School** will be in lovely San Antonio from the 4th to the 7th of February. That's right around the corner! Surely, after seeing the Texans and Cowboys face off in "the big game," we'll be ready for a week of great training. The Investigator Board members outdid themselves this time around, and attendees are going to feast on a smorgasbord of topics ranging from "lone wolf" killers and photographing crime scenes to digital evidence. Additionally, we are offering Civilian Interaction Training (TCOLE 30418) so everyone can satisfy that requirement with a class designed just for CA and DA investigators.

In April we'll hold the first of two specialty schools. I'm pleased to inform you that the Training Committee elected to put on a **Domestic Violence Seminar** this year—but this one is going to be a little different from years past. Rather than run the risk of watering down the training by inundating attendees with tons of options, we are narrowing the focus to those topics necessary to successfully analyze, prepare, and try DV cases. Don't get me wrong: If you are working in a prosecutor's office and your job touches on family violence, there is definitely something here for you. We'll be offering a track on protective orders, specific victim issues, and even post-arrest investigation. This seminar is about acquiring the tools, knowledge, and professional connections to successfully prosecute cases of domestic violence. Eyeball the course on our website and join us from April 9–12 in Georgetown.

We'll head back to San Antonio for our **Civil Law Seminar** May 8–10. The Civil Committee is again bringing you invaluable updates to all those areas of law that civil practitioners deal with the most. In addition, we'll have a mid-session legislative outlook as well as talks on *Garrity*, jail standards, roads, and subdivisions. And the committee has heard your pleas and we are once again hosting forums for offices that deal with rural or more urban issues. I don't know whose bright idea it was to get away from that format ... probably some know-it-all who works at the Association.

Next up is our second (and one-day-shorter) specialty school. We'll be in scenic San Marcos from the 12th to the 14th of June covering all things **Homicide**-related. There was a specific goal to make this an offense-focused school rather than a survey course. In the last few years this specialty-course slot has been filled by evi-

TDCAA's upcoming seminar schedule

Check TDCAA's website for the whole list of seminars, including DWI-related regionals, Border Prosecution Unit (BPU) training, and Legislative Updates, which start this summer. Register for any of these seminars online at www.tdcaa.com/training.

Investigator School, February 4–7, at the Omni Colonnade in San Antonio.

Newly Elected Boot Camp Part 2, February 21–22, at the Embassy Suites Central in Austin.

Domestic Violence, April 9–12, at the Sheraton Hotel & Conference Center in Georgetown.

Civil Law Seminar, May 8–10, at the Omni Colonnade in San Antonio.

Homicide Seminar, June 12–14, at the Embassy Suites Hotel & Conference Center in San Marcos.

Prosecutor Trial Skills Course, July 14–19, at the Omni Southpark in Austin.

Advanced Trial Advocacy Course, July 28–August 2, at Baylor Law School in Waco.

Annual Criminal & Civil Law Update, September 18–20, at the American Bank Center in Corpus Christi. ❇

dence, cybercrimes, and most recently forensic evidence. All those schools were well-received by attendees, but the content lacked the cohesiveness that naturally occurs when the topic is narrowed by offense type. By returning to a more classic topic and agenda, we hope to scratch a training itch that we haven't hit in a while.

After our second **PTSC** in July, we'll return to the Baylor Law School for the **Advanced Trial Advocacy Course** at the end of the month. If you are unfamiliar with this course, it is open by application only and limited to 32 attendees. The registration fee and hotel stays are covered by TDCAA—that's right: It's free! The week-long training is a mix of lecture, small group discussion, and courtroom advocacy, all using a real case as a teaching tool. Each attendee is filmed conducting parts of trial—voir dire, open, direct, cross, and close—which faculty advisors then review and provide one-on-one feedback. This is not a course designed for brand new prosecutors, but rather it's about going from good to great. If you are interested in the course, *do not hesitate* to talk to your boss about it and apply. There are a variety of factors we consider when admitting applicants, and the worst thing that can happen is that you receive a polite email from me explaining that we can't take you this time. So far for 2019, I've identified our course director and we're working on the case problem now, so keep your eyes peeled for the brochure, which includes the case topic and application and should show up online and in the mail in late April or early May.

The crystal ball gets hazy after that, and clouds are obscuring that distant shore. I'll meet with the various boards and committees to plan our **Annual Criminal & Civil Law Update** in the coming months and will update you accordingly on its agenda. Until then, keep a sharp eye on the TDCAA website, tdcaa.com. We are constantly updating the training page with new information, and we have more irons in the fire than one article can safely hold. W. Clay Abbott, our DWI Resource Prosecutor, is coming to your town (or at least near it) with outstanding free training for you and local law enforcement on **drugged driving** and **effective courtroom testimony**. And don't forget this is a legislative year, so those three-hour **Legislative Updates** will start midsummer.

As always, if you have any training questions, ideas, or just want to say hi, please email me at brian.klas@tdcaa.com. ❇

How Macho Man Randy Savage made me a better prosecutor (cont'd)

Learning the ropes of storytelling

Understanding the law, rules of evidence, criminal procedure, and the facts of a case are all important parts of being a competent, ethical prosecutor. Early in my career, I feel like I had a good grip on this aspect of the job. My shortcomings stemmed from my difficulty in presenting a case to the jury in a way that was easily understandable and interesting enough to hold jurors' attention. My presentation was stilted and more than a bit boring. I was failing as a storyteller.

Before I go any further, know that storytelling is not a synonym for trial advocacy, opening statement, or closing argument. The ability to tell a story is one of many tools in the trial advocacy toolbox. When I was first starting out, I was much more of a lecturer than a storyteller. Lecturing to a jury might get a trial prosecutor where he needs to be more often than not, but when up against a skilled defense attorney and a challenging set of facts, lecturing is not enough. Jurors need to remember the facts and circumstances of the case in clear detail and understand what conclusion those facts and circumstances dictate.

The best way to achieve this goal is through storytelling.

Human beings are wired to listen to stories. The first stories were oral histories that taught us who we were and where we came from. Storytelling is a universal art shared by every human culture. Everyone understands—and loves—a good story.

Storytelling is much more than a simple chronological recitation of the facts. It requires a full-fledged narrative with identifiable characters, easy-to-follow plot, and a lesson for the listener. As trial attorneys, we are oral storytellers. The best oral storytelling is done with conviction and emotion. Great storytellers tell a story where the important characters are obvious and the story structure doesn't leave the listener guessing or confused.[1]

I knew that I needed to improve in this regard. One weekend, I took a break from preparing for a misdemeanor assault family violence case and spent some time with my grandfather, who had an affection for professional wrestling that I was only remotely aware of. On this particular day, he was watching some sort of "greatest wrestling feuds" show. I sat watching it with him when the narrator began telling the story of the rise and fall of the Mega Powers, Macho Man Randy Savage and Hulk Hogan. The short version of their story is really one of a friendship falling apart. An important element was Macho Man Randy Savage's belief that his girlfriend, Miss Elizabeth, was romantically involved with Hulk Hogan. The whole Macho Man vs. Hulk Hogan story was the central storyline for the spandex soap opera in 1989. As I watched the various clips of Macho Man from throughout the feud, I couldn't help but see similarities between the jealousy and paranoia exhibited by both Macho Man and the defendant in my upcoming family violence case.

Macho Man presented himself as someone consumed by jealousy and paranoia. I observed these same characteristics in my defendant. The whole story structure was designed so that the wrestling fans of 1989 could easily see how unfounded and ridiculous Macho Man's beliefs were. As I watched the little documentary play out, I realized I could use a similar story structure to show how ridiculous and inexcusable the defendant's actions in my case were. By the end of the hour-long program, I had more than a few ideas on how to improve my trial plan.

My approach to that jury trial was more story-driven than it had ever been, which led to a much more energetic argument. I could tell that I had the jury's attention and interest. There was still a lot of room for improvement, but the trial ended with a positive result for the victim and, for possibly the first time ever, genuine positive feedback from my elected.

As odd as it was, I wasn't oblivious to Macho Man Randy Savage's storytelling lessons. I was convinced that there was still more to learn from him and his ilk, and I decided to explore it further.

It's not the bright spandex that makes a prosecutor

The thing that got me most about my boss's critique was his comment that I was milquetoast. I cared deeply about each and every case that I took to trial! That I was perceived as timid or feeble in closing drove me absolutely insane. Improving on my delivery was one of the most noticeable—and, in hindsight, the easiest—changes I could make to my trial presentation. I may not be saying the right words but, by God, I was going to say them with conviction.

Anyone who has watched a professional wrestling show has undoubtedly noticed the wild presentation of each character. The performers

march to the wrestling ring garbed in brightly colored gear with personalized theme music blaring over the speakers. This showmanship goes a long way toward establishing each performer's character and telling the audience what to think of him.[2] How the performer carries himself and how he speaks is equally important when the audience determines its opinion of him.

It's not at all uncommon for participants in a wrestling match to give a monologue before or after the match. While the material they are given to work with is not always the most compelling, you'd be hard-pressed to deny their presentation skills. I've yet to see a professional wrestler who didn't speak clearly and authoritatively. The performers have quite the emotional range and, depending on what the script calls for, they can appear everything from apologetic to apoplectic. I've seen wrestlers exhibit a level of righteous indignation to rival that of any prosecutor. They also do a remarkable job of adjusting the tone and tempo of their speech to emphasize an important point or otherwise suit the needs of the story.

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When speaking to jurors during closing argument, we shouldn't try to entertain them or use theatrics to distract them from the task at hand, but we can mimic the energetic and commanding delivery of professional wrestlers. The righteous "say your prayers and take your vitamins" approach of the heroes really lends itself to a prosecutor's plea for law enforcement or demand for justice for a helpless victim.

That's not to say that there aren't lessons to learn from the villains, though. It's the villains' role to get the audience to dislike them. They are doing their job when they get the crowd to boo them. They present themselves as arrogant, untrustworthy, or egocentric—or sometimes as predators looking to exploit the weak. Other times, they are cowardly slime balls who have no qualms about lying, cheating, or stealing to reach their goals. A prosecutor would never want to be seen in the same light as a pro wrestling villain, but you can learn a lot from how they tell their stories, too.

Heroes and villains both do an excellent job controlling the tempo of their speech. Even today, eight years into this job, I struggle with tempo. I've always spoken very quickly and, when I was younger, I would frequently stumble over my words. If I tried too hard to slow my speech down, I ended up speaking with such a weird cadence that you might think I was doing a bad impersonation of William Shatner. I didn't make any true, lasting improvement in this area until I began mimicking successful public speakers. Because I was in the midst of my study of professional wrestling promos, it made sense to give imitating them a shot. Success didn't come right away, but after a little time, the deliberate tempo with which most professional wrestlers spoke began to be the default speed for my courtroom persona.

A time and place for everything

There is structure to everything we do as lawyers. Telling a story is no different. Every story has to have a setting, characters, a plot or conflict, and a theme. When I set out to become a better storyteller, I found the comparatively straightforward storylines of professional wrestling to be very instructive.

Setting. If you saw the word "setting" and thought, "Duh, my setting is the county I work for," you are right for legal purposes but otherwise completely wrong. Choosing the setting for your story is incredibly important. You literally set the scene for a story by first describing the setting.

You might not guess it if you haven't been exposed to it, but a good bit of storytelling in professional wrestling is done outside the ring. Characters interact in backstage areas like locker rooms and the offices of authority figures. There are even occasional fourth-wall-breaking events that occur at, say, a character's home. The wrestling ring itself can even be transformed depending on the story the performers are trying to tell.

Setting is just as important to the stories that prosecutors tell jurors. Which is the better setting for a driving while intoxicated case: "the state highway between Henderson and Tatum" or "a dark, perilous stretch of road dotted with patches of ice and high-speed traffic traveling both directions"? Would you rather the setting of your assault strangulation case be "100 N. Main Street" or "the floor of a child's bedroom as described by the 5-year-old who is peeking out from underneath the covers, hoping and praying that his father doesn't hurt his mother"?

The setting of your story, to a degree, will be dictated by the underlying criminal offense. Don't let yourself fall into the bad habit of treating setting like a simple geographical location. It is so much more than that. Think about the story

you are trying to tell the jury and how the setting of that story impacts your message.

Characters. The characters in our story are just as important as the plot of the story itself. Book and film characters' personalities are often ambiguous, with no clear protagonist. All of that is fine when you are telling a story for entertainment, but when you tell a story for comprehension purposes, characters must be simple and straightforward.

Professional wrestling's sole purpose is undeniably entertainment. It is, however, entertainment designed for a wide audience. As such, the characters (and plots) tend to be simple, if not one-dimensional. This might render the pro-wrestling spectacle uninteresting to you, but that doesn't mean the medium is without lessons for prosecutors.

Turns out that professional wrestling storylines are, at their heart, morality plays. Each storyline features a hero and a villain. The hero is almost always an exaggerated symbol of virtue. Spectators know who the hero is because the hero works hard, plays by the rules, and treats people with respect. The villain is often the complete opposite. He is obvious to wrestling fans because the villain isn't afraid to cheat, abuses his power, and takes advantage of people.

As prosecutors, the stories we tell are also, at least to some degree, morality plays. For that reason, it's important that our stories have easily identifiable heroes and villains. For me, the first step is identifying my heroes. There is no black-and-white rule for determining this. The hero in a case might be the victim, it might be law enforcement, or it could be a simple bystander. Because the world a prosecutor works is in nuanced and real, the heroes of our story might not have done more than simply follow the law. Don't be afraid of making the law-abiding citizen or police officer the hero of your case. By simply following the law, that person has already done more than the defendant has.

At first glance, selecting the villain can seem pretty easy. A man who angrily throws his wife down a flight of stairs makes a pretty great villain, and getting a jury to recognize that guy as such is a straightforward task. It might be harder to get the jury to see a 17-year-old kid who got caught with an ounce of marijuana as evil or villainous. In such cases, don't overplay your hand. Cast the act of violating the law as your villain, and in closing argument, use your plea for law enforcement to drive the point home.

Plot. Plot is a story's action, what happens in the story. When a story begins, all of the characters are at Point A. When the story ends, all of the characters will be at Point B. The "story" is about the conflict or the obstacles the characters overcome between Points A and B.

Surprise! Pro wrestling stories are really good at keeping things simple. The plot of a wrestling storyline is going to be dramatically different from the plot of a criminal prosecution storyline, but when I looked at these stories for inspiration, I observed that the movement of a wrestling storyline from Point A to Point B never included more than two or three key moments. For instance:

Point A: The hero and the villain must compete for the opportunity to fight the champion.

Plot Point 1: During the contest, the villain cheats to win.

Plot Point 2: The hero demands a second, fair match between himself and the villain.

Plot Point 3: The hero prevails over the villain in the rematch, despite the villain's cheating ways.

Point B: The hero gets to fight the champion.

When you sit down to organize your case into a story for the jury, keep your story similarly uncluttered. For example:

Point A: Our teenage heroine has suffered years of sexual abuse at the hands of her father, our villain.

Plot Point 1: The teenager and her young son spend the weekend with her mother, who is separated from her husband, the villain.

Plot Point 2: The villain calls law enforcement after the heroine refuses to return home.

Plot Point 3: The heroine reveals to her mother and law enforcement the years of sexual abuse.

Point B: DNA testing reveals that the villain fathered his own grandson with his daughter, the heroine.

I know that this story is a sad and disgusting one, but explaining this type of story to the jury is the unfortunate reality of our responsibilities as prosecutors. The story also goes to show that no matter how many facts you are dealing with and no matter how complex the offense, the crux of the story can often be boiled down to just a few key points. When telling the story, you certainly don't have to—or want to—skimp on any important details, but when it comes down to brass

Setting is just as important to the stories that prosecutors tell jurors. Which is the better setting for a driving while intoxicated case: "the state highway between Henderson and Tatum" or "a dark, perilous stretch of road dotted with patches of ice and high-speed traffic traveling both directions"?

tacks and you are forced to sell the story to the jury, you want to be able to emphasize the story's basic components.

Theme. Every book we read or movie we watch has a moral or theme that offers a comment on or insight into the human experience. The morals of a pro-wrestling storyline are successful because they emphasize simple values that are already familiar to the audience. The audience already knows that cheating is bad. When faced with a story where the villain has cheated to win, the audience is already primed for the story's happy ending where the cheating villain gets his just desserts.

There is no reason for the theme or moral of our story to be much different or more complex. Our juries know that murder, sexual assault, and home burglaries are bad. When we tell those stories and, through the facts in the case, show them who the villain is, they will be similarly primed and ready for the villain to pay for his crime. For less heinous offenses, the jury might need more reminding about the values of our case. Spend time considering the jury pool when deciding what values to emphasize for drug possession, low-level theft, and criminal trespassing in particular. While these offenses are no less illegal than more serious crimes, public sentiment about low-level crimes is changing and the way people view these crimes is quite varied. It's important not to miss the mark and oversell the moral value of this type of a case. If you do, you run the risk of driving your jurors into the waiting arms of opposing counsel.

Catchphrases will reinforce your message to the jury. During deliberations, when the jury is discussing evidence, a well-designed catchphrase will draw jurors to those facts that are most important to your case theory.

Catchphrase. "Do you smell what The Rock is cooking?" I'm not 100 percent sure myself, but the man now known as Dwayne Johnson made quite the name (and money) for himself by asking that question repeatedly throughout the late '90s and early 2000s. Pro wrestlers love their catchphrases, and their fans love the catchphrases even more. They buy T-shirts, hats, and lunchboxes emblazoned with them. These phrases are memorable and, years after the performer has moved on to bigger, better, less painful pursuits, they might be the only thing fans remember about him.

Storytelling prosecutors need catchphrases. Now don't get me wrong, I'm not encouraging anyone to don a pair of tacky sunglasses and proclaim to jurors that he is "the best there is, there best there was, the best there ever will be."[3] That could rub judges, opposing counsel, and coworkers the wrong way. But I *am* encouraging prosecutors to find a phrase that relates the moral or theme of their story. Once you find it, prosecutors should make that catchphrase important and central to the case.

Choose one that touches on whatever concept you are using to tell the story to the jury. I once tried an aggravated assault where a homeowner's right to exclude or remove unwanted people from his home was central to my case theory. My catchphrase for that case was, "My house, my rules." If you have a fact that stands out above the rest, design a catchphrase that emphasizes why that fact is important. I tried a possession of methamphetamine case where the meth was located in a plastic bag tucked under the defendant's private parts. "Location, location, location" practically wrote itself.

These catchphrases will reinforce your message to the jury. During deliberations, when the jury is discussing evidence, a well-designed catchphrase will draw jurors to those facts that are most important to your case theory. If a disagreement between jurors arises during the middle of deliberations, a catchphrase may very well be the tool State-leaning jurors use to win over a fellow juror who isn't quite convinced.

Don't believe me? Ask yourself how many times you have heard, "If the glove doesn't fit, you must acquit."

Putting it all together. As prosecutors, the goal of our story is to guide a jury through the facts in a complete and understandable fashion. Simply explaining what happened is not enough, so our story structure should also lead the jury to reach the appropriate verdict based on a clear and accepted value. For example, consider the following way to tell the story of a police officer stopping an intoxicated driver to a jury:

> "Officer Jane Noble [our heroine] is out patrolling the highway late at night. She is doing everything she can to make sure citizens make it home safely. The last thing she wants to do is call somebody's parents in the middle of the night to tell them their child died at the hands of a drunk driver.
>
> "Defendant McDrunk [our villain], on the other hand, spent the evening partying with friends. One drink turned into a second, then a third, and so on. At 11:30 p.m., he got behind the wheel of his 4,000-pound F-150, with his 9-year-old son in the back seat, and he began the

drive home. He nearly clipped Officer Noble's patrol vehicle when he sped past her at 85 miles an hour (in a 65-mile-an-hour zone). It wasn't enough for McDrunk to simply fail his standard field sobriety tests—he had to fail them spectacularly.

"It took a while to locate the child's mother, but after about three hours she arrived on the scene to pick up her son. The sobbing boy was released to her custody right around the time McDrunk refused to provide a sample of his blood. After our heroine secured a warrant, McDrunk's blood was drawn, and the DPS lab confirmed his blood alcohol content to be .151. As he was booked into jail, he remarked on how much he loves his son and how he would do anything for him."

Once upon a time, before I really knew the value of storytelling in closing arguments, I would have probably put a PowerPoint slide before the jury that detailed the elements of driving while intoxicated with a child passenger. Under each element, I would have listed all of the physical evidence and testimony in support of that element. I would have left no stone unturned and given the jury an incredibly thorough summary of the evidence. If I had done a good job in voir dire, my chances at success in trial probably would have been decent enough. However, if I had let a defense-leaning venire member onto the jury or if I found myself up against a particularly skilled defense attorney, a humbling defeat was just as likely.

I know what you are thinking: How is that possible? All the facts are there. The defendant's guilt is as clear as crystal. If you were presenting these facts on a law school exam or talking shop with a group of prosecutors, you would be exactly right. However, we don't argue our cases before juries of law students or prosecutors. Our juries are comprised of a diverse group, all with different life experiences. But whatever the jurors' backgrounds are, I guarantee that they share an ability to listen to and understand a story. Storytelling is universal and, as my boss likes to say, trials often boil down to a battle of competing stories. The jury will usually be swayed by whatever side presents the facts in the most compelling story.

Early in my career, when approaching trials as an exercise in admitting facts into evidence and organizing those facts for the jury, I lost some cases that I shouldn't have because I wasn't doing anything to connect the jury with my case or help them understand why a guilty verdict was the appropriate one. It was only when I began presenting the facts as a story with a clear moral purpose that I began to find the success that I had been missing.

And that's the bottom line—because Stone Cold said so

I realize that the storytelling lessons of professional wrestlers are not for everybody, but that doesn't change the fact that storytelling ability is one attribute that sets a passable prosecutor apart from a good or great one. If you lack in the area of storytelling, seek out storytellers to whom you relate. Study those people. Take what you can from them and make it your own. Practice, practice, and practice some more until you find a storytelling voice that works for you. Don't be afraid to explore a variety of storytelling media to find what's best.[4]

At the end of the day, there is no gold champion's belt awaiting prosecutors who master the art of storytelling. We are public servants. It is our job to come to the courthouse every day and seek justice for the citizens of the counties we serve. We owe it to those citizens to be the best prosecutors we can be. The best version of every prosecutor is one who can do more than read off a list of facts and summarize the law. The best version of every prosecutor is someone who can win the battle of competing stories at trial. ❇

As prosecutors, the goal of our story is to guide a jury through the facts in a complete and understandable fashion. Simply explaining what happened is not enough, so our story structure should also lead the jury to reach the appropriate verdict based on a clear and accepted value.

Endnotes

[1] I realize that many television shows, movies, and novels featuring dramatic twists or non-traditional story structure have been incredibly successful. While the writers of *Westworld* have been good at getting millions of viewers, myself included, to tune in to episode after episode of non-linear insanity, that type of story structure is not an effective advocacy tool.

[2] Need an example? Look up "Ric Flair entrance" on YouTube. Someday, I will walk to the podium for opening statements wrapped in an ornate bathrobe with "Also Sprach Zarathustra" blaring over the courtroom audio system. I encourage everyone reading

Continued in the green box on page 27

How can we make our courthouses safer?

Like many of those in the working world, getting to your desk becomes the most routine exercise of your day.

By Rebecca Lundberg
Assistant Criminal District Attorney, and
Mike Holley
CDA Investigator, in Kaufman County

Maybe you travel the same roads, park in the same general area, and enter through the same door every day. Fueled by coffee, your day is on track to be a rinse-and-repeat experience. But what happens when you miss a warning sign, ignore your intuition, or just flat-out forget to be observant? Failure to address Texas's courthouse security flaws has led to numerous incidents of violence during the last decade from both internal and external actors.

Although being a government employee has many benefits, workplace safety isn't always one of them. Workplace violence against government employees is three times greater than in the private sector. From 2002 to 2011, about 96 percent of workplace violence against government employees was against state, county, and local employees, who made up 81 percent of the total government workforce.[1] Ultimately, meeting the requirements of open government slows the implementation of stricter security policies and practices in comparison to the private sector. Add in the factors of budgetary restrictions and securing courthouses in the digital age, and achieving a safer work environment becomes a true uphill battle.

So why can't we learn from the tragedies others have experienced and justify the security expenditures that our jurisdictions so desperately need? Oversaturation of security issues now impacts the public places we travel, the schools our children attend, and our workplaces. This increase in the number of societal focal points has led to a level of indifference among the governing members of the community with regards to focusing funding toward courthouse security. The "it's not going to happen here" mentality still reigns supreme in many Texas counties. However, the occurrence of several high-profile incidents over the last 15 years shows just how pervasive courthouse tragedies have become.

- In Smith County on February 24, 2005, David Hernandez Arroyo, Sr., opened fire in front of the courthouse with a semi-automatic AK-47 rifle, killing his ex-wife and wounding his son. A downtown resident, Mark Alan Wilson, attempted to intervene but was shot dead. Arroyo was fatally shot by police after a high-speed pursuit.
- In Kaufman County in 2013, Eric Williams shot and killed Assistant CDA Mark Hasse in January in the courthouse parking lot. Williams later murdered CDA Mike McLelland and his wife, Cynthia, in a home invasion-type assault in March of that year.
- In Travis County on November 6, 2015, Chimine Onyeri opened fire on Judge Julie Kocurek, who was shot and seriously wounded in the driveway of her home in Austin.
- In Baytown on April 3, 2017, William Kenny shot and killed Harris County Pct. 3 Assistant Chief Deputy Constable Clinton Greenwood in the parking lot of a Harris County annex courthouse.

Liability considerations

If protecting human life does not provide a persuasive enough reason to prompt change, then perhaps financial hardship is a consequence a jurisdiction may consider. Weighing the cost of security upgrades with that of future liability is a balancing act that each governing body should contemplate as a part of its risk management strategy. Don't let the lack of caselaw mislead you: Like many areas of civil litigation, most suits related to security incidents are resolved through settlement.

Two high-profile security incidents offer readily available and recent examples of impressive settlement figures. Specifically, Fulton County, Georgia, suffered a heartbreaking attack in 2005, resulting in the killing of a judge and a court reporter inside the courthouse and two ad-

ditional murders outside the courthouse.[2] A settlement of over $10 million was approved by the Fulton County Commissioners Court. A closer-to-home example includes the settlement reached in the Judge Kocurek case referenced above.[3] In this settlement, the Travis County Commissioners Court agreed to pay Judge Kocurek $500,000 for the 2015 incident.

Two causes of action should be explored to limit liability: 1) 42 U.S.C. §1983 federal suits and 2) premises liability claims under the Texas Tort Claims Act (both special defect and premise defect claims). Most §1983 suits regarding security incidents will focus on 14th and 4th Amendment violations. Typical 14th Amendment violations revolve around negligence related to personnel—failure to train, failure to direct/supervise, failure to protect, or negligent hiring/retention[4]—whereas suits based on 4th Amendment violations involve excessive or improper use of force by law enforcement officers. Section 1983 suits are especially concerning to a jurisdiction because there is no damages cap. A successful plaintiff may recover a broad range of both compensatory and punitive damages, as well as potentially recovering attorney's fees. Compensatory damages are particularly concerning regarding physically injured plaintiffs, as these damages may include costs of medical care and supplies, lost wages (i.e., back pay and lost future earnings), physical pain and suffering, emotional pain and suffering, and disability/loss of normal life.

Texas, like many other states, grants citizens the right to sue the state, cities, and/or counties under the Texas Tort Claims Act.[5] The act provides for premises liability. "Defects" are qualified into two classes: 1) special defects and 2) premise defects. If the defect is a premise defect, the plaintiff must additionally prove actual knowledge of the defect on the government entity's part before the injury occurred. Recent cases have attempted to use the Texas Tort Claims Act to prove a failure to warn, failure to make safe, or failure to implement adequate security.[6] However, showing that the plaintiff was injured by the condition or use of real or personal property—and that the property was not just a backdrop for the incident—is challenging. The act's notice of claim requirements should be followed strictly, as a plaintiff has only 180 days from the date of the incident to send adequate notice.[7] Finally, note that Texas has capped money damages in a maximum amount of

this to write a letter in support of me to the State Bar when that day comes.

[3] As made famous by my favorite Canadian, Bret "The Hit-Man" Hart. At first glance, you would be forgiven for not knowing what to make of Hart's wraparound sunglasses and hot pink wrestling attire. Despite his appearance, every action he took and every word he spoke oozed authority and self-confidence.

[4] Professional wrestling was hardly the only stop I made on the road to being a better storyteller. Jim Perdue's *Winning with Stories* was legitimately a great help to me. I also found a series of TED Talks on the art of storytelling that were instructive. If you just want to listen to some good storytellers, I highly recommend two podcasts: The first is a modern-day take on Paul Harvey's famous "The Rest of the Story" radio show. It's produced by Mike Rowe, and it's called "The Way I Heard It." The other is "The Moth," which is an hour-long podcast with each show built around a common theme featuring stories from three or four different storytellers. Unlike "The Way I Heard It," all of the stories on "The Moth" are personal ones, which I found to be particularly helpful. I recommend listening to an episode once just for enjoyment and then a second time to analyze the story structure.

$250,000 for each person and $500,000 for each single occurrence for bodily injury or death.[8]

Senate Bill 42: the legislature's best intentions

Senate Bill 42 was passed by the Texas Legislature during its 85th Regular Session (2017). Entitled the Judge Julie Kocurek Judicial and Courthouse Security Act, the bill represents the legislature's reaction to the assassination attempt against Travis County District Judge Kocurek and takes important steps forward in meeting the state's courthouse security needs. Prior to the bill passing, the Office of Court Administration (OCA) sent a court security survey to judges across the state to investigate the status of judicial security. The survey's findings indicated an urgent need for counties to implement security plans, training, and incident reporting standards. SB 42 provides for these initiatives and several more regarding safety for judges and their families.

Although being a government employee has many benefits, workplace safety isn't always one of them. Workplace violence against government employees is three times greater than in the private sector.

SB 42's four main initiatives:

- amends Tex. Code Crim. Proc. Art. 102.017(f) to say that a written report is required regarding any incident involving court security that occurs in or around a building housing a court to be filed with the OCA no later than the third business day after the incident occurred. The presiding judge of the court in which the incident occurred must receive a copy. The report is confidential and exempt from disclosure under Chapter 552, Government Code (Open Government).
- amends Tex. Gov't Code §51.971 to include a $5 fee on the filing of any civil action or proceeding requiring a filing fee. The fee may provide for: 1) continuing legal education for prosecuting attorneys and their personnel, 2) innocence training for law enforcement officers, law students, and 3) court security training programs for individuals responsible for providing court security.[9]
- amends Tex. Gov't Code Ch. 158 to provide that a person may not serve as a court security officer unless the person holds a court security certification issued by a training program approved by the Texas Commission on Law Enforcement (TCOLE).
- amends Tex. Gov't Code §74.092 to require the local administrative judge to establish a courthouse security committee and adopt security policies and procedures.

Courthouse security committees

While being on a committee is not always everyone's favorite task, SB 42's committee mandate actually proves to be a great way to bring awareness to your community regarding security issues. First, the committee brings together the right players and courthouse stakeholders—those who represent law enforcement, the judiciary, and the county's purse strings. Specifically, the statute mandates the following six individuals make up the committee: 1) the local administrative judge, who chairs it; 2) a representative of the sheriff's office; 3) a representative of the commissioners court; 4) one judge of each type of court in the county other than a municipal court or a municipal court of record; 5) a representative of any county attorney's, district attorney's, or criminal district attorney's office that serves in the applicable courts, and 6) any other person the committee determines necessary to assist the committee.

Regarding the final "wild card" committee member, consider appointing a human resources representative. Not only do employees need routine training and support, but they also represent a concern group for internal threats of violence. By appointing a committee member who deals with employee-related issues, you obtain insight into current personnel issues and brewing conflicts or controversies.

The committee's official purpose is to "establish policies and procedures necessary to provide adequate security." Because the committee may not direct the assignment of resources or expenditure of funds, sharing the committee's concerns and security needs with the commissioners court is crucial to implementing any changes—and it should ideally be done prior to the county's annual budget adoption.

Third-party resources

Kaufman County's Courthouse Security Committee chose to adopt an annual report, going beyond just adopting a general security policy.[10] Since when is adopting a longer report preferable? Keep in mind that it is highly likely that your sheriff's office already has an operational "courthouse security policy" document. By incorporating the sheriff's policy, discussing the current security needs, and then making recommendations, our county's committee could generate a more useful and comprehensive report. Courthouse security is a complex topic, and usually people have quite a bit to say regarding it.

How you say it—and the persuasiveness of your recommendations—become incredibly important during the budget process and when dealing with the public or media.

Additionally, using multiple resources to justify security expenditures will help overcome political biases and strengthen the committee's report. Kaufman County's committee utilized data from several third-party sources. Below are some example resources that may prove useful to bolster your own committee report.

A historical courthouse master plan. A master plan must be complete to participate in the Texas Historical Courthouse Preservation Program.[11] These architectural plans are extremely comprehensive and show structural vulnerabilities and building integrity issues that will impact security. Note that the Texas Historical Commission (THC) plans to request additional funding from the 2019 Legislature and continues to accept applications for preservation projects. THC does consider security upgrades as a part of its preservation initiatives.

The Office of Court Administration's (OCA) Court Security Division Incident Reporting. OCA provides useful data compilation regarding incident reporting.[12] OCA anticipates a significant rise in reported incidents post-SB 42 as Texas courts become more efficient at reporting.

The Department of Justice United States Marshals Service security survey of the Kaufman County Courthouse (April 12, 2013). This study was performed after the prosecutor murders in Kaufman County; however, OCA's court security director, Hector Gomez, has been assisting counties with obtaining their own security surveys as a proactive measure. Contact Mr. Gomez for more information.[13]

City of Kaufman Fire Marshal's Office Occupancy Study. Due to privacy concerns, the Kaufman County committee redacted sections of its full report to generate a summary so that the committee's findings and recommendations could be shared as a part of its public information campaign. The summary report was presented to the commissioners court during its budgetary process. In the event that your commissioners court has additional questions that touch on private security concerns, there are two viable ways for the court to enter into an executive session regarding security audits pursuant to the Texas Open Meetings Act.[14]

Finally, distribution of the committee's summary report and the officially adopted "courthouse security policy" to each law enforcement stakeholder must be a priority. Kaufman County's law enforcement positions tend to overlap, such as CDA investigators who are sometimes asked to perform general security duties and the duties of bailiffs. Making sure that each law enforcement officer who carries a weapon and would be a first responder has a copy of the plan is crucial. You want law enforcement officers to "speak the same language" during a security incident, which means that having the same training and protocols is essential. Additionally, armed prosecutors should consider and address their own responsibility to engage in security training.

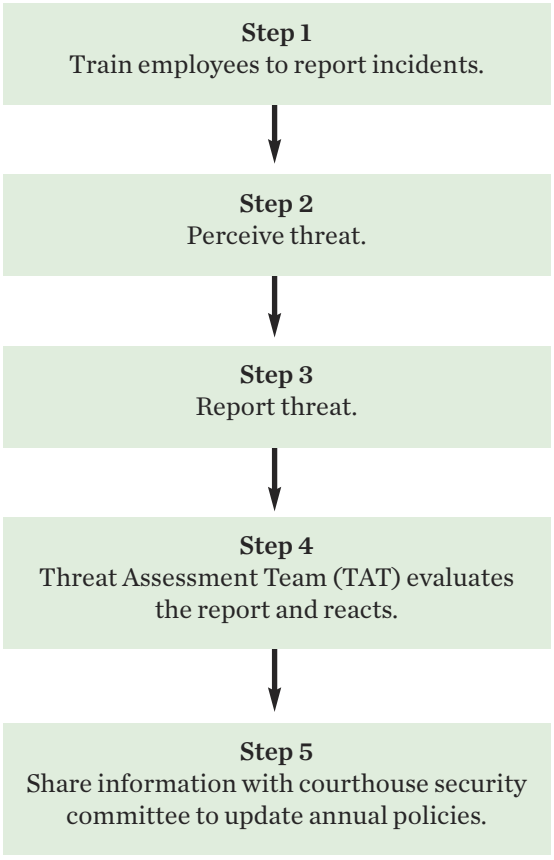
Threat Assessment Team

Making your courthouse security initiatives proactive and not just reactive should be a very important cause to your courthouse security committee. During the course of multiple committee meetings, it became apparent that simply adopting a policy would not provide a blanket fix to our county's security issues. First off, many security concerns occur without ever manifesting into an actual reportable incident. To deal with these types of high-risk situations, the committee explored the creation of a courthouse Threat Assessment Team (TAT). Kaufman County's TAT is also responsible for training and employee-support issues. The committee specifically recommended that training be provided immediately to law enforcement and courthouse employees regarding armed shooters, prisoner escapes, medical situations, hostage situations, explosive devices, fire evacuations, and severe weather.

The primary goal of any TAT is to proactively assess the conditions, policies, and procedures of the organization to prevent or reduce the chances that a potentially violent situation will occur. The TAT identifies threat-makers, assesses risk, and recommends a risk abatement plan—all of which are preemptive measures intended to increase communication about potential threats and reduce incidents from occurring. Members on the Kaufman County TAT consist of: 1) courthouse security supervising sheriff's deputy; 2) the chief investigator from the CDA's Office; 3) a human resources representative, and 4) a City of Kaufman Police representative.

Not only do employees need routine training and support, but they also represent a concern group for internal threats of violence. By appointing a committee member who deals with employee-related issues, you obtain insight into current personnel issues and brewing conflicts or controversies.

Steps to safer courthouses



Encouraging creativity in security solutions

It is up to your county to create a courthouse security model that fits the challenges facing your own community. We offer the Kaufman County model as one idea to share with your community's planning efforts. It is by no means perfect, but it does move the county forward by taking steps to increase safety and encourage community leaders to recognize the cost of tragedy. Courthouse violence is not dependent on your location or population size and can truly occur anywhere at any time. Like any piece of legislation, SB 42 doesn't come close to solving this multifaceted issue, but it does provide a vehicle to kickstart security initiatives for your courthouse. Whether those initiatives are compiling a comprehensive security report, creating a TAT, or reaching out to third-party resources, just remember to get creative and encourage new answers. ❇

You want law enforcement officers to "speak the same language" during a security incident, which means that having the same training and protocols is essential.

Endnotes

[1] Erika Harrell, Bureau of Justice Statistics, *Workplace Violence Against Government Employees*, 1994-2011, (April 2013), www.bjs.gov/content/pub/pdf/wvage9411.pdf.

[2] Atlanta Courthouse Shootings Fast Facts, CNN (Mar. 6, 2018), https://www.cnn.com/2013/10/31/us/atlanta-courthouse-shootings-fast-facts/index.html.

[3] County agrees to settlement with Judge Kocurek over 2015 attack, KVUE (Jan. 31, 2017), https://www.kvue.com/article/news/investigations/defenders/county-agrees-to-settlement-with-judge-kocurek-over-2015-attack/269-393652590.

[4] *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992); *Thompson v. Upshur Cnty.*, 245 F.3d 447, 459 (5th Cir. 2001); *Rocha v. Potter Cnty.*, 419 S.W.3d 371, 381 (Tex. App. 2010); *Dorris v. County of Washoe*, 885 F. Supp. 1383 (D. Nev.1995).

[5] Tex. Civ. Prac. & Rem. Code §101.021.

[6] *Tex. S. Univ. v. Mouton*, 541 S.W.3d 908, 916 (Tex. App.–Houston [14th Dist.] 2018, no pet.).

[7] Tex. Civ. Prac. & Rem. Code §101.101.

[8] Tex. Civ. Prac. & Rem. Code §101.023.

[9] Tex. Gov't Code §56.004.

[10] Contact Kaufman County Criminal District Attorney's Office for a copy of the report.

[11] Tex. Historical Comm's, *How to Participate*, http://www.thc.texas.gov/preserve/projects-and-programs/texas-historic-courthouse-preservation/how-participate (last visited Oct. 26, 2018).

[12] Tex. Judicial Branch, Court Security, http://www.txcourts.gov/programs-services/court-security/court-security-incident-reporting/ (last visited Oct. 26, 2018).

[13] Mr. Gomez can be reached by phone at 512/463-1679 or e-mail at Hector.Gomez@txcourts.gov. More information about the Court Security Division is available at txcourts.gov/programs-services/court-security/.

[14] See Tex. Gov't Code §§551.076, 551.089.

The nuts and bolts of competency

All prosecutors have encountered an obstacle to a legal goal, looked at that obstacle, scratched their heads (maybe even cried), and thought, "What am I going to do?"

By Joshua Luke Sandoval
Assistant Criminal District Attorney in Bexar County

In the world of prosecution there are countless hearings, motions, and legal rules that could prove useful at a moment's notice. It is our job to be ready for those moments.

One morning in the fall of 2015, I was on my way to a motion to suppress when I received a text message from my division chief: "Call me ASAP." As any other level-headed prosecutor would do, I immediately ran through a long list of possible errors, omissions, and other minor acts of malfeasance that I had committed to warrant such a message. I called my division chief, and before I could even ask how he was, I heard on the other end in an abrupt tone: "Report to the magistrate court and be prepared to try a competency hearing on the capital murder case. This afternoon if need be."

This was an important case that involved a defendant accused of brutally gunning down a San Antonio police sergeant, who had stopped in his patrol car at a red light. It had already been over four years since the crime, and the defendant had been tried and convicted of capital murder. However, the day after his conviction, the defense filed a motion alleging the defendant was no longer competent. Following a provision in the law that permits the judge to continue with proceedings, the trial judge went on with the punishment phase.[1] Within a week, the jury handed down a death sentence. Now, the only thing that stood between the accused and sentencing was settling the competency issue.

This article isn't going to focus on details of the capital murder case. Rather, I hope to use that case as an example of the importance of understanding the law on competency and knowing how to navigate a hearing.

The law on competency

Under Texas law, a person is incompetent and thus unable to stand trial if that person doesn't have "1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or 2) a rational as well as factual understanding of the proceedings against the person."[2] The law's goal is to ensure that a criminal defendant is able to confer with and assist his attorney and also have an understanding of what is going on around him in the courtroom. An easy way to remember the distinction between competency and sanity is to think of sanity as pertaining to the accused's mental state *at the time of the offense*, whereas competency deals with the accused's mental state *at the present time*. The law has also included a presumption of competency for all criminal defendants.[3] Any party attempting to challenge this presumption must prove incompetency by a preponderance of the evidence.[4] A basic understanding of our legal system and fundamental fairness should make it abundantly clear why we want to ensure that an individual accused of a crime should be competent. What may be less clear, however, is how to handle defense claims of incompetency and the possibility for a subsequent competency hearing.

The prosecutor, court, or defense attorney may raise the issue of competency.[5] The motion should allege that the accused does not have the present ability to confer with counsel or understand the proceedings that are taking place and the specific facts that support the criminal allegation.[6] Although both sides have a right to raise the issue, in my experience, the defense is the side that contests competency in the overwhelming number of cases. This is logical seeing as defense counsel will have almost exclusive

An easy way to remember the distinction between competency and sanity is to think of sanity as pertaining to the accused's mental state at the time of the offense, whereas competency deals with the accused's mental state at the present time.

exposure to the accused and his family and the opportunity to see behavior that leads to a legitimate concern regarding competency. Considering this, presume for purposes of this article that the defense is suggesting incompetency.

Typically, a motion suggesting incompetency leads to a hearing known as an informal inquiry.[7] Although the court is not required to hold this hearing (and thus can order a competency evaluation without it), the hearing can be a useful tool to flesh out legitimate claims from those that are without merit.[8] The objective of an informal inquiry is to determine if there is some evidence that the accused may not be competent to stand trial.[9] These hearings are designed to give the benefit of the doubt to an accused who is potentially incompetent. As such, the trial court is required to consider only evidence that demonstrates incompetency and is not required to look at contrasting evidence that may demonstrate competency.[10] It is also important to note that that the rules of evidence do not apply at informal inquiries.[11]

When exactly can the competency matter be brought up in a criminal proceeding? The law is generous in allowing the movant plenty of opportunities to bring up the issue. If it is raised prior to trial, all proceedings must be stayed until competency is determined.[12] However, if the issue is raised during trial, the trial court judge does not have to stay the proceedings (as in the capital case mentioned at the beginning of this article). In this situation, the judge has the option of continuing the trial proceedings up until sentencing. While the trial can continue, the defendant cannot be sentenced until he has been deemed competent.

Competency as a delay tactic

Let's not be naïve: Competency could be used by defense counsel as a delay tactic. In my experience the overwhelming number of defense attorneys would shudder at the thought of employing such a tactic; however, there are always a few individuals out there who may invoke competency in their efforts to zealously represent a client. If a prosecutor believes competency has been raised merely for purposes of delay, make sure to read and re-read the defense's motion and confirm counsel is actually alleging facts that would entitle the accused to an evaluation. Although competency is a very low threshold, the presence of a certain mental illness, prescribed medication, or injury does not automatically translate into incompetency. Although the standard for the movant at an informal inquiry is not high, the movant still needs to demonstrate some facts that suggest the defendant is not competent.

Competency hearing

If a trial court judge determines that there is some evidence suggesting incompetency, the court must order a competency examination.[13] Under Texas law, there are very specific requirements for who can perform these evaluations, and in counties where these proceedings are rare, it is wise to make sure that the appointed psychologist or psychiatrist meets those criteria.[14]

If an unmeritorious claim happens to get past the informal inquiry and to a competency hearing, the State must explore the evidence to determine the weakest spots of the defense case. Is its assertion based on a smoke-and-mirrors-type argument where it focuses on conditions that do not necessarily mean one is incompetent? If so, take advantage of the doctor's examination and emphasize that the alleged affliction is not an automatic indicator of incompetency. Perhaps the accused is a pernicious malingerer and is feigning symptoms? It is more difficult to successfully feign incompetence than the average individual may think. Competency evaluations often include a mental status exam that looks at the accused's mood, thought process, thought content, and cognition. Additionally, the expert will have access to the accused's developmental, educational, and medical history. This information is useful to the expert in coming to an accurate conclusion and gives a deeper insight into one's competency than if the doctor merely inquired about the criminal proceedings. When examining the expert, make sure to discuss any inconsistencies in the accused's responses to questions. Explore and emphasize any responses that indicate he may be withholding information or exaggerating various symptoms. No matter how good an actor he may be, the expert is trained to identify inconsistent answers and feigned symptoms.

The expert's report

After receiving the much-anticipated competency evaluation, many of us will immediately flip to the last page to see what the doctor concluded. Just make sure that in your haste to find the expert's conclusion that you do not skip over

some of the valuable information in the report, such as the accused's developmental history, details on his mental status, and any diagnostic impressions the expert has. Finally, pick up the phone and call the expert with specific questions.

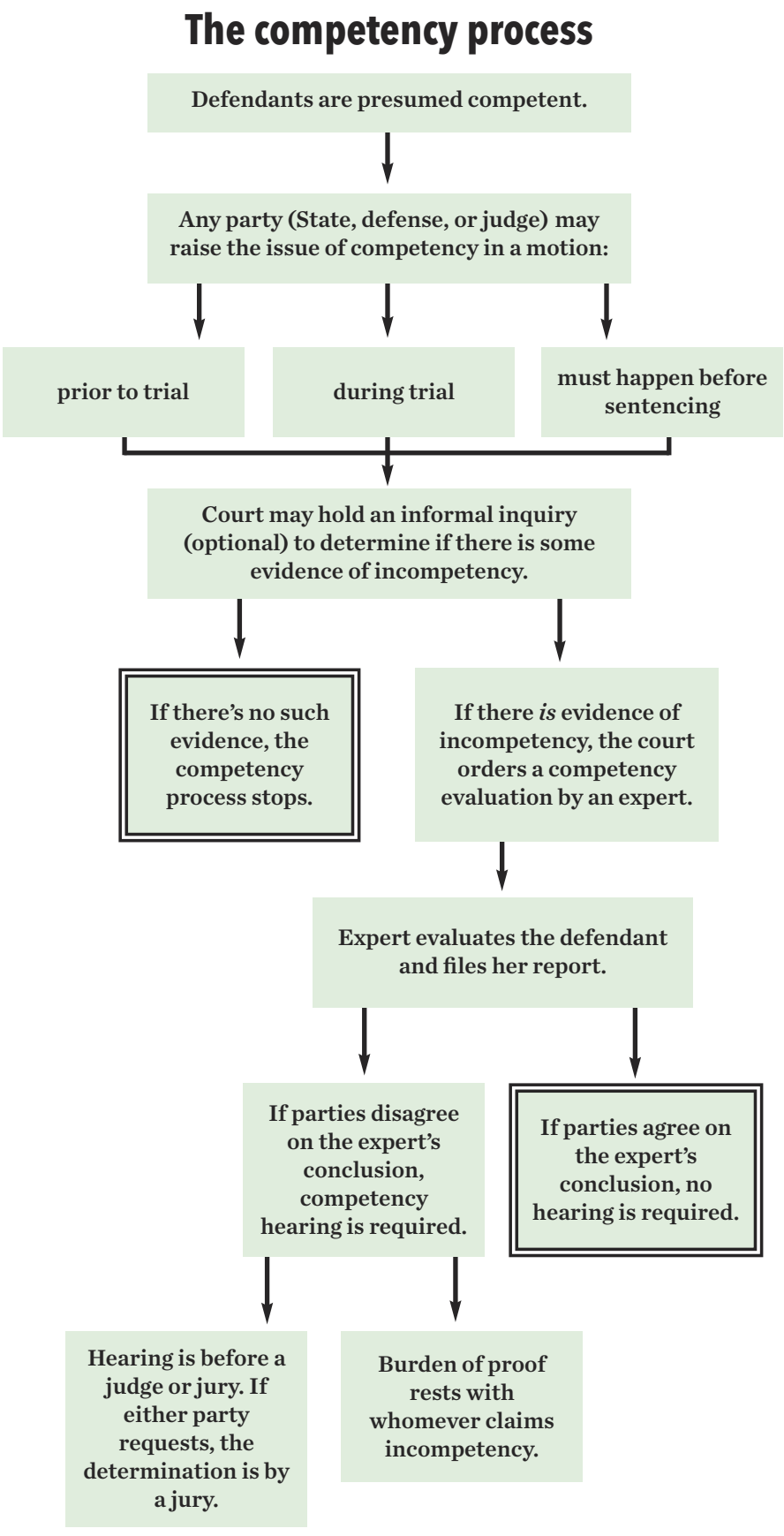
Making a decision

A suggestion of incompetency does not guarantee that the matter will be resolved with a hearing. There will be instances where, after reviewing the competency evaluation, a prosecutor will agree that a defendant is not competent to stand trial. Perhaps an expert's evaluation reveals previously unknown information, thus making it clearer to the State that the defendant is incompetent. Furthermore, in hearings where the evidence is limited, a surprise conclusion by an expert that a defendant is not competent can cause any prosecutor to reconsider whether to proceed with a hearing. In most cases the expert will be the most important witness. As such, it is important to keep an open mind and discuss with the expert his or her reasons for reaching the conclusion.

Voir dire

Take some time to introduce the panel to the concept of competency and how it relates to criminal proceedings. Educate the panel on the presumption of competency and who has the burden to prove incompetency (that is, whichever party raised the issue, usually the defense). Assuming that you are arguing in favor of competency, you want to instill in the panel how strong a force a legal presumption is. Examples can prove invaluable in ensuring the panel, and thus the jury, has a solid understanding of the law. In the past, I have explained a legal presumption as being similar to a ball thrown in the air. We know that, absent an interfering action, a tossed ball will fall to the ground. Much like the natural trajectory of the ball, we must presume that a defendant is competent unless evidence causes us to believe otherwise.

Temper the panelists' expectations early and tell them what information they will *not* have access to due to the limited nature of the proceedings: the offense charged, the offense report, and a copy of the expert's evaluation, to name a few. Additionally, start training the panel to think of competency as it is defined under the law and not to perceive it as one may in common everyday usage. Distinguishing between competency and sanity can also be useful to emphasize the limited



scope of the proceedings. If it's applicable, introduce the panel to malingering. I have used the scene from *Ferris Bueller's Day Off* where the eponymous character feigns symptoms of an illness to demonstrate why someone might seek to exaggerate symptoms.

The presumption of competency should play an important role in closing. It is not every day that prosecutors get the benefit of such a weighty legal presumption. Why not remind every juror in that room of that fact and the tremendous weight that it carries?

The hearing

The side with the burden of proof will be the first to deliver opening statements as well as present its case-in-chief. A compelling opening statement should always refer back to basic concepts that were discussed during jury selection and also discuss what the evidence will show. If you are arguing in favor of competency, use the law to your advantage. I have found it helpful to remind the jury of the limited scope of the hearing. The ability to confer with counsel and understand the pending charges doesn't require special intellectual abilities. This seems rather intuitive especially when recalling that every defendant is presumed to be competent unless proved otherwise by a preponderance of the evidence.[15]

A practical effect of the burden (usually) lying with the defense is that in simpler hearings, where only one expert is appointed, the defense will call the expert during its case-in-chief. This results in the defense's direct examination of that expert looking and sounding a lot more like a cross-examination because the defense disagrees with the expert's conclusion. When it is the State's chance to question the expert, focus on the expert's observations and interactions with the accused. The expert's knowledge of the accused's past developmental and psycho-social history can be helpful in supporting his conclusion. This information can be a very efficient and basic way for the jury to understand on what the expert, in part, based his decision.

The prosecution's case-in-chief offers an opportunity to present any additional evidence that demonstrates competency. Because the defense is likely to call the expert first (and the State isn't required to), the prosecution can put on other evidence, perhaps showing that the accused is malingering or possesses mental faculties that suggest he is competent. Jail calls can be a great resource to demonstrate to the jury that the accused is exaggerating or even fabricating his illness. I have seen situations where jail calls recorded the accused stating that he is going to pretend to be crazy. Don't overlook State-friendly witnesses who have been in recent and close contact with the accused, people such as jail guards and treatment providers. These people can be excellent at demonstrating how the accused behaves when the evaluating expert is not around. Furthermore, try to think outside of the box and see if there are coworkers, family members, or friends of the defendant who can testify about his or her normal cognitive abilities, capacity to hold a job, or even ability to function independently. These considerations can help the jury obtain a fuller picture of how the defendant thinks and interacts with others, which can directly relate to one's competency.

A successful closing argument should consider three points: the hearing's limited scope, the presumption of competency, and the evidence. Use this argument as a platform to remind the jury that all it should be concerned with is whether the accused knows what is going on in the courtroom and can assist his attorney—if the jury believes that he can, then he is competent. Similarly, the presumption of competency should play an important role in closing. It is not every day that prosecutors get the benefit of such a weighty legal presumption. Why not remind every juror in that room of that fact and the tremendous weight that it carries?

Finally, remind the jury that the side contesting competency (usually the defense) needs to bring evidence to prove otherwise. Look back at all the evidence and present it to the jury as part of a greater narrative on why the presumption of competency is right in this case. As in any closing argument, avoid the common pitfalls of regurgitated facts and conclusory statements by piecing the evidence together and using reason to demonstrate why the State's position is superior. Just because the defense brings a whole laundry list of facts, details, and stories doesn't make its position correct.

And in case you are interested in the outcome of the capital case I mentioned above: After

four days of testimony, the jury determined that the accused was competent. The competency certification was sent back to the district court where the defendant was formally sentenced to be executed. I believe that the jury reached the right conclusion in the trial on the merits as well as in the competency hearing. Regardless of what the stakes are in your case, it is important to know the law on competency and be confident in your ability to handle a hearing on the matter. ❇

Endnotes

[1] See Tex. Code Crim. Proc. Art. 46B.005 (establishing procedures for determining incompetency to stand trial).

[2] Tex. Code Crim. Proc. Art. 46B.003.

[3] *Id.*

[4] *Id.*

[5] Tex. Code Crim. Proc. Art. 46B.004.

[6] *Id.*

[7] *Id.*

[8] Tex. Code Crim. Proc. Art. 46B.021.

[9] Tex. Code Crim. Proc. Art. 46B.004.

[10] See *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999).

[11] See *McDaniel v. State*, 98 S.W.3d 704, 710-13 (Tex. Crim. App. 2003) (holding that no formal competency hearing is required when the defendant never raises any bona fide doubt as to his competency).

[12] Tex. Code Crim. Proc. Art. 46B.005.

[13] Tex. Code Crim. Proc. Art. 46B.021.

[14] *Id.*

[15] Tex. Code Crim. Proc. Art. 46B.003.

"Cover that up!" The reassurance of a liability policy

"Needing insurance is like needing a parachute. If it isn't there the first time, chances are you won't be needing it again."
— Unknown (but lucid) source

By C. Scott Brumley
County Attorney in Potter County

As you glide through these pages, reading think pieces, stories, and pointers from your colleagues about prosecuting crime and seeing that justice is done, what could build on that enthusiasm more than taking a momentary pause to think about ... insurance? Sure. To use a self-generated, cheesy analogy, insurance coverage is like your socks. It's probably a good idea to have insurance, and there doesn't appear to be much reason to think about it until the point of exposure. But just as surely as your big toe will be laid bare for the world to see at the TSA checkpoint if your sock has a hole, so too will inadequate insurance coverage become a matter of consternation (to say the least) when a citation or—worse yet—a federal court summons lands on your desk.

No one needs me to add another stanza to the refrain often seen in the pages of the very songbook you're reading right now about how cool it is to be a prosecutor. Even so, I completely agree that we have the greatest job in the legal profession and the second greatest job in the world (I concur with Jeff Foxworthy that No. 1 would be shooting frozen chickens from a cannon at the windshields of airplanes). Yet, it can't be denied that if we're doing our jobs even reasonably competently, someone is going to wind up feeling a bit chippy about the ordeal. While violence remains a happily rare outcome from that seething anger, litigation is less so. As you do your job, then, you may ask yourself, "Can I get sued over this?" The answer is clichéd but largely accurate. All it takes to file a lawsuit is a bad attitude and about $300.

Of course, that doesn't mean the lawsuit will be meritorious. In fact, the vast majority of civil suits for damages against prosecutors are ab-

It can't be denied that if we're doing our jobs even reasonably competently, someone is going to wind up feeling a bit chippy about the ordeal. While violence remains a happily rare outcome from that seething anger, litigation is less so.

jectly frivolous. In considerable part, that is true because of prosecutorial immunity. A painstaking discussion of prosecutorial immunity would be really long, and probably really dull, and it wouldn't really be germane to the ultimate purpose of this writing. Suffice it to say that prosecutors who are sued for acts within their duties that are "intimately associated with the judicial phase of the criminal process" have absolute immunity from such lawsuits.[1] In case you lack experience with civil litigation, it is worth pointing out that an absolute immunity is strong medicine, indeed. The immunity effectively cuts off the suit early in the process, generally even before discovery begins. But someone has to assert it for the court to apply it. And, while that can be done *pro se*, the old saying that "the lawyer who represents himself has a fool for a client" didn't become an old saying just because it's pithy.

If you're sued, then, you probably will need someone to file the appropriate responsive pleading on your behalf. As the rather indelicate police adage goes, "You may beat the rap, but you won't beat the ride." Though lawsuits may be unavoidable, the headaches that come with worrying about representation don't need to be.

The county ride

For those who haven't already moved along to see if any pictures of you at a recent seminar made it into this issue, and for those who may be assistants, key personnel, or elected county attorneys, Texas law authorizes in-house help. Specifically:

> A county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.[2]

Where criminal charges may arise from the same facts that generate the lawsuit or where additional counsel is necessary, the official or employee is entitled to have the commissioners court employ and pay private counsel.[3] There is no requirement to accept the representation,[4] but the statute does not obligate the commissioners court to fund representation by a lawyer of the officer's or employee's choice, either. On its face, the statute provides a measure of assurance for county attorneys, assistant prosecutors, and staff members (who are paid from county funds) if the commissioners court determines the suit against any of them "arises from the performance of public duty."[5] But what about cases in which the commissioners court does not or will not make that determination? And what about elected district attorneys?

Let's consider the latter circumstance first, as its answer is instructive in both instances. Within the context of the Local Government Code's representation provision, a district attorney is not a county officer or employee.[6] On the other hand, a district attorney is entitled to be defended by the attorney general in an action in federal court if:

1) the district attorney is a defendant because of his or her office;

2) the cause of action accrued while the plaintiff was confined the Texas Department of Criminal Justice;

3) the district attorney requests the attorney general's assistance in the defense; and

4) there is no action pending against the district attorney in which the attorney general is required to represent the State.[7]

Anecdotally, district attorneys have reported, at best, mixed results in securing federal court representation from the attorney general's office—and that says nothing of cases filed against district attorneys in state court. Essentially, then, that brings us back to the authority of the commissioners court. Even where the Local Government Code does not require county-funded defense in a given case, the county retains a common-law authority to provide a civil defense if the commissioners court finds that the suit involves a public interest requiring a vigorous defense or that paying the legal fees serves a public (not merely the officer's or employee's private) interest.[8] Additionally, the court must determine that the officer or employee committed the alleged act or omission that is the basis of the lawsuit while acting in good faith and within the scope of official duties.[9] That authority applies in cases involving district officers, as well as county officers and employees.[10] Existence of those factors is no guarantee, though, because the common-law authority is discretionary, not mandatory.[11]

Is there something else out there?

Not every county has the in-house capability to provide effective civil defense. Where that may be true, alternatives exist. Texas commissioners

courts are statutorily authorized to provide insurance to protect "a county officer or employee" from "liability for losses arising from the performance of official duties by the officer or duties of employment by the employee, including losses resulting from errors or omissions of the officer or employee or from crime, dishonesty, or theft."[12] Included within the scope of who may be "a county officer or employee" in this context are district attorneys.[13] Coverage of this sort may be provided through a self-insurance program or risk retention group under Chapter 2259 of the Government Code or through a governmental pool operating under Chapter 119 of the Local Government Code.[14] Even if some commissioners courts are woefully unappreciative of prosecutorial valor and value, elected prosecutors are authorized to use "state or county funds appropriated or allocated for the expenses of [his or her] office" or discretionary funds to purchase liability insurance or similar coverage—from the same sources available to commissioners courts—to insure against claims arising from the performance of official duties.[15]

"Now, wait," you may be saying. "Don't I recall something about the Attorney General putting the kibosh on defending myself out of forfeiture funds?" Yes, you do. Sort of. Noting that it has narrowly construed the concept of "official purposes" of the office, as required for expenditure of forfeiture funds under Code of Criminal Procedure Art. 59.06, the Attorney General's Office has concluded that legal defense of the elected district attorney in a civil suit is not an official purpose of the office for which forfeiture funds may be used.[16] The legislature subsequently amended Art. 59.06 to provide that an official purpose of the office may include "legal fees, including court costs, witness fees, and related costs, including travel and security, audit costs, and professional fees."[17] While the change in law may affect the vitality of the Attorney General's opinion, it doesn't establish whether adequate funds exist in the forfeiture account at any given time to pay for a civil defense lawyer. Either way, even under the narrow construction of the Attorney General's Office, its opinion did not pass upon whether forfeiture funds could be used to purchase liability insurance, as opposed to directly using them to pay defense counsel. That's probably because—as mentioned above—county and district attorneys have explicit statutory authority to purchase liability insurance for official duty claims "from accounts maintained by the county or district attorney, *including but not limited to* the fund created by charges assessed by the county or district attorney in connection with the collection of 'insufficient fund' negotiable instruments."[18] Taken together, those factors make it worthwhile to at least consider insurance.

Where to start? Several private, commercial insurers offer liability insurance, as well as some variant of "errors and omissions" coverage that may provide a measure of protection against official duty claims. Whether any given company's premium rates and its fiscal stability are such that it may be an attractive provider are matters for informed comparative shopping. How complicated that may be is, in part, a function of how much will be spent. If the premium outlay will exceed $50,000, acquisition of coverage will need to comply with the County Purchasing Act, because insurance is included within the definition of an "item" subject to the act's procedures.[19] If your county has a purchasing agent, it's probably advisable to involve that person in the review of available insurers because purchasing agents tend to be, for lack of a better term, trained shoppers.[20] In doing that shopping, it may be worthwhile to consider an alternative with a bit more governmental flavor.

You may recall the earlier discussion of sources from which commissioners courts, or prosecutors, may obtain liability coverage. Those sources include a governmental pool operating under Chapter 119 of the Local Government Code. In practice, that means the Texas Association of Counties Risk Management Pool (TAC RMP). The TAC RMP has been around for more than 40 years. It is governed by a board of trustees consisting of elected county officials from around the state. Meetings of that board are subject to the Texas Open Meetings Act. Beyond the fact that the TAC RMP has to clear some of the same hurdles as a commissioners court in running its affairs, it is worth noting that the staff that handles the day-to-day operations of the pool comprises people with substantial experience in county government who understand the intricacies and peculiarities of the way Texas counties work.

TAC RMP is no small-time, Mom-and-Pop outfit. The pool fund exceeds half a billion dollars, and the protection it provides is backed up by excess liability coverage through County Rein-

TAC RMP is no small-time, Mom-and-Pop outfit. The pool fund exceeds half a billion dollars, and the protection it provides is backed up by excess liability coverage through County Reinsurance Limited, reinforcing the stability and solvency of the RMP's claims capacity.

While larger counties may have adequate staff and sizeable human resources and risk management departments to assess and train on liability minimization, many smaller counties do not. To that end, coverage through TAC RMP makes available guidance services from an array of consultants with substantial county experience in risk management involving law enforcement, road and bridge work and human resources, among other areas of county endeavor.

surance Limited, reinforcing the stability and solvency of the RMP's claims capacity.[21] Among the panoply of coverages offered through the TAC RMP is Public Officials Liability (POL) coverage, which is most germane to the subject at hand here.

The coverage provided by POL policies extends to claims arising from a wrongful act (meaning any actual or alleged error or misstatement, omission, act of neglect, or breach of duty) while performing official county duties. Within this scope, coverage is provided for employment-related liability including claims arising from termination, harassment, and discrimination. Unless you have an employment lawyer already on staff (or if the employment lawyer is the one getting the axe), that kind of reassurance can prove invaluable when human resources problems arise.

Elected officials or employees of a county insured by the TAC RMP are covered while acting in their official capacity. That coverage expressly includes elected county attorneys. Moreover, this coverage extends to an assistant county attorney, assistant district attorney, or other employee of a county attorney's or district attorney's office for claims sounding in malicious prosecution (in addition to other potential official-capacity claims). Of potential interest to elected district attorneys and criminal district attorneys is the availability of optional coverage by endorsement for a district attorney when performing functions on behalf of the county. Malicious prosecution coverage is included, with the coverage becoming applicable if the Attorney General does not provide defense.

Unlike some commercial insurers, TAC RMP does not deduct defense costs from a policy's limit of liability. Also distinguishing TAC RMP from some other commercial carriers is the pool's inclusion of cyber liability coverage, which is included within POL coverage.

While larger counties may have adequate staff and sizeable human resources and risk management departments to assess and train on liability minimization, many smaller counties do not. To that end, coverage through TAC RMP makes available guidance services from an array of consultants with substantial county experience in risk management involving law enforcement, road and bridge work and human resources, among other areas of county endeavor. So even if you can't provide training on lawsuit avoidance, TAC RMP staff members can. Even when misfortune does strike, the pool provides pre-claims assistance, upon written request, prior to the existence of a formal claim. When a formal claim arises, the pool's claims staff is knowledgeable not only about liability issues, but also county governance and workflow, substantially flattening the learning curve about how things work within a given county while trying to resolve a claim.

To learn more about TAC RMP coverage, you can contact the Risk Management Consultant for your region online. You can determine the region that includes your county or district by going to https://www.county.org/County-Risk-Management-Map.

Whether you choose to pursue coverage through TAC RMP or some other insurer, the nature of prosecutorial work makes liability coverage something of an imperative unless you want to spend your time defending civil lawsuits instead of prosecuting crime. Just like wearing new socks at the airport, liability coverage will make you more comfortable and confident in getting to where you're going. ❇

Endnotes

[1] *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Charleston v. Pate*, 194 S.W.3d 89, 90 (Tex. App.–Texarkana 2006, no pet.).

[2] Tex. Loc. Gov't Code §157.901(a).

[3] *Id*. at (b).

[4] *Id*. at (c).

[5] Tex. Att'y Gen. Op. No. KP-0031 (2015), at 2.

[6] See Tex. Att'y Gen. No. JM-1276 (1990) at 11-12 (district attorney is non-county official for purposes of §157.901); Tex. Att'y Gen. Op. No. MW-252 (1980), at 2 (under essentially identical predecessor statute, district attorney was not "county officer or employee" entitled to representation).

[7] Tex. Gov't Code §402.024(a).

[8] Tex. Att'y Gen. Op. No. JC-0047 (1999), at 3.

[9] *Id*.

[10] See *id*. at 5 (concluding county has authority to defend district judge).

[11] See *id*. at 3 ("the common-law rule is permissive – it does not require the political subdivision to provide counsel").

[12] Tex. Loc. Gov't Code §157.043(b).

[13] *Id*. at (a).

[14] *Id*. at (b).

[15] Tex. Gov't Code §41.012.

[16] Tex. Att'y Gen. Op. No. GA-0755 (2010), at 2.

[17] Act of May 13, 2013, 83rd Leg., R.S., ch. 157, §1, 2013 Tex. Gen. Laws 595, 596 (codified at Tex. Code Crim. Proc. Art. 59.06(d-4)(8)).

[18] Tex. Gov't Code §41.012 (emphasis added).

[19] Tex. Loc. Gov't Code §262.022(5); see also *id*. §262.023(a) (requiring competitive purchasing procedures for purchase of items under contract entailing expenditure exceeding $50,000).

[20] See Tex. Loc. Gov't Code §262.011(p) (requiring judicially-appointed purchasing agent to complete at least 25 hours of training each two-year term).

[21] See Tex. Loc. Gov't Code §119.005(e) (authorizing pool board to purchase reinsurance).

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