The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

January–February 2021 • Volume 51, Number 1

"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 prosecutors are making it work

If anything is true about people who work in a Texas prosecutor office, it's that y'all are a resourceful lot.

Compiled by Sarah Halverson
TDCAA Communications Director in Austin

Prosecutors and staff are accustomed to making the most of what they have, whether it's limited time, personnel, or funds, and those limitations often lead to remarkable creativity and smart solutions to pesky problems.

We wanted to find out how everyone is operating amidst the still-raging pandemic, and it's been no small feat as some counties are changing course week by week. To bring this information to our entire service group, we asked several prosecutors across the state the same series of questions: how their jurisdictions are conducting trials (or *not* conducting trials), what the biggest difficulties are, whether pleas are moving forward, how the shutdown is affecting defendants on bond, and whether anything good has come from this whole crisis. We share their answers here so that everyone might benefit from their setbacks and successes—and there *have* been successes. Prosecutor office personnel, after all, are a resourceful bunch.

Has your office conducted any trials since the COVID-19 shutdown?

Benjamin I. Kaminar
Assistant County & District Attorney in Lamar County
Yes, we conducted a felony jury trial in mid-November. None of the trial was conducted remotely; however, our defense attorneys have been using Zoom to meet with defendants in jail, including with this trial.

Erica Morgan
Assistant District Attorney in Bell County
We have not conducted any trials. We had two scheduled before the court, but each fell through due to concerns about adequate representation in the remote process. Specifically, the defendant was to appear remotely from the jail, and there was not a way for his attorney to be with him in the jail facility. Others in my office have conducted suppression hearings and outcry hearings remotely. We have a death penalty case pending, and there have been many hearings on pretrial motions conducted remotely for that case.

We've thought through the logistics of having a trial and examined how that would look procedurally, and if completed, would the constitutional rights of the accused remain protected? We do not believe we can safely hold a trial and address the health concerns of the participants and public at the same time. We have serious concerns about selecting a jury of one's peers if we are automatically excusing prospective jurors who are older, who have health concerns, or who live or work with such a person. Once those individuals are excused, is the remaining panel really a representative cross-section of our community from which to select a fair and impartial jury?

Continued on page 16

And another joins the Texas Prosecutors Society

Like ships passing in the night, our September-October 2020 issue of *The Texas Prosecutor* was going to print just as **Donna Hawkins** accepted our invitation to join the Texas Prosecutors Society.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Donna is a respected former prosecutor from Harris County and has had a great career in the profession. Donna, we are honored to place your name with the others for our Class of 2020!

The "Machine Gun Mike" Scholarship Fund

In the last edition of this journal, I reported on the passing of legendary Houston prosecutor and defense attorney **Mike "Machine Gun" Hinton**. (He might have been best known for prosecuting the "Candyman"—search for "the man who killed Halloween" to read all about it.) Mike, who was a member of the TDCAF Board at his passing, had a lot of friends. Indeed, **Chuck Rosenthal**, former Harris County DA and Foundation Advisory Board member, quickly organized an effort to memorialize Mike with a scholarship fund. That took off, and within weeks it had accumulated $5,950 in donations. The list of donors to the fund reads like a "who's who" in Texas criminal law. Thanks to the following individuals who gave substantial gifts in Mike's name so that his legacy would be preserved:

Kathy Braddock	Jerry Gross	Maria McAnulty
Vic Driscoll	C. Hamel	Mary Beeler Meadows
Lawrence Finder	Keno Henderson Jr.	Charles Rosenthal
Jack Frels	Helen Jackson	Ken Sparks
Leon Frels	Timothy Johnson	Larry Urquhart
Mary Flood	Rob Kepple	Carol Vance
Bert Graham	Chip Lewis	Ron Woods

Texas District and County Attorneys Association

505 W. 12th St., Ste. 100
Austin, TX 78701 • www.tdcaa.com

About *The Texas Prosecutor*

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, staff, and TDCAA members. Articles not otherwise copyrighted may be reprinted with attribution as follows: "Reprinted from *The Texas Prosecutor* journal with permission of the Texas District and County Attorneys Association." Views expressed are solely those of the authors. We retain the right to edit material.

Table of Contents

Congratulations to our newly elected prosecutors

Congratulations to the prosecutors who took office on January 1—they're listed in the box below.

Even for those who have been experienced assistant prosecutors, we know that the "corner office" comes with a whole different set of challenges. We hope you will rely on TDCAA and on your neighboring county and district attorneys for guidance and assistance. For you experienced hands, think about reaching to our new folks. I am sure you recall how you were "drinking out of a firehose" those first few months!

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Cindy Ayres, County Attorney in Baylor County
Greg Barber, County Attorney in Ector County
Jennifer Bergman, District Attorney in Liberty County
Coll Bramblett, County Attorney in Hudspeth County
Hunter Brooks, 50th Judicial District Attorney
Christina Busbee, 38th Judicial District Attorney
Dawn Cahill, County Attorney in Sutton County
Janet Cassels, District Attorney in Angelina County
Jennifer Chau, County Attorney in Matagorda County
Benjamin Clayton, County Attorney in Runnels County
David Colley, 76th Judicial District Attorney
Keith Cook, County Attorney in Leon County
Kyle Denney, County & District Attorney in Lavaca County
Michele Dodd, County Attorney in Reagan County
Jenny Dorsey, County Attorney in Nueces County
Dusty Gallivan, District Attorney in Ector County
Sean Galloway, County & District Attorney in Andrews County
Delia Garza, County Attorney in Travis County
Jose Garza, District Attorney in Travis County
Earl Gray, County Attorney in Brazos County
Calvin Grogan, County Attorney in Hunt County
Mark Haby, Criminal District Attorney in Medina County
Stephen Harpold, 198th Judicial District Attorney
Colton Hay, County Attorney in Trinity County
Caleb Henson, District Attorney in Leon County
Whitney Hill, County Attorney in Dallam County
Al Iracheta, County Attorney in Maverick County
Andrew Jones, District Attorney in Nacogdoches County
Craig Jones, County Attorney in Hutchinson County
Katie Lackey, County Attorney in Kent County
Erin Lands, 69th Judicial District Attorney
David Martinez, County Attorney in Val Verde County
Christian Menefee, County Attorney in Harris County
Matt Minick, County Attorney in Hardin County
Ann Montgomery, County & District Attorney in Ellis County
Samantha Morrow, County Attorney in Nolan County
Amanda Oster, District Attorney in Aransas County
Jenny Palmer, District Attorney in Henderson County
Karren Price, District Attorney in Shelby County
Gocha Ramirez, 229th Judicial District Attorney
Landon Ramsay, County Attorney in Franklin County
Rollin Rauschi, County Attorney in Shackelford County
Dwain Rogers, County Attorney in Llano County
Yvonne Rosales, 34th Judicial District Attorney
Rickey Shelton, County & District Attorney in Morris County
Brent Smith, County Attorney in Kinney County
Bridgette Smith-Lawson, County Attorney in Fort Bend County
Jeff Swain, District Attorney in Parker County
Will Thompson, Criminal District Attorney in Navarro County
Rebecca Walton, District Attorney in Hardin County
Suzanne West, 63rd Judicial District Attorney
Ori White, 83rd Judicial District Attorney
Hayden Wise, County Attorney in Coleman County

Texas Board of Legal Specialization freezing out prosecutors?

The Texas Board of Legal Specialization affords attorneys the opportunity to demonstrate expertise in an area by taking a comprehensive exam. Upon successful completion, attorneys can hold themselves out as having a specialization in that area. In criminal law, an attorney can seek a specialization certification in criminal appellate or general criminal law.

Today, there are 819 lawyers with criminal law certification and 135 with criminal appellate certification. To be qualified to sit for the six-hour exam for criminal law specialization, you must:

- have practiced law full-time for at least five years as an active member of the State Bar of Texas;
- have at least three years of criminal law experience with a yearly minimum 25 percent substantial involvement in criminal law matters;
- have handled a substantial number of criminal law matters involving state and federal misdemeanors, felony trials, and state and federal appeals;
- have qualified, vetted references from judges and lawyers in the area;
- have completed 60 hours of TBLS-approved continuing legal education in criminal law; and
- meet all of the TBLS Standards for Attorney Certification.

Seems like an experienced prosecutor should have no problem getting a shot at taking the exam, right? Curiously, though, we have been hearing that very experienced prosecutors are being shut out on the grounds that they don't do appeals or federal court work. That, by the way, didn't used to be the case—I got certified in the 1990s without any appellate or federal experience.

So what has changed? We want to find out. Here is what we need from you: If you have applied to take the exam and been denied, please contact me at Robert.Kepple@tdcaa.com. TDCAA leadership wants to advocate for you and make sure that prosecutors with solid criminal experience have the right to recognition as criminal law specialists.

Diversions and money don't mix

I've heard it said that lessons are re-taught until they are learned. Over the years the law has remained consistent when it comes to getting money from a criminal defendant: A statute must authorize that fine, fee, cost, reimbursement, or restitution. But it seems that every now and again a headline like this appears: "For a Price, this Texas DA drops drug charges." (The whole story is here: https://www.houstonchronicle.com/politics/texas/article/For-a-price-this-Texas-DA-drops-drug-charges-15734631.php.)

Ouch. As well-intentioned as such a program may be—the defendant gets a case dismissed and the community benefits from it—it is not authorized by law. This has been pretty clear since Attorney General **John Cornyn** issued Opinion JC-0042 in 1999, when the AG opined that a county attorney could not condition a diverted prosecution on a contribution to the county law library, CrimeStoppers, a D.A.R.E. program, or the Sheriff's Posse. AG Cornyn followed with JC-0119, in which he opined that a county attorney may not condition an offer of pre-trial diversion upon a payment of $1,500 to a nonprofit that the CA created to dole out the funds. Indeed, the only fee that may be charged if the case will be deferred can be found in Article 102.012 of the CCP, and that is a maximum fee of $500, *if* it is budgeted to run the diversion program and nothing more.

I am certainly sympathetic with the DA in the article, who was trying to find a way to avoid tagging someone with a felony offense for a THC edible from Colorado, but one can quickly see the problems with the "optics." What if you don't have the $4,000 required for the deferred? Poor people get prosecuted and rich people skate? Diversion may indeed be the right thing to do, but the "justice for sale" criticism is hard to get past.

I am certainly sympathetic with the DA in the article, who was trying to find a way to avoid tagging someone with a felony offense for a THC edible from Colorado, but one can quickly see the problems with the "optics."

Thanks to TDCAA leadership

I want to take a moment to thank some of TDCAA's best leaders ever, who ended their board service at the end of the year. It has been challenging, but these folks have stayed the course and made great decisions for your organization that has kept us strong. Thanks to **Jarvis Parsons**, DA in Brazos County; **Isidro "Chilo" Alaniz**, DA in Webb and Zapata Counties; **Sharen Wilson**, CDA in Tarrant County; **Landon Lambert**, County Attorney in Donley County; and **Hardy Wilkerson**, 118th Judicial DA. Great work in a tough year!

Continued on page 7 in the orange box

Ready for a bright new year ahead

I want to thank the members and leadership of TDCAA for the privilege to serve as TDCAA President. It is truly an honor to hold this position and I am deeply humbled.

By John Dodson
TDCAA President & County Attorney in Uvalde County

I want to start out by wishing a very fond farewell to those prosecutors who have left office this year. I have had the pleasure of meeting many of you over the years, and you will be missed. I also want to officially welcome and congratulate all the newly elected prosecutors! I look forward to the opportunity to meet all of you over the course of the year. I hope that not too long into the new year, the coronavirus has been tamed and we can get back to meeting in person.

With its wealth of programs and services, including quality training and publications, TDCAA is the foremost support resource for Texas prosecutors. Even with the shutdowns of 2020, the amazing staff at TDCAA was able to move mountains and adjust to the times to maintain quality education opportunities for Texas prosecutors. Thanks in large part to the dedication of past president Kenda Culpepper, I take leadership of an organization that is operating smoothly despite these crazy times, and it is my sincere hope and mission to maintain its well-earned reputation.

TDCAA is the largest statewide association of prosecutors in the nation. As is usually the case, the true value of any organization lies in its members. Having so many members is one of TDCAA's greatest strengths. I first joined TDCAA almost 19 years ago as the newly elected County Attorney in Uvalde County and received a warm welcome. Pretty soon thereafter I expanded my involvement by serving as a member (twice) and subsequent chairperson of the Civil Committee. I have also served on the Training Committee and spoken at conferences. More recently, I have continued my TDCAA relationship as a board member, officer, and now, president.

My association with TDCAA is in no way unique. Over the years I have come to know and work with many elected DAs and county attorneys, prosecutors, civil lawyers, investigators, and professional staff with more experience and longevity than I have. If I could point to a single factor that contributes the most to TDCAA's ability to serve and benefit its membership, it is because of its diverse and active members. That has never been more evident than this past year. I have to say that for any of you wanting to increase your involvement, you will find a very welcome reception. Whether you are in the big city or small town (that would be me), TDCAA is dependent upon the experience and expertise of its membership to maintain its high level of service to our profession.

As many of you are aware, 2021 is a legislative year. As I am writing this, it is anybody's guess as to how the legislature is going to conduct its business. Due to the impact of COVID-19 on our state and nation, I am pretty sure state leaders will be very busy with the budget and related matters. However, that doesn't mean we get to sit back and enjoy some popcorn as we watch the show. I expect the issue of defunding police and efforts to limit involvement by associations such as TDCAA to get quite a bit of attention as well. As leaders in the criminal justice system, prosecutors must remain vigilant and be prepared to respond to issues about the justice system, both real and imagined. The public debate from 2020 will be continued in the upcoming session of the legislature, and we all have an obligation to ensure that any legislative response is deliberative and constructive. TDCAA has been, and will continue to be, an integral participant in the discussion. TDCAA will depend upon the expertise and

support of its members to help shape public policy in criminal justice matters. It seems that each successive legislative session is increasingly important to Texas prosecutors. Executive Director Rob Kepple or Government Relations Director Shannon Edmonds cannot carry this load for us. They can help strategize and fashion our message, but our legislators must hear from us, the locally elected prosecutors. You can help this session by staying informed on the legislative issues that impact your work and collaborating with TDCAA to communicate your concerns and solutions to the legislature. I encourage each of you to subscribe to and read Shannon's weekly updates for starters. They are always informative and usually entertaining as well.

I hope that you agree with me on the importance of our profession and this association. I didn't start my legal career with an ambition to become an elected prosecutor. In fact, my grand plan was to become a real estate and transactional attorney in a small-town practice with my father. Fortunately for me, I discovered that there was hardly anything better than working for and serving my community as county attorney. And almost 19 years later, I still believe that to be true. I don't think I would be saying this if it weren't for the support, training, and fellowship that TDCAA has provided me over the years. I sincerely invite you to call me or search me out at the next TDCAA event. I would love to hear your story. Now, let's put 2020 behind us and look forward to 2021. ❇

And in with the new!

TDCAA held its Annual Business Meeting to elect the leadership for 2021. Here are the results of the executive leadership elections and the Regional Director elections:

- Chair of the Board (by bylaws): **Kenda Culpepper**, Criminal District Attorney in Rockwall County;
- President Elect: **Jack Roady**, Criminal District Attorney in Galveston County;
- Secretary-Treasurer: **Bill Helwig**, Criminal District Attorney in Yoakum County;
- Criminal District Attorney at Large: E**rleigh Wiley**, Criminal District Attorney in Kaufman County;
- County Attorney at Large: **Leslie Standerfer**, County Attorney in Wheeler County'
- Region 1 Director: **Randall Sims**, DA in Armstrong and Potter Counties'
- Region 2 Director: **Philip Mack Furlow**, DA in Dawson, Gaines, Garza, and Lynn Counties; and
- Region 4 Director: **John Hubert**, DA in Kleberg and Kenedy Counties.

Thanks to you all for jumping in. It is going to be a busy year, and with your leadership I am sure it will be a successful one. ❇

Training predictions for 2021

You guys heard about this coronavirus thing?

By Brian Klas
TDCAA Training Director in Austin

This is the second article I have written in response to the pandemic and its effects on the TDCAA training calendar. It has been only a few additional months, but that first article now seems awfully naïve. I thought we would be able to host our Annual Conference *live* in September. What a buffoon!

As preposterous as hindsight tells me that is, I was even more off-track way back in March. I recall sitting in a Fredericksburg conference room shaking my head in bemusement over news of a toilet paper hoarding fight at a Texas Walgreens. Who were these Chicken Littles and wannabe disaster profiteers? Didn't they know that this was going to blow over like every other pandemic doomsayer's prediction? Turns out they were right. Kind of. Toilet paper may not the limited resource some folks thought it was, but months later, COVID continues to spread. As bleak as that is, the sky isn't falling, and there are a lot of people to thank for that—including you. Our criminal justice system has had to flex and adapt, but it has not ground to a halt. Thanks for that.

Despite the continued threat posed by the coronavirus, I remain an optimist. Like you, I can't wait to take the lessons I've learned and the skills I've developed during the pandemic to get back to a new and improved normal. In adapting to the pandemic paradigm, we've been forced to examine our training methodology and explore new ways of delivery. Online training, for example, has long been the next thing for us to get to. We've finally gotten to it, and in a complementary capacity, it is here to stay—alongside live conferences.

So what does this mean for TDCAA training? There is some really hopeful news regarding vaccine development and distribution. Predictions of delivery and final vaccine efficacy offer some guidance on live training and human grouping, but they are inexact. Because the decision to conduct live conferences versus online training must be made well in advance, I've had to make the call on our early 2021 offerings. Due to our funding structure and the nature of hotel contracts, we have no current plans to offer any courses that are simultaneously live and available online.

Fundamentals of Prosecution

Starting in January, rather than our usual Prosecutor Trial Skills Course (PTSC), we will be offering an online course entitled Fundamentals of Prosecution. In a meeting with the Training Committee, we discussed the idea of shifting PTSC to an online format. Ultimately, we decided that course cannot be effectively re-created online. The table work with faculty and colleagues, advocacy tips, and networking are intrinsically linked to the quality and success of that program. To fill the temporary void, we created Fundamentals of Prosecution. Our intent is to bridge the gap until attendees can make it to a live PTSC. That is not to say anyone will be shorted quality training by attending the new course! Fundamentals of Prosecution is not "PTSC Lite." Along with brand-new topics, existing presentations have been adapted for the online format and provide a different look at those functions most essential for new prosecutors. Initially, we will be releasing the training over a period of four weeks (one track each Monday). Also, along with speakers and faculty, we will host a live forum every Friday of those four weeks for attendees to ask questions related to that week's topic.

Finally, because this is aimed at the same audience as PTSC, all attendees will receive four TDCAA books: *Predicates, DWI Investigation & Prosecution, Punishment & Probation*, and *Traffic Stops*. We'll collect mailing addresses during the training using our online platform. Registration is open now at www.tdcaa.com/training/fundamentals-of-prosecution-2021, and even if you miss the initial release weeks, all content will remain available at least through February.

Investigator Conference

Next up, our annual Investigator Conference is moving. Currently, we are unable to offer online training for TCOLE credit. I hope that we can add that to our training toolbox in the future, but it is not an option yet. Rather than cross our fingers and risk a cancellation and loss of the training at the last minute, we rescheduled the course, which normally happens in February, for August 9–11 at the Hilton Hotel in Rockwall. I know the Investigator Board, like me, was frustrated by the necessity of the move, but the training they have put together for our CA and DA peace officers is some of the best yet. Keep an eye on our website for Investigator Conference registration and related information in the coming months.

Crimes Against Kids and Civil Law Conference

Both Crimes Against Kids and our Civil Law Conference are migrating to an online format. They will still become available in their previously scheduled live training months (April for Crimes Against Kids and May for the Civil Conference). Each will remain available online for at least a month—likely longer. Planning and creating these online courses is underway, and I hope to have more information up on our website regarding both early in the new year.

And beyond

Currently, anything scheduled in June or beyond remains a live event. We will continue to monitor news and trends on the pandemic and the vaccine very closely. As of today, there are simply too many variables in play to commit to any course of action so far into the future. As unknowns become knowns and the situation develops, we will solidify plans to accommodate reality. Please check our website for updates, and as always, you can shoot me an email (Brian.Klas@tdcaa.com) with questions.

That covers most of the scheduled live content planned for 2021, but there is new online training on the way. In addition to our regularly scheduled events, the Training Committee have turned their gaze to future online training initiatives as well. Building off the model created by our Multiple Presenter and Mental Health Training, we will produce online courses in oft-requested subjects such as juvenile law and family violence prosecution. One of the great advantages of online training is that we can quickly go from identifying a need to delivering the training itself, so please check our website regularly to stay up-to-date on upcoming online events.

No doubt there will be some continued reformation of the 2021 training calendar. If you are interested in the most current TDCAA training offerings, keep an eye peeled for updates on our website. I can't wait to see y'all at live training events, but until that can happen, stay healthy! ❇

Timeline of 2021 training

Online Courses	When it's online
Fundamentals of Prosecution	January 10–February 28
Crimes Against Children	April
Civil Law Conference	May
Juvenile law	coming soon
Family violence prosecution	coming soon

Live Courses	Dates
Elected Prosecutor Conference	June 9–11
Prosecutor Trial Skills Course	July 11–16
Advanced Trial Advocacy Course	July 26–30
Investigator Conference	August 9–11
Annual Criminal & Civil Law Conference	September 22–24
Key Personnel & Victim Assistance Coordinator Conference	November 10–12
Elected Prosecutor Conference	December 1–3

Check www.tdcaa.com/training for courses still available online.

A new statewide PO registry

In the very near future, Family Violence Protective Orders (POs) filed on or after October 15, 2020, in all 254 Texas counties will be accessible via a website administered by the Texas Office of Court Administration (OCA).

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

Members of the criminal justice community, including all elected prosecutors, will soon be contacted by the OCA with information to gain access to the Texas Protective Order Registry portal. Actual images of both PO applications and orders filed in any county in Texas will be available.

This registry is the result of SB 325, which was passed in 2019. Due to the COVID-19 pandemic, its implementation was delayed (it was supposed to start June 1, 2020), and an extended start date of October 15 was granted by the Texas Supreme Court.

The bill is now codified in Chapter 72, Subchapter F of the Texas Government Code (§§72.151–72.158.) This legislation is also known as Monica's Law in honor of victim Monica Deming of Odessa, who was murdered by an abusive ex-boyfriend in 2015. The ex-boyfriend had been subject to two prior protective orders, which Monica didn't know had been issued.

The registry contains protective orders issued by Texas courts relating to domestic violence, stalking, human trafficking, dating violence, and abuse. Restricted users, such as the attorney general, a district attorney, a criminal district attorney, a county attorney, a municipal attorney, or a peace officer, will be provided portal access to view information and images of each PO application filed and protective orders issued, including vacated or expired ones. For security purposes, elected prosecutors will be given the authority to designate users within their offices. Users can then search for and receive a copy of a filed application for a protective order or issued protective order through the registry's website.

Since September 1, the OCA has trained over 1,200 district, county, municipal, and justice court users. Clerks' training and actual PO entries are considered the first phase of the registry's implementation, and clerks are reportedly steadily entering protective order applications and final orders. To date, over 7,000 records have been entered into the registry, which includes applications and issued orders. It is anticipated that the website and training for prosecution personnel and law enforcement will be available very early in 2021. Elected prosecutors, please be on the lookout for a Texas Protective Order Registry announcement email from the OCA.

Public access to the registry, which is free of charge and requires no log-in, protects victim privacy but shares court information, cause numbers, and the person whom the order is against by searching the respondent's name, birth year, and county of issuance. By statute, public access occurs only with the express written consent of the petitioner in final protective orders and does not include temporary ex parte POs or magistrates orders for protection. Further, no images of any applications or orders are available to the public through the registry. The OCA does not provide access to either confidential or sealed case information.

Having worked with crime victims and applicants for protective orders in a prosecutor's office for many, many years, I can see where this PO registry will be so very helpful. I can remember numerous victims who had fled their perpetrators from another county, coming to our office for protection, and for whatever reason they did not have a copy of their protective order from the other county but they knew that they had one in

force. I can remember some POs were not entered into TCIC/NCIC for whatever reason, and our DA investigator could not find an entry of the PO by doing a criminal history check. It was sometimes like looking for a needle in a haystack. Our office would call other district or county clerks requesting official copies of POs from other counties. Although filed POs are a matter of public record, sometimes it would take actually going to the county courthouse where the PO was issued to get a copy. I so wish this registry could have been up and running back then!

In addition to providing vital information to the courts for making sentencing and release decisions, the registry will allow peace officers to view the image of the full, signed order when determining probable cause to arrest for violations. Further, the information is required to be entered within 24 hours of issuance, whereas entry into TCIC can take up to four business days.

The Protective Order Registry (geared toward court users) can be found at www.txcourts.gov/judicial-data/protective-order-registry. By early 2021, a separate website will be available to provide access to prosecution and law enforcement personnel. OCA will be providing the information for this website to TDCAA members as it becomes available.

KP-VAC Conference

A Zoom conference was held for key personnel and victim assistance coordinators (VACs) from across Texas on November 12. This was TDCAA's very first KP-VAC Conference via Zoom. More than 250 members were registered and participated. Many, many thanks to our very informative speakers and forum facilitators! We appreciate your time and valuable assistance for TDCAA members.

Mark your calendar for next year's 2021 Key Personnel & Victim Assistance Coordinator Conference to be held November 10-12, 2021, in Kerrville at the Inn of the Hills Conference Center.

Awards and recognition

At the KP–VAC Conference, we normally present awards, but this year was different. We mailed awards to these highly deserving recipients and honored them during the online conference with accolades. Here are the awards from this year's conference:

PVAC. Sara Bill, the Director of Victim Services in the Williamson County Attorney's Office, received Professional Victim Assistance Coordinator (PVAC) recognition in 2020. Sara has 20 years' experience working in prosecutor offices and is highly regarded by Williamson County Attorney Dee Hobbs. "Sara has extensive knowledge of victims' rights, which has prepared her to educate and mentor the victim advocates she supervises. Sara goes above and beyond for each victim she serves, not stopping until all questions have been answered and action plans in place. I could not be prouder of Sara!"

VAC Sara Bill & County Attorney Dee Hobbs

Oscar Sherrell Award. Adina Morris, VAC for the Palo Pinto County District Attorney's Office, was honored with the Oscar Sherrell Award, which honors service to TDCAA. It recognizes those enthusiastic folks who excel in TDCAA work and may recognize a specific activity that has benefited or improved TDCAA or may recognize a body of work that has improved the service TDCAA provides to the profession.

Adina has worked in the Palo Pinto DA's office since 2010. She served on TDCAA's Key Personnel–Victim Services Board from 2015–2018 and in 2017 served as the Chair. Adina was always a willing participant and brought great training ideas to the table during her tenure on the Board. She attended almost every training session, introduced guest speakers, and always offered help in other areas. Even after she ended her term as the chairperson, she gave freely of her time and talent to TDCAA.

District Attorney Kriste Burnett & VAC Adina Morris

Although filed POs are a matter of public record, sometimes it would take actually going to the county courthouse where the PO was issued to get a copy. I so wish this registry could have been up and running back then!

Suzanne McDaniel Award. Katie Etringer Quinney, a VAC who has worked for the 81st Judicial District Attorney's Office in Floresville for four years, has been honored with TDCAA's Suzanne McDaniel Award for her work on behalf of crime victims. The award is given each year to a person who has demonstrated impeccable service to TDCAA, victim services, and prosecution.

Katie has shown a tremendous dedication to TDCAA and currently serves on the Key Personnel-Victim Services Board as the South Central Area (Regions 4 & 8) Representative. She has devoted her time to speak at several conferences on her experience as a VAC during the Sutherland Springs shooting, which occurred in her jurisdiction. Katie possesses the quality of willingness to serve and has such a kind spirit. She is always eager and able to assist in any way needed.

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

VAC Katie Etringer Quinney & District Attorney Audrey Louis

PVAC recognition

This is a voluntary program for Texas prosecutor offices designed to recognize professionalism in prosecutor-based victim assistance and acknowledge a minimum standard of training in the field. Applicants must provide victim assistance through a prosecutor's office and be or become a member of the Texas District & County Attorneys Association (key personnel category).

For information on qualifications and how to apply, please see https://www.tdcaa.com/wp-content/uploads/Victim_Services/Duties_Victims/Professional-Victim-Assistance-Cerftification-Application.pdf.

National Crime Victims' Rights Week

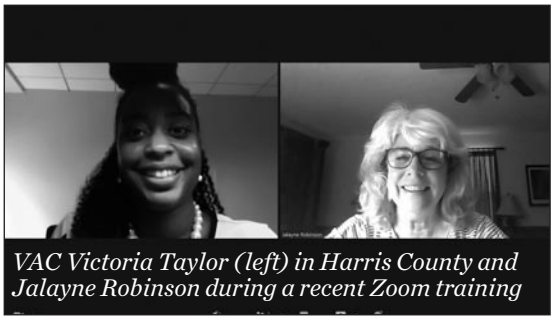
Each April, communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. In 2021, NCVRW will be observed April 18-24 with a theme of "Support Victims. Build Trust. Engage Communities."

Check out the Office for Victims of Crime (OVC) website at https://ovc.ojp.gov/program/national-crime-victims-rights-week/overview for additional information. Sign up for the NCVRW subscription list at https://ovc.ncjrs.gov/ncvrw/subscribe.

If your community hosts an event, we would like to publish photos and information about it in an upcoming issue of *The Texas Prosecutor* journal. Please email me at Jalayne.Robinson@tdcaa.com with information and photos of your event.

Victim services consultations by Zoom

As TDCAA's victim services director, my primary responsibility is to assist elected prosecutors, VACs, and other prosecutor office staff in providing services for crime victims in their jurisdictions. I am available to provide training and technical assistance to you by phone, email, or Zoom. The services are free of charge. If you would like to schedule a Zoom victim services videoconference, please email me at Jalayne.Robinson@tdcaa.com. Let me know how I may be of assistance to you and your office! ❇



VAC Victoria Taylor (left) in Harris County and Jalayne Robinson during a recent Zoom training

Can there be a 'false testimony' claim without testimony or falsity?

"False testimony" claims fascinate me. On the one hand, it definitely sounds bad to have false testimony, and it's something all prosecutors want to avoid.

By Clinton Morgan
Assistant District Attorney in Harris County

On the other, nearly every trial will have testimony that is in some sense false. If the parties present two (or more) versions of events, some of that testimony has to be false.

Much of it will be benign and is a function of ordinary people being ordinary. An honest witness might testify something happened at "11 o'clock," but it really happened at 11:08. Sometimes discrepancies like that will be immaterial, but sometimes they might decide a case.

The legal question behind false testimony claims is what kind of false testimony entitles a convicted defendant to relief. Appellate courts have gotten involved and done what appellate courts do best: They divide claims into categories and make legal standards. How do we determine if testimony is "false?" How do we determine if the falsehood was material to the case? We've got standards for that.

The Court of Criminal Appeals's most recent false evidence case, *Ukwuachu v. State*,[1] added a wrinkle to the false evidence caselaw I wasn't expecting: How do we determine if something is evidence? In *Ukwuachu*, a prosecutor asked a question on cross-examination that may or may not have contained false information. On its way to holding that Ukwuachu failed to prove his false evidence claim, the court shows all the ways to make or defend false evidence claims.

Where was Tagive?

Sam Ukwuachu was charged with sexual assault. He picked up a classmate, Krystal, around 2 o'clock a.m. and took her back to an apartment he shared with a roommate, Tagive. Krystal testified they went into Ukwuachu's bedroom, and Ukwuachu forcibly raped her. She testified that she screamed "No!" and "Stop!" loudly enough that anyone else in the apartment would have heard her.

Ukwuachu's defense was that the sex was consensual. The defense presented testimony from Tagive that he was at the apartment and did not hear screams or sounds of a struggle.

Before Tagive testified, the prosecutor announced that just that morning the State received Tagive's cell phone records. The State's expert believed the records contradicted Tagive's grand jury testimony and showed that he was not at the apartment at the relevant times.

The trial court excluded the phone records because the State had not followed the procedure to admit them as business records. But the court said the State could ask Tagive "if he was making phone calls" on the night of the offense.

Tagive's friend, Reed, testified she picked Tagive up from a party at 12:30 a.m., then dropped him off at the apartment. Tagive testified he went to bed between 1 and 1:30, and sometime after that he heard a female voice in the living area, but he never heard screaming or a struggle.

Without objection, the prosecutor cross-examined Reed and Tagive by referencing the phone records. The prosecutor asked Reed questions about why Tagive was still calling her after 1 o'clock if she had dropped him off. The prosecutor said her answer—which generally stood by her testimony on direct—"didn't match the facts."

The State Prosecuting Attorney petitioned for discretionary review. The ground for review succinctly captured some of the problems with the Tenth Court's opinion: "Can you have a 'false testimony' claim without testimony or falsity?"

The prosecutor asked Tagive, "You know your phone records show you were across town at 1 o'clock in the morning and you were making calls to [Reed] at 1 o'clock in the morning?" Tagive replied, "Yes, sir."

What time was it in Waco?

After he was convicted, Ukwuachu filed a motion for new trial alleging, among other things, the State's use of the phone records on cross "created a false image to the jury." The motion included affidavits suggesting the time zone in the phone records could be off by six hours, not five hours as the parties had calculated at trial. An affidavit also described the difficulty of interpreting locations from phone records, though it did not say the State's interpretation at trial was wrong. Importantly, though, the motion did not include the actual phone records. The trial court denied the motion without comment.

On appeal, Ukwuachu described the State's use of the phone records as "false testimony" and claimed it violated his right to due process. The Tenth Court of Appeals reversed.[2] In a short, unpublished opinion, that court held that "the State's repeated references to what the cell phone records showed, including the location and time of calls made, without their admission into evidence created a false impression with the jury." According to the Tenth Court, the State had "referenc[ed]" the records in a way "that indicated that the records definitively showed [Tagive's] location at certain critical times when they did not."

What is false testimony?

The State Prosecuting Attorney petitioned for discretionary review. The ground for review succinctly captured some of the problems with the Tenth Court's opinion: "Can you have a 'false testimony' claim without testimony or falsity?"

The Court of Criminal Appeals granted review and held: No, you cannot. Judge Slaughter wrote the opinion for a five-judge majority. Presiding Judge Keller and Judges Hervey, Newell, and Walker concurred without opinion.

The opinion contains a good summary of the Court of Criminal Appeals's false-testimony cases. The general rule is that the use of material false testimony to procure a conviction violates a defendant's due process rights. The rest of the opinion focused on what is "false" and what is "testimony."

Testimony is "false" if it gives the jury a false impression. For instance, in *Ex parte Ghahremani*,[3] the State presented evidence showing that after being sexually assaulted by the defendant, the complainant had a mental breakdown. The State's evidence omitted that the complainant had been abusing drugs and had been assaulted by others in the meantime. Even though no one explicitly lied, the State's evidence created the false impression that Ghahremani's assault was the sole cause of the breakdown.

To prove testimony was false, the defendant must produce a record "contain[ing] some credible evidence that clearly undermines the evidence adduced at trial."[4] In *Ghahremani*, that evidence was police reports detailing the intervening assaults and drug use. In *Ex parte Chavez*,[5] another individual's confession to the offense supported a claim that a witness's identification of Chavez as the shooter was false testimony.[6] The Court emphasized that to justify a finding of false testimony, the evidence of falsity must be "definitive or highly persuasive."

The Court used *Gharhemani* and *Chavez* to illustrate that while older cases sometimes refer to false testimony claims as "perjured testimony" claims, there is no requirement that the testimony be criminally perjurious. That is because a due process claim of false testimony is aimed not at punishing perjury but at ensuring defendants are convicted and sentenced on truthful testimony.

Turning back to Ukwuachu's case, the Court noted that unlike other cases in this area, Ukwuachu did not even complain about *testimony*; all he complained about were the prosecutor's questions. As everyone who has ever heard a trial judge conduct voir dire knows: Statements and questions from the attorneys are not evidence. The Court noted that cross-examination questions containing incorrect information are "perhaps suggestive of some other type of complaint," but the appellant had not objected to the questions in the trial court so the matter presented nothing for review.

The Court noted that a proper false testimony complaint would have focused on the actual testimony, but nothing in the record showed that Tagive or Reed gave the jury a false impression about anything. The only claim of falsity was what the prosecutor had said.

The final nail in the coffin was that the evi-

dence on appeal was insufficient even to determine falsity. The phone records were not in the record, and the affidavit evidence "merely call[ed] into question the State's reliance on the cell phone records." The affidavit did not identify "actual inconsistencies" between the records and the testimony. And while the affidavit said it was hard to use phone records to establish location, it did not say the State was wrong about Tagive's location.

After concluding that the thing Ukwuachu complained of wasn't "testimony," and Ukwuachu had failed to show it was false, the Court reversed the Tenth Court because it "erred by applying false-evidence principles" to this case.

Takeaways

False testimony claims are a booming area of litigation. Since *Ex parte Chabot*[7] came out 11 years ago, recognizing that a defendant could make a due process claim even if the State did not know it was using false testimony,[8] the Court of Criminal Appeals has handed down at least seven published opinions on the subject. There's no telling how many times the Court has addressed it in writs without opinions.

Part of the reason is that such claims don't require contemporaneous objection. A false evidence claim is something you prove up after the trial, either in a motion for new trial or on a writ, making them powerful tools to correct injustice the parties were not aware of at the time—but it also means the caselaw in this area must be circumscribed to keep defendants from using the "false testimony" label to get review of routine, unpreserved trial errors. Though the Court did not explicitly say it, it's clear that Ukwuachu's claim should have been raised as a "facts not in evidence" objection when the questions were asked.

Ukwuachu serves as a good primer for defense lawyers making false testimony claims and for prosecutors defending convictions. A false testimony claim is not a cure-all for everything the State says that the defense doesn't like. Did the State make an improper argument? There's an entire other area of law for that. But false testimony claims, as the name implies, are reserved for claims that testimony is provably false. ❇

Endnotes

[1] ___ S.W.3d ___, No. PD-0776-19, 2020 WL 6750464 (Tex. Crim. App. November 18, 2020).

[2] *Ukwuachu v. State*, No. 10-15-00376-CR, 2019 WL 3047342 (Tex. App.–Waco July 10, 2019). This was the Tenth Court's second opinion in the case. It reversed the conviction in 2017 based on the trial court's decision to exclude some text messages, but that decision was reversed in an unpublished opinion from the Court of Criminal Appeals in 2018. See *Ukwuachu v. State*, No. PD-PD–0366–17, 2018 WL 2711167 (Tex. Crim. App. June 6, 2018). Because Ukwuachu still has some unresolved points of error, the Tenth Court will get a third try at this case on remand.

[3] 332 S.W.3d 470 (Tex. Crim. App. 2011).

[4] *Ukuawachu*, 2020 WL 6750464 at * 6.

[5] 371 S.W.3d 200, 208 (Tex. Crim. App. 2012).

[6] The Court in *Chavez* ultimately concluded that this false testimony was not material.

[7] 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

[8] The concurring and dissenting opinions in *Chavez* explored the import of the State's knowledge that the testimony was false.

Turning back to Ukwuachu's case, the Court noted that unlike other cases in this area Ukwuachu did not even complain about testimony*; all he complained about were the prosecutor's questions. As everyone who has ever heard a trial judge conduct voir dire knows: Statements and questions from the attorneys are not evidence.*

How prosecutors are making it work (cont'd from the front cover)

Those concerns do not disappear once the jury is selected. We would still have a concern of a juror being exposed or infected, and then exposing the rest of the jury as trial is underway. That scenario happened in another county and resulted in a mistrial.

Jury selection itself gives rise to additional constitutional concerns. How are the jurors protected—with face shields or face masks? Are the attorneys able to communicate effectively and judge the venireperson's demeanor with shields or masks in place?

If we did select a jury and moved forward, we would limit the number of people allowed in our courtrooms at one time. That means that family members of the accused or victims would potentially be excluded from watching in-person. We are cognizant of the fact that people are reacting to this pandemic differently. Some people are avoiding public places and large gatherings and wearing masks. Some are not. With that in mind, we have to consider that every person we compel to enter our courtroom is at a potential risk of exposure.

We have considered the option of holding a trial or portions of the trial remotely, but we do not think that this option is feasible. Whether it's a prospective juror or a witness who is appearing remotely, the ability to communicate effectively and judge that person's credibility is never going to be the same as viewing the person live. For witnesses especially, there is no way of knowing if there is someone else speaking with the witness during his or her testimony, or if the witness is referring to a document or other item that is not available to the attorneys. I haven't even mentioned the potential for technical difficulties.

All of the various concerns we aren't able to adequately address are potential appellate points down the road. We could jump through all of these hoops and make a trial happen only for a later court to say it wasn't good enough—do it over.

Tyra McCollum
Assistant District Attorney in Fort Bend County
Yes: four complete certification hearings and one determinate sentencing disposition hearing, all for juveniles. All testimony has been received in-person. In one hearing, the court reporter worked remotely though Zoom and was connected through the judge's platform. She was able to hear us and we could hear her, though we couldn't see her.

Adam Poole
Assistant Criminal District Attorney in Galveston County
We've had two trials (for aggravated robbery and murder), both done live except one witness's testimony done virtually because she was exposed to COVID and her employer ordered her quarantined. That witness was an expert, and we conducted both a *Daubert* hearing and her trial testimony remotely. The defense did not object. There were technical difficulties on her end, which caused a delay, and then audio difficulties on our end, which made it difficult for the jurors to hear her.

Scott Turner
Assistant District Attorney in Ector County
All of our judges except for one shared the opinion that we should shut down. The one judge devised a procedure that he believed would allow a jury trial to be conducted in way that did not risk the safety of the jurors and the parties. This judge still wanted to proceed with trials even after there were problems with his devised procedure, which the local health department pointed out at a hearing. Specifically, the health department recommended that the defendant be tested for COVID-19 prior to any proceedings. However, the morning the trial was scheduled to begin, the jail notified the judge that the defendant had contracted COVID-19 while in custody, and the trial was continued. This was after the defendant's attorney had spent the previous weekend preparing for trial with his client. It should also be noted that the defense attorney also contracted COVID-19 days after his client did, spent weeks in the hospital, and eventually passed away from the virus.

Nathan Wood
Assistant District Attorney in Brazos County
On August 3, 2020, we picked a jury for the trial of the *State of Texas vs. Justin Byrd*. The defendant had invoked his right to a speedy trial under the Interstate Agreement on Detainers in January of 2020. Let that sink in for a minute knowing what you know about this year. The Byrd trial wasn't just a test case—it was the first case of many that we have tried during the pandemic. Byrd went first because of his speedy trial issues,

but his was only the first in a long list of cases we've already tried since August.

Hilary Wright
Assistant Criminal District Attorney in Dallas County
We have had a trial by court, but we have not held any jury trials in Dallas County since the second week of March 2020. In a recent bench trial, both the pretrial portion and the defense witness testimony were conducted remotely.

What has been the hardest part about holding a live trial?

Mike Holley
First Assistant District Attorney in Montgomery County
We have experienced three difficulties. The first is jury selection. A large group of people creates some logistical and safety issues. For example, spreading jurors out makes them safer but renders them more difficult to hear and see. The second difficulty is that lay witnesses are understandably more concerned about testifying during a pandemic. Testifying at trial is always a little daunting, but testifying (and traveling to testify) during a pandemic makes this concern even more pronounced. The third difficulty is the multiple appellate issues raised by defense counsel concerning trial proceedings. These issues require careful and considered responses. All of these obstacles are surmountable.

Adam Poole, Galveston County
First, the unknown. For example, a witness discovered her husband had COVID the day before her scheduled testimony, so we had to reschedule her for later in the week and would have needed to take additional steps to obtain her live testimony had the defense and judge not allowed for remote testimony. Any witness can test positive at any time. If one of the attorneys tests positive, it might require mistrial.

The acoustics have also been hard. Some witnesses have worn masks, and most jurors wear masks, muffling their speech. Everyone spreads out more so we all have to speak up. Jury selection in particular requires a lot of repeating questions and answers and reminding people to speak loudly.

And lastly, the reluctance of witnesses to participate has been difficult. Multiple witnesses in each case were reluctant to testify in person or were directed by their employers to avoid it.

Raneca Henson
Assistant Criminal District Attorney in Galveston County
The hardest part has been working out the logistics of voir dire and seating in the courtroom for the trial. Fortunately, our office, the clerk's office, courtroom staff, and defense attorneys have all worked together to develop a smooth procedure for conducting trials. For example, we do voir dire in our Jury Assembly Room, rather than the courtroom. During trial, the courtroom has a layout that allows everyone to socially distance.

"Any witness can test positive at any time. If one of the attorneys tests positive, it might require mistrial." –Adam Poole, Assistant Criminal District Attorney in Galveston County

Benjamin I. Kaminar, Lamar County
From an overall perspective, jury selection is the biggest challenge. We attempted to summon a panel in October, but after the mandated COVID questionnaire, we didn't have a large enough panel remaining. In November, we summoned two panels, one in the morning and another in the afternoon. We had to combine the qualified jurors from the first panel with the second to get enough to proceed with jury selection.

Maintaining social distancing during trial was also a challenge. We reconfigured our courtroom somewhat to allow more space for the jury. During recesses, they were divided between two jury rooms, and for deliberations, everyone vacated the courtroom so the jury could assemble there while maintaining social distancing.

Specifically for us as prosecutors, the actual in-trial adjustments have been relatively minor. However, they tend to throw you off-stride and cause everything to slow down. We typically publish photos and document exhibits via PowerPoint anyway, which saved us from making jurors don and dispose of gloves to pass an exhibit around. The defense was either unaware of, unable to, or unwilling to use an Elmo to publish its documents, which did slow things down a bit.

Tyra McCollum, Fort Bend County
The logisitics were challenging, but the two most important to me were:

1) handling evidence with the least amount of hand-to-hand contact. We utilized CDs and flash drives, an Elmo presenter, laptops, etc., for in-court production and publication—basically any technology that would avoid hands-on contact from multiple people, and

"When jurors were called on with questions, they were asked to stand, pull their masks aside, and respond. Having jurors stand and speak without masks seemed like a fairly straightforward procedure, but in our opinion, it had a chilling effect on the interaction between jurors and attorneys. Being spread out across several rows and with several feet of space between each person was isolating and caused jurors to be less vocal about their opinions unless directly called on. The fast-paced, dynamic "popcorn" nature of past jury selections was disappointingly gone."
–Maritza Sifuentes-Chavarria, Assistant District Attorney in Brazos County

2) social distancing and effectively presentation and advocacy while wearing face masks. It was hard to make sure that everyone in the courtroom and witnesses could hear. One of my juvenile cases involved a murder charge, so managing social distancing so that the victim's family and the juvenile respondent's family all could be in the courtroom was challenging.

Maritza Sifuentes-Chavarria
Assistant District Attorney in Brazos County
We picked our first jury in a church sanctuary that had been converted to a commissioners court and community center. Sound was meant to go from the pulpit to the pews, not the other way around. The attorneys spoke with microphones from the floor at the front of the first pew, and the judge and the court reporter sat up on the stage. When jurors were called on with questions, they were asked to stand, pull their masks aside, and respond. Having jurors stand and speak without masks seemed like a fairly straightforward procedure, but in our opinion, it had a chilling effect on the interaction between jurors and attorneys. Being spread out across several rows and with several feet of space between each person was isolating and caused jurors to be less vocal about their opinions unless directly called on. The fast-paced, dynamic "popcorn" nature of past jury selections was disappointingly gone.

After a while, my co-counsel, Nathan Wood, and I noticed that I was missing jurors on the end of the left section and the mid-to-back-sections of the room. The areas I missed were the farthest away and hardest for me to see or hear. So we switched it up on the spot. I started questioning the room in a "left section, middle section, right section" format to make sure I was talking to as many jurors as possible. This method let me zero in on jurors who had been flying under the radar. Now we were talking to people in manageable groups instead of running up and down rows attempting to reach people in numerical order.

Nathan Wood, Brazos County
A couple of weeks after our first trial in August, another case ended in a mistrial after an inmate, who tested positive for COVID-19, was accidentally transported to the courthouse. Since then, though, masked jury trials are almost the new norm for us. The precautions we take in these cases are uncomfortable and inconvenient, but they are extremely important to keep everyone safe.

Hilary Wright, Dallas County
In our trial, the defendant was wearing a mask that covered most of her face. The complainant has known the defendant for more than 40 years, but he had a hard time identifying her with a face covering. I had him step down from the witness stand to get a better look. He was eventually able to identify her.

Also, the defense witnesses testified outside in a parking lot near Love Field Airport. (These witnesses were all homeless, and the airport is near where the offense occurred and where the witnesses lived.) While they testified, we could hear planes flying overhead. We had to pause to wait for the planes to pass over. It was distracting and funny.

Casey Smith
Assistant District Attorney in Harris County
Communication challenges, on top of normal, inevitable, unexpected trial challenges, were the hardest part about live trials during COVID. During a trial, challenges arose when speaking with co-counsel and the judge through masks and face shields. We used headsets to speak with opposing counsel and the judge, but it took some effort to get all the headsets charged every day and for them to operate properly at the same time. But we eventually got everything to work in the end.

How have you been able to proceed with pleas and pretrial hearings? What have you had to hold off on?

Hilary Wright, Dallas County
We have been able to conduct plea hearings, bond hearings, and probation revocation hearings over Zoom and Microsoft Teams. These hearings would not have been possible without our plea documents being converted into digital form, and the use of Adobe Sign has been vital in this process for most courts. Additionally, Dallas County has two felony and one misdemeanor magistrate courts that have been handling in-person pleas. An ADA drafts the paperwork and emails it to the defense attorney, who signs it and brings it to court to have the jailed client sign and give to the magistrate judge for the in-person plea—where everyone is wearing personal protective equipment.

Raneca Henson, Galveston County
We handle jail pleas remotely. A few days before the plea, the prosecutor sends the defense attorney all plea paperwork; the defense attorney then meets with the client at the jail. After this, the plea paperwork is forwarded to the district clerk's office. The day of the plea, the judge and attorneys all log in to a website remotely. The inmates remain in the jail, but the deputies also have access to the website, and they log in for the inmates for the plea.

Erica Morgan, Bell County
We have hearings for pleas, sentencings, writs, and motions concerning bond. We've even managed to do many of these hearings despite them being contested in nature. We call witnesses to appear remotely and prepare our exhibits for the court and the other party in advance. Some hearings have had three or four witnesses testify per side. The attorneys make a judgment call on how complicated is too complicated to hear the case remotely.

There have been a limited number of cases in which we have had hybrid live-remote hearings. The hearing is always broadcast live on the county's website so that it is always considered public (www.bellcountytx.com/county_government/district_courts/court_hearings_livestream_links.php). There was a limit of 10 people who could be present in the courtroom at a given time (including attorneys, courtroom personnel, and the defendant). That allowed the defense and State to have two spectators each during witness testimony (that was also live). In one case, this was done specifically so that the victim's family could be present for the defendant's sentencing.

Benjamin I. Kaminar, Lamar County
We've been able to proceed with pleas, which are still done in-person. Most pretrial hearings have been postponed, unless they're related to bail. Most other things we are holding off on unless absolutely necessary.

Mike Holley, Montgomery County
We have been able to proceed with all hearings that do not require a jury using a combination of remote, in-person, and distanced measures. Jury trials have not been forbidden but for a variety of understandable reasons have not occurred with any frequency.

Casey Smith, Harris County
We have been doing pleas and hearings as normal. Inmates are still being brought over from jail to do pleas in court, and defendants on bond still come to court to do pleas. There are some remote docket pleas that happen from jail. We do many hearings including pretrial, MRP/MAJs, PSIs, bond hearings, etc. remotely via Zoom. We haven't had to hold off on any scheduled pleas or hearings.

Scott Turner, Ector County
We have been doing guilty pleas consistent with the local gathering and social distancing guidelines. We do one guilty plea at a time, and we do not allow more than 10 people in the courtroom. Everyone is required to wear masks. Some courts are still doing pretrial hearings, but they are happening one at a time as well.

Tyra McCollum, Fort Bend County
Because juvenile detention hearings are required within 48 hours of detention, we had to pivot quickly. We have been using Zoom for those proceedings since early March, and they are now second nature. We generally do juvenile adjudication pleas through Zoom, but on the serious and violent offense cases, the pleas are done in-person so that the court can have appropriate impact on the juvenile.

What has been the hardest part about not doing any trials, or only very few trials?

Benjamin I. Kaminar
Assistant County & District Attorney in Lamar County
Inmates, inmates, inmates. We aren't pushing to resolve bond cases unless they are pleas to probation, but even with reduced or lenient offers, very few of our jail cases are resolving.

Tyra McCollum, Fort Bend County
The pandemic has made it much more difficult to bring cases to conclusion. Juvenile cases don't have the latitude to linger when the respondents are in custody. We have to exercise more flexibility in the handling and negotiation of those cases so that they can resolve. The potential backlog after this is over may be problematic.

"Because juvenile detention hearings are required within 48 hours of detention, we had to pivot quickly. We have been using Zoom for those proceedings since early March, and they are now second nature."
–Tyra McCollum, Assistant District Attorney in Fort Bend County

Scott Turner, Ector County
Jury trials are the first thing people associate with being a lawyer. They are also the most scary, exciting, infuriating, and worthwhile part of the profession, in my opinion. Jury trials give me an opportunity to problem-solve in a creative way. If you take trials away from this job, it becomes very boring.

Mike Holley, Montgomery County
Victims who want closure cannot obtain that closure in a reasonable amount of time. For example, in family violence cases, the delay is accompanied by several negative consequences to all parties. In other serious cases, victims seeking some redress are told they have to wait, which is difficult for them for many reasons. As with any delay, cases do not tend to become better with age, so finding difficult-to-locate witnesses and keeping tabs on them during a pandemic has been something of a challenge.

We are also concerned about those defendants in custody who need some resolution to their cases and the effect on the county jail resulting from a backlog of trials and intermittent transport of defendants to prison.

"Other than the anxiety of knowing the backlog that awaits me next year, the hardest thing for me personally has been the ability to prioritize my large trial-centered projects. There's a feeling of overwhelming futility whenever I find myself opening a file to organize my exhibits and witness list."
–Erica Morgan, Assistant District Attorney in Bell County

Erica Morgan, Bell County
Other than the anxiety of knowing the backlog that awaits me next year, the hardest thing for me personally has been the ability to prioritize my large trial-centered projects. There's a feeling of overwhelming futility whenever I find myself opening a file to organize my exhibits and witness list. I begin to wonder if this is the case I should be focusing on. What if, next year, it's a different case that gets priority? What if this case ends up pleading after all this time? Aren't there more urgent things I could be working on?

Hilary Wright, Dallas County
The hardest part is explaining to grieving families and victims of violent crimes that they will have to wait an indefinite amount of time for justice. The cases get colder, and the witnesses' living situations get more complicated. We can foresee a great difficulty in gathering up the witnesses when the trials can safely begin again. How much time will have passed by then?

Another hard struggle is whether to keep in jail violent offenders who want their cases disposed of only by jury trial. In Dallas County, we are working hard to re-evaluate all jail cases for a "best offer under these circumstances." Innocent until proven guilty is a well-known concept, but it's a difficult one for victims to reconcile when we discuss a bond for a case involving murder, sexual assault, kidnapping, etc.

How is the shutdown affecting bond for defendants awaiting trial?

Erica Morgan, Bell County
We are definitely receiving more requests for reduced bond. The defense attorneys are emphasizing that the period of the defendant's incarceration "pretrial" is extended now, with no definite end in sight. In some cases this is persuasive to the judges; in others it is not. We have continued to argue that the standard for setting bond based on an individualized analysis of the defendant and the case has not changed. In most cases, the existence of the pandemic and the length of the delay are considered as part of the bigger picture in setting bond, as it should be.

Benjamin I. Kaminar, Lamar County
Defendants whose cases would be subject to the 90-day PR bond provisions (i.e., drug cases pending lab analysis) are being PR-bonded earlier rather than waiting for the inevitable.

Tyra McCollum, Fort Bend County
Juveniles are not entitled to bond; however, we have instituted new considerations about youth being detained and the types of offenses that will now warrant continued disposition if a trial is requested.

Scott Turner
Assistant District Attorney in Ector County
When the Office of Court Administration (OCA) first came down with its executive orders regarding hearings and trials, my office reviewed all of the cases of the defendants in custody to evaluate the appropriateness of their bonds. We were hoping to balance the safety of the community from both a criminality and a health standpoint. It was our intent to keep in custody only those defendants who posed a safety threat to the community. As a result, I have not seen that we have had many requests for bond reductions that have been granted. However, it has not stopped the flood of pro se motions.

Hilary Wright, Dallas County
In Dallas County, bond jury trials have been postponed indefinitely. They are not going to meet the Texas Supreme Court requirements for an in-person procedure during COVID, especially with the infection rate in our county being so high.

Mike Holley, Montgomery County
Judges have tended to grant more personal recognizance bonds, particularly for misdemeanor cases, but the overwhelming number of defendants in custody awaiting resolution of their cases are charged with serious felonies. Almost all defendants charged with misdemeanors and low-level felonies have been released on personal recognizance or very low bonds.

Have any good things come from conducting trials during COVID?

Raneca Henson, Galveston County
COVID has made us think on our feet and adapt.

Casey Smith, Harris County
The absolute best thing about the two COVID trials that ADA Tyler White and I tried was being able to finally get justice for our victims. Both trials were child sexual abuse cases and these girls, who are now teenagers, had been waiting a very long time to finally start to begin their healing process. I'm glad we could help do that for them.

Tyra McCollum, Fort Bend County
Not really—although I will say we have assessed with even greater scrutiny the case that really needs to go to trial versus the case that we really need to try to work out.

Erica Morgan, Bell County
Our elected District Attorney, Henry Garza, stepped up and took the lead on ensuring that justice in Bell County didn't grind to a halt. Practically overnight, our office instituted secure methods of videoconferencing with victims and witnesses, exchanging paperwork for signatures with law enforcement and defense counsel, and holding court via video conference. It was Mr. Garza and our IT department who coordinated with the company that we use (Lifesize) to make sure that everyone in the county was using the same program and had access to it. He also convinced our judges early on to subscribe to remote court via videoconference so that cases could continue to be heard and disposed. All of this served to limit contact with those outside our office, but also allowed for attorneys and staff to work remotely. These new measures let us continue carrying the same workload as before with a surprisingly slight slowdown.

For me personally, videoconferencing witnesses has been the biggest upside. My previous choices were a phone call or an in-office meeting. Videoconferencing allows me to have a face-to-face conversation and build rapport that I couldn't get from a simple phone call. The victims do not need to make arrangements with jobs, childcare, and transportation to attend an in-person meeting. Whenever rescheduling is necessary, even last minute, there's a lot more flexibility now than in the past.

Having paperwork exchanged and signed electronically and then e-filed with the courts speeds that process up and allows our office to track its whereabouts in the process.

Scott Turner, Ector County
I think that the pandemic has really made us all look closely at how we handle our personal health. As prosecutors, we are exposed to numerous people throughout an ordinary day. It should not have taken a pandemic for us to realize that we should wash our hands several times daily. We also should not be afraid stay home when we are sick. How many of us have come into work when we really should stay home because we do not want to miss a hearing or push work off on someone else? These days, the office is likely to send you home if you cough more than three times an hour. I think this is a good thing because the cases and people whom we deal with deserve that we do our best, and despite popular opinion, we are not our best when we are sick.

Maritza Sifuentes-Chavarria, Brazos County
There are now physical barriers in the form of face masks, social distancing protocols, and juror seating arrangements that can create obstacles in connecting with jurors—but all hope is not lost. We can overcome COVID challenges. It just takes practice, patience, and preparation. Knowing some of the pitfalls, understanding the complications, and preparing for unexpected situations will better equip us to try our cases as usual and fight for justice as it was in a time without COVID. Prosecutors are used to overcoming obstacles and balancing interests on the path to justice. We

"The absolute best thing about the two COVID trials that ADA Tyler White and I tried was being able to finally get justice for our victims."
–Casey Smith, Assistant District Attorney in Harris County

"These days, the office is likely to send you home if you cough more than three times an hour. I think this is a good thing because the cases and people whom we deal with deserve that we do our best, and despite popular opinion, we are not our best when we are sick."
–Scott Turner, Assistant District Attorney in Ector County

study, train, and prepare for unpredictable moments that arise during trial. Our commitment to the duties of Article 2.01 requires it.

What courtroom adaptations have you made in response to the pandemic that you anticipate continuing to use once normal court activity resumes?

Scott Turner, Ector County
I practice in a community that can be slow to embrace technology. As a result, only two judges have been open to conducting hearings via Zoom or some other type of internet-based program. However, I hope that if the current situation continues, the other judges will realize that this type of technology can be useful and will be more open to using it in the future.

Benjamin I. Kaminar, Lamar County
Our judges have installed plexiglass sneeze guards that might remain, but most of our courtroom adaptations make things harder on conducting trials, so they probably won't last.

Erica Morgan, Bell County
I can't speak to what the courts will decide to keep, but I hope that using a videoconference for certain witnesses will be less of an issue in the future because the judges and local attorneys are all so familiar with the process. The courts have also been giving each case its own dedicated time slot on the docket, which has been immensely helpful in scheduling my other work duties. I have told them how helpful that has been to me, and I hope they can keep that practice for some of the shorter matters, such as guilty pleas.

Livestreaming court hearings has been really interesting and helpful to me as an attorney. I would love to see that continue, but I suspect the courts will discontinue that practice because of the technological necessities.

Chad Bridges, Fort Bend County
I anticipate there will be more use of digital copies entered as evidence during trial instead of paper copies.

Casey Smith, Harris County
In each trial, we have used at least one witness via Zoom. In the first, the witness was a punishment witness, and she had health complications and couldn't fly from Mexico so she testified via Zoom. In the second trial, we had a witness who also had serious health concerns testify via Zoom. As testimony via Zoom becomes more widespread and feasible, I think in the future we really should consider allowing more witnesses to testify that way if they live out of state or out of the country, both sides agree, and they are not material witnesses. Of course, some witnesses will always be better live, but for others, Zoom can really save a lot of time and resources. ❇

Recent gifts to the Foundation*

Richard Alpert
Elmer Beckworth
Kathy Braddock *in memory of Michael Hinton*
Kathy Braddock *in honor of Jaime Esparza and David Finney*
Tom Bridges *in honor of Kenda Culpepper and Tom Krampitz*
Tom Bridges *in memory of Ronnie Earle*
Clark Butler *in honor of Tom Lee*
John Dodson
Vic Driscoll *in memory of Michael Hinton*
Lawrence Finder *in memory of Michael Hinton*
David Finney
Mary Flood *in memory of Michael Hinton*
Jack Frels *in memory of Michael Hinton*
Leon Frels *in memory of Michael Hinton*
Bert Graham *in memory of Michael Hinton*
Jerry Gross *in memory of Michael Hinton*
C. Hamel *in memory of Michael Hinton*
Staley Heatly
Bill Helwig
Keno Henderson Jr. *in memory of Michael Hinton*
Douglas Howell III
John Hubert
Helen Jackson
Timothy Johnson *in memory of Michael Hinton*
Rob Kepple *in memory of Michael Hinton*
Chip Lewis *in memory of Michael Hinton*
Doug Lowe
Sonny McAfee
Maria McAnulty *in memory of Michael Hinton*
Lyn McClellan *in honor of Justin Wood*
Lyn McClellan *in honor of Joe Vinas*
Katherine McDaniel
Mary Beeler Meadows *in memory of Michael Hinton*
Larry Moore
Murray Newman
Jacob Putman
Julie Renken
Ross Rommel Jr.
Charles Rosenthal *in memory of Michael Hinton*
Vince Ryan
April Sikes
Ken Sparks *in memory of Michael Hinton*
Sherri Tibbe
Beth Toben
Larry Urquhart *in memory of Michael Hinton*
Carol Vance *in memory of Michael Hinton*
Jerry Varney
Ron Woods *in memory of Michael Hinton*

Buying back time with technology

Looking back to early March of 2020, it is easy to wish that I knew then what was about to happen.

By Todd Smith
Chief CDA Investigator in Lubbock County

I was talking to our DA, Sunshine Stanek, the other day, and we couldn't believe our first Zoom office meeting was in the middle of March and that we still wouldn't be meeting as a group as this article goes to press. If I had known how much time would pass without trials, I would've changed a few office procedures and updated many policies. But trials were, we hoped, just around the corner, and it was easy to let days turn into weeks and weeks into months.

With all of this extra time, some people got active with their workouts and improved their fitness, but that seemed awful tiring to me. Others "worked on themselves" and improved their mental outlook, but that seemed awful hard. What I worked on—and this won't surprise those who know me—is how we could improve the office: how we operate and how technology might improve the way we handle and try cases (when those days return).

Without an in-person conference to update everyone on the "latest and greatest" advances, we thought an article could showcase technologies that may help a prosecutor office run a little more smoothly when we get back to normal. I've selected some software that may not be new to everyone, but neither has it seemed to break through as common to prosecutor office systems.[1] Though the old saying claims that "time is money, but money can't buy time," all of these products have bought us back precious hours and days in our preparations for trial.

Video redacting

I don't think anything has changed more in my almost 30-year career as the explosion of video into criminal trials. Cameras are everywhere, and we all know how hard it can be to prepare them as trial exhibits and then get them to play properly in court.

If you put someone on camera for any extended amount of time, there is a good a chance that s/he will say or do something that will not be allowed in front of a jury, so redacting video is now one of my primary duties. Without the right software and equipment, it can be almost impossible between codecs, proprietary videos, videos that should open but won't, and all the other issues involved in video.

For several years, our office has used two pieces of software for video redacting. Based on performance and cost, I believe these are the two most useful that an office can implement.

Vegas Movie Studio, $49.99; vegascreativesoftware.com. We have been using Vegas since our main police department changed in-car video systems and started using one that places both audio channels (in-car microphone and body-worn microphone) onto one audio track. We needed a way to split these apart for instances in which one channel needed to be isolated. Vegas does the trick very well, and we also found that it is a very robust program that opens most standard format videos that come into our office. The redaction process is intuitive and easy to manipulate, and Vegas has become our go-to program when those last-minute redactions come into play.

Filmora by Wondershare, $69.99; filmora.wondershare.com. As much as we like Vegas, our office is also reliant on Filmora. If a video has a codec conflict or issue in Vegas, then Filmora will be able to open and redact it. Filmora is also an easy-to-use, intuitive piece of software. And when time is an issue, it's good to have a couple of options when one application doesn't work.

Both of these video editors do a great a job for us, and having both is advantageous because it seems what one won't do, the other will. These

programs don't have all the bells and whistles associated with higher-priced editors that really seem to slow them down, and most people pick up on them pretty quickly. I would highly recommend both of these editors for your digital toolbox.

Projecting wirelessly

Then-Hockley County District Attorney Gary Goff and I first a used PowerPoint, a laptop, and a projector to present evidence to a jury in 1997. One of the biggest obstacles we had was getting the laptop to project onto the screen without having wires strung across the floor to trip and injure court participants. We settled on using lots and lots of duct tape and dreamed of a day when we could ditch the wires and magically project from laptop to projector. Finally, that day has arrived.

Actiontec ScreenBeam Mini2, $49.99; screenbeam.com. Wireless projecting through Windows has been around for a while, but we were mostly limited to systems that "piggybacked" onto a WiFi connection. The resulting signal was mostly fine for photos and PowerPoint slides but became unworkable when video was needed. It simply couldn't handle video, and that was a deal-breaker for trials.

Then in 2006, Intel came up with WiDi (wireless display) technology that has been advancing more and more. Today, WiDi connectivity is present on most laptops, and projectors or televisions can be used wirelessly by attaching the Actiontec ScreenBeam Mini2 receiver. The ScreenBeam has an HDMI connection for the TV or projector, and converters can be used for any type of input. Power to the ScreenBeam can come from a regular wall outlet or, better yet, using the powered USB port on the TV or projector, which is really helpful in making a small, compact package—we all know space is usually at a premium when it comes to trial setups.

All the software you need is on the Windows laptop, and it's a very simple process of connecting to the unit. I have put this device through hours of testing by running video to a screen and still using the laptop for other jobs, and I have yet to see any degradation in the video signal. Our county has equipped each courtroom with this setup without any difficulty. It really is a game-changer in court and would be very helpful for folks doing a lot of presentations.

Video conversion software

iNPUT-ACE, $1,000 per year; input-ace.com. Very pricey, I know. But this software is an amazing time-saver. In today's prosecution world, we are inundated with video data taken from proprietary systems found at practically every crime scene. These videos are often in a proprietary format and will play only with an accompanying folder full of codecs and files designed to play the video. They also usually consist of nine or more separate camera views (multiplexed), and using all these files to show an event, from start to finish, in court is practically impossible.

iNPUT-ACE solves this problem by converting the video files from a crime-scene video and converting them to a standard format (mp4). Each camera view can then be edited together to form a more understandable "movie" of the scene and events. The suspect can be tracked across camera views in a much more understandable way for the jury.

iNPUT-ACE features updates to stay current with the hundreds of different camera systems that are on the market, and we have had only a few instances when this program couldn't convert the video. A huge time-saver!

AI automated transcription

Transcriptive, cost varies; transcriptive.com. Many of our attorneys like to generate a transcript of an interview or other video as they prepare for court. They begin with a blank page and start transcribing, highlighting the important parts as a way of preparing for trial. It seemed there should be a better and easier way with all the voice recognition programs out there. That's how we found Transcriptive.

The gist of Transcriptive is that it allows you to upload a video, and it generates a transcript of that video. The transcript is split by speakers and time-stamped, and the accuracy rate is quite impressive. An attorney should be able to take the initial transcript and review the video while fixing any errors that might have occurred instead of typing it all out completely. A very cost-effective time-saver.

Transcriptive is an add-on to Adobe Premiere ($239 per year), a video-editing program like Vegas and Filmora (mentioned earlier in this article) and would be useful as an office's main

One of the biggest obstacles we had was getting the laptop to project onto the screen without having wires strung across the floor to trip and injure court participants. We settled on using lots and lots of duct tape and dreamed of a day when we could ditch the wires and magically project from laptop to projector. Finally, that day has arrived.

During the pandemic, I have spent hours redacting videos for release, and I have been searching for an easier solution. Using the software editors I have already mentioned will work, but it is a very labor-intensive process of redacting out every license plate from a scene.

video editing software if you'd like to use Transcriptive as well. (I like the other editors a little better in usability, but Adobe Premiere is also a good tool.) Transcriptive can also be used as a browser-based system without using Adobe Premiere.

Automated redacting software

Sighthound, $2,500 per year; sighthound.com. As more and more officers use video, there will be more and more situations in which a Public Information Act request will come in, and it is incumbent on us to redact the video for license plates, faces, and other personal information. During the pandemic, I have spent hours redacting videos for release, and I have been searching for an easier solution. Using the software editors I have already mentioned will work, but it is a very labor-intensive process of redacting out every license plate from a scene.

The solution we found is a program called Sighthound, which allows a user to upload a video and make selections for automatically redacting certain items from the video. An example would be removing all license plates from PIA requests. With Sighthound, you can open a video and select "License Plates"; the software will search and remove those that it recognizes. The user can then review the video for faces, officer notes containing personal identifying data, driver's licenses, and other things, and those can be easily and quickly removed by selecting them and then having the software "track" the item through the scene.

This software is an immense time-saver with a hefty price, but it is worth every cent for an office doing many of these videos. I've been impressed with its ease of use, and it is CJIS-compliant for video uploads. It is one of the few ways you can literally buy time.

Conclusion

I've always heard the saying that "time is money, but money can't buy time." This always seemed true—until we started encountering so many digital items in prosecution. Each and every case now contains gigabytes of digital media. From body-cam videos to cell phone downloads, we are experiencing an avalanche of data that has to be prepared for trial. This preparation of digital media has to be done and takes time away from the "regular" job of getting everything else in a case ready for trial. The right tools (software and hardware) are the only things we can use to do both effectively, and investing in them seems more reasonable than adding personnel in this day of tighter budgets. ❇

Endnote

[1] I am very familiar with Apple products, and many of these same options are available on Macs, but as county governments are generally Windows-based, I am focusing this article on those programs.

What every prosecutor should know about human trafficking

Human trafficking is occurring throughout Texas, every day, often in plain sight. Claims that "we don't have a human trafficking problem here" are simply untrue.

By Brooke Grona-Robb (at left)
Assistant Attorney General, and
Cara Foos Pierce
Human Trafficking Section Chief, Office of the Attorney General, both in Austin

In fact, in the first 11 months of 2020, when so many industries were struggling because of COVID-19, the commercial sex trade flourished. According to research conducted by the Department of Public Safety, there were over 1.5 million online commercial sex ads in Texas in these 11 months, almost 300,000 of which contained suspected minors.[1] Not all commercial sex is trafficking, of course, but this is a clear indication that traffickers have flourished despite the pandemic. And while labor trafficking is more difficult to quantify, it is occurring in big cities and rural areas alike throughout Texas as well.

What trafficking is not

In order to effectively combat human trafficking, we must know what to look for. Human trafficking is not about children getting snatched from the local store and auctioned off to the highest bidder. Trafficking victims are seldom locked in cages or chained, and trafficking rarely starts with a guy in a white van grabbing a small child off a playground. Although the media often portrays trafficking akin to the movie *Taken*, that scenario is the exception, not the rule.

What trafficking is

Trafficking usually arises from a manipulative relationship that ensnares a teenager or young adult by fulfilling a basic need for food, shelter, or love. Traffickers find people in desperate situations, and they promise to make their victims' lives better, so usually victims go with them willingly. Traffickers target runaways, foster kids, drug addicts, homeless people, undocumented immigrants, and those with mental illness or disability, for several reasons. First, these people are less likely to be missed if they disappear. Also, they are easy to manipulate because of their circumstances, so they will do as the trafficker tells them. Finally, they are less likely to be believed by law enforcement and the public if they manage to get away from the trafficker. While traffickers often use violence and threats of violence against victims and their family, the key to trafficking is coercion—emotional and psychological manipulation—to exert control over victims.

There is no "typical" trafficker. Traffickers are men and women, of all ages and ethnicities. Media portrayals of what a pimp looks like are merely stereotypes. While some traffickers drive fancy cars and wear expensive clothes, just as many blend in. They could be your neighbor who enslaves a domestic worker in her house, the owner of your favorite restaurant who holds his employee's immigration papers, or the grandmother who owns the "spa" next to your local grocery store where two 16-year-old runaways are being trafficked for commercial sex.

As with traffickers, there isn't a typical trafficking victim. They are both children and adults, both female and male. Their key common trait is vulnerability. They seldom outcry about the abuse and generally encounter the justice system first as offenders rather than as identified victims.

To determine whether a set of facts constitutes human trafficking, first look to the definition of trafficking in §20A.01. To many people's surprise, trafficking does not require a victim to be moved from one place to another.

Trafficking law in Texas

Over almost 20 years, Texas has developed robust anti-trafficking criminal and civil statutes. Texas enacted its first human trafficking criminal statute in 2003. Since then, both the laws and the statewide anti-trafficking effort have increased considerably. Texas Penal Code Chapter 20A, which contains the human trafficking statute, has been amended almost every legislative session since its passage in 2003 to make it more expansive and giving it teeth.[2] The changes have broadened the statute so that sex buyers and those who profit from trafficking enterprises are included. Additionally, punishment has increased in many situations, including the addition of a Continuous Trafficking statute, which creates a 25-year minimum sentence.

This statute punishes three crimes:

1) labor trafficking,
2) sex trafficking of a child, and
3) sex trafficking of an adult.

Notably, a "child" in this statute and others[3] with a commercial exploitation aspect includes anyone under 18. For labor trafficking of children or adults, the statute requires the trafficker to have used force, fraud, or coercion to obtain labor or services.[4]

To determine whether a set of facts constitutes human trafficking, first look to the definition of trafficking in §20A.01. To many people's surprise, trafficking does not require a victim to be moved from one place to another. People sometimes confuse human trafficking, which is a crime against a person, with human smuggling, which is a crime against the U.S. border. While trafficking may include transporting a victim, it also includes enticing, recruiting, harboring, providing, or otherwise obtaining another person. For example, the fact that a person lives at a business where he works is a red flag that he may be harbored by a trafficker to obtain forced labor. Likewise, a recruiter for a sex- or labor-trafficking organization may be guilty of human trafficking even if he never had anything to do with transporting or harboring any victims.

Labor trafficking. Labor trafficking, found in §20A.02(a)(1), criminalizes trafficking another person with the intent that he engages in forced labor. Labor traffickers use some combination of force, fraud, and coercion to maintain control over victims. They often recruit with false promises of high wages or citizenship documents (fraud) and then use violence (force), threats of violence against the victim or his family (coercion), and confiscated identity documents (coercion) to keep victims from leaving. Labor trafficking occurs in the agriculture industry, as well as in restaurants, nail salons, and other storefront businesses we all visit.

People who benefit or profit from labor trafficking can be prosecuted under §20A.02(a)(2). The elements of labor trafficking are the same for child victims (§20A.02(a)(5) and (a)(6)), although child labor trafficking is a first-degree felony, while trafficking adults is a second degree.[5]

Sex trafficking of a child. What is commonly referred to as sex trafficking of a child or CSEC (commercial sexual exploitation of a child) is covered under §20A.02(a)(7). Sex trafficking of a child requires a showing that the defendant knowingly trafficked a child (under 18) and caused the child to engage in sexual conduct. Although the enumerated list of underlying conduct is long, it essentially covers all of the sexual crimes involving children. The State is not required to prove that the trafficker knew that the victim was under 18. Note also that all of the adults engaging in any part of this behavior are guilty of trafficking; those who profit as well as the sex buyer can be prosecuted under §20A.02(a)(8) for minor victims and §20A.02(a)(4) for adults.

Sex trafficking of an adult. Sex trafficking of an adult requires that a person knowingly traffics another using force, fraud, or coercion to cause the person to engage in prostitution activities. In a society that frequently punishes the sellers of sex more often and more severely than the buyers of sex, law enforcement and prosecutors sometimes raise the bar for what they consider force, fraud, or coercion higher than what legislators likely intended. Force is not defined in the Penal Code, so while it can certainly include handcuffs, chains, and bodily injury, force could also be obtained through a slap or by preventing someone from leaving the room by standing in front of the door.

While coercion includes various types of threats,[6] in the context of adult sex trafficking it also includes withholding, destroying, or confiscating a person's identification documents or government records, as well as forcing victims to use drugs or alcohol or withholding drugs from a person who is addicted to gain compliance.[7] However, this expanded definition does not cur-

rently apply to labor trafficking absent the legislature passing a bill to create consistency in the definition of coercion.

Under the law, a person who previously engaged in prostitution activities willingly can still be trafficked. Pimps frequently target victims who are especially vulnerable, such as girls and women living at hotels and engaging in prostitution. Pimps want law enforcement and prosecutors to hold onto stereotypes about people engaged in prostitution activities so that they can continue to prey upon them. If someone does not want to work that night, at that location, or with that buyer, and a pimp uses force, fraud, or coercion to obtain acquiescence, that is trafficking. Trafficking can and should punish the people benefitting from the prostitution—the pimp and the customer, regardless of the history of the victim.

Trafficking punishments

Generally speaking, the punishment for trafficking is a second-degree felony when the victim is an adult and a first-degree felony when a child. However, a violation of §20A.03 (Continuous Trafficking) has a minimum of 25 years in prison regardless of the victim's age. Continuous Trafficking occurs when any trafficking (sex or labor of adult or child) happens more than once over a period of 30 or more days. This isn't simply limited to harboring a person for that time period. The crime could be committed by recruiting a person for forced labor that occurs once a month and transporting him to the worksite. Or it could mean that a child was recruited for prostitution on Day 1, and an adult was transported for forced prostitution on Day 31 by the same trafficker. The Texas statutes criminalizing trafficking and continuous trafficking are broad and carry serious consequences, and they are powerful tools for prosecutors—we should use them whenever appropriate.

Statute of limitations

The statute of limitations in human trafficking has also been changed and extended over the last decade. In child sex trafficking cases, there is no statute of limitation, and there is a 10-year statute of limitations after the child's 18th birthday for labor trafficking of children. The limitation for (sex and labor) trafficking of adults is 10 years from the offense date. Because the statute has changed a number of times over the last two decades, the chart on page 30 might help if you are looking to charge an offense that occurred several years ago. It also includes information about sex offender registration, which applies in child and adult sex trafficking cases.

Anti-trafficking resources

Research confirms what many of us have suspected all along: Victims fall into trafficking at an early age, and it takes a great deal of time and support to get out. A recent analysis of youth at risk for sex trafficking in Texas found that 33 percent of them were victimized during the last year. Once exploited, these youth spend 35 percent of their life in circumstances of exploitation.[8] While not all victims are first trafficked as children, knowing that many are and that their cycle of exploitation continues unless disrupted is important.

As prosecutors, it is also important to note that trafficking victims often end up charged criminally themselves, sometimes as a direct result of their trafficking situation. Whether their trafficker made them hold drugs or he or she caused them to rob a sex buyer, you may find that a victim is also a defendant in your court. Be aware that they may not tell their lawyers or you that they are victims initially, or ever. The coercive nature of trafficking often delays victim outcries, so just because they did not claim they were forced to commit the crime from the beginning does not eliminate the possibility they were forced. This is a unique area of cooperation between prosecutors and defense lawyers. By learning the signs of trafficking, we can keep an eye out for potential trafficking victims in our courts. Trafficking is a defense to prostitution,[9] and that defense should be considered by both the prosecutor and the defense handling a prostitution case. While committing a crime at the behest of a trafficker may not equate to a dismissal, it can be a mitigating factor in a plea offer or charge. And those defendants may benefit from services to prevent them from being victimized again and from reoffending.

Exciting things are being done statewide in response to trafficking, with many agencies across the state taking serious actions to address this problem. To help address trafficking, the Governor's Office has given grants statewide to protect, recognize, and recover victims, support their healing, and bring justice to them and their traffickers. Such grants have supported protec-

Date of offense (most recent to least)	Offense (Penal Code Statute)	Degree of felony	Sex offender registration?	SOL
Sept. 1, 2011–current	Forced labor or services (§20A.02(a)(1))	second	No	10 years
Sept. 1, 2011–current	Benefit from forced labor or services (§20A.02(a)(2))	second	No	10 years
Sept. 1, 2011–current	Sex or labor through force, fraud, or coercion (§20A.02(a)(3)) [coercion definition added in 2017; chemical dependency added in 2019]	second	Yes	10 years
Sept. 1, 2011–current	Benefit from sex or labor (§20A.02(a)(4))	second	Yes	10 years
Sept. 1, 2011–current	Forced labor of child (§20A.01(a)(5))	first	No	10 years upon a child victim's 18th birthday
Sept. 1, 2011–current	Benefit from labor of child (§20A.01(a)(6))	first	No	10 years upon a child victim's 18th birthday
Sept. 1, 2011–current	Sex labor of child (§20A.02(a)(7))	first	Yes	No limit
Sept. 1, 2011–current	Benefit from sex labor of child (§20A.02(a)(8))	first	Yes	No limit
Sept. 1, 2011–current	Continuous trafficking (>30 days, 2 or more offenses) (§20A.03)	25+	Yes, as of 2017 if (a)(3), (4), (7), or (8)	No limit
2011–current	Trafficking that results in the death of the victim (§20A.02(b))	first		
2017–current	Trafficking that results in the death of the victim's unborn baby (§20A.02(b))	first		
June 15, 2007– Sept. 1, 2011	Forced labor or services— included a specific enumerated list (§20A.02(a)(1))	second (first if child victim)	No	3 years
June 15, 2007– Sept. 1, 2011	Benefit from forced labor or services (§20A.02(a)(2))	second (first if child victim)	No	3 years
Sept. 1, 2003–June 15, 2007	Traffic another to engage in forced labor or services or Chapter 43 (prostitution and public decency) offenses	second (first if child victim)	No	3 years

tive programs such as Texas CASA and the Texas Alliance of Boys and Girls Clubs, among others.

Many communities across the state have created multi-disciplinary teams (MDTs) to gather and discuss how they are approaching the problem of trafficking. The Governor's Office has supported adding advocates for child victims of sex trafficking, who develop long-term relationships with these survivors to assist with recovery. Grants have also supported care coordinators, who focus on the system's response to the trafficked child by engaging in emergency staffing and MDTs.

Why are MDTs for trafficking victims needed? Can they just fit into the child abuse MDT? Although each community is different, it is important that any MDT truly addresses the unique nature of trafficking victims. Traditional child abuse MDTs are focused on the crime, making sure that everyone on the team communi-

cates what they know so that the proper charge can be filed and the child's needs can be addressed. In contrast, trafficking MDTs often need to focus on the victim's current and future situation. Many trafficking victims fall through the cracks: They don't outcry so they can't get Crime Victims Compensation resources, they run immediately from placement, their homes are unstable, and follow-up care doesn't occur. An HT MDT must bring all the people involved with that victim to the table to discuss what resources are working and which ones are failing and to decide how best to help the victim recover. Investigative and prosecution discussions in HT cases are important, but the first focus has to be stabilization of the child. This takes a great amount of time and endless energy poured into finding a solution that is as unique as each child. If given the opportunity to participate in an HT MDT, prosecutors can learn about their benefits.

Along with trafficking-specific MDTs, local anti-trafficking task forces and coalitions are key to serving victims in their communities. Below are the ones who have regular participation by prosecutors and law enforcement:

Area	Task Force/Coalition
Bastrop County	Bastrop County Coalition Against Human Trafficking
Bell County	Central Texas DMST Roundtable
Bexar County	Alamo Area Coalition Against Trafficking (AACAT)
Brazoria County	Brazoria County United Front Coalition
Collin County	Collin County Children's Sex Trafficking Team (C3ST)
Dallas County	North Texas Coalition Against Human Trafficking
Dallas & Tarrant Counties	North Texas Anti-Trafficking Team (NTATT)
Denton County	C7 (Denton County Human Trafficking Coalition)
El Paso County	El Paso County Anti-Human Trafficking Task Force
El Paso County	El Paso JPD Human Trafficking Task Force
Gregg County	East Texas Anti-Trafficking Team Partners in Prevention
Harris County	Houston Area Council on Human Trafficking (HAC-HT)
Harris County	Houston Rescue & Restore Coalition
Harris County	Human Trafficking Rescue Alliance (HTRA)
Hidalgo County	Rio Grande Valley Human Trafficking Coalition
Jefferson County	Southeast Texas Alliance Against Trafficking (STAAT)
Lubbock County	Human Rescue Coalition
Lubbock County	Sex Trafficking Allied Response Team (START)
McLennan County	Heart of Texas Human Trafficking Coalition
Montgomery County	Montgomery County Human Trafficking Coalition
Nueces County	Texas Coastal Bend Border Region Human Trafficking Taskforce
Potter County	Freedom in the 806 Coalition Against Trafficking
Smith County	Network to End Sexual Exploitation (NESE)
Tarrant County	Tarrant County 5-Stones Task Force
Taylor & Jones Counties	Big Country Coalition Against Human Trafficking
Travis County	Central Texas Coalition Against Human Trafficking (CTCAHT)
Travis County	Central Texas Human Trafficking Task Force
Williamson County	WilCo Human Trafficking Coalition

Along with these regional groups, Texas has a statewide task force to combat trafficking. The Texas Human Trafficking Prevention Task Force's 2020 report came out in December, with a summary of initiatives and collaborations that reach across the state. And the Texas Human Trafficking Prevention Coordinating Council, which is made up of leader agencies in the task force, released its strategic plan in May 2020. That plan includes strategies to partner, prevent, protect, prosecute, and provide support for victims of human trafficking.

Prosecution assistance

As the regional coalitions help victims, the Human Trafficking and Transnational/Organized Crime Section (HTTOC) of the Texas Attorney General's Office exists to help local prosecutors throughout the state with human trafficking cases. Human trafficking happens in every part of Texas, and cases can have unique challenges. They take considerable time and resources that not every local prosecutor has. The Texas AG's HTTOC section wants to help.

HTTOC has six experienced prosecutors

with more than 25 years of collective human-trafficking prosecution experience and more than 80 years of prosecutorial experience. HTTOC also partners with a team of AG Criminal Investigation Division Human Trafficking Investigators who work with local law enforcement across the state, and we have a victim advocate. We are available to help in four ways:

• provide in-person and online training for prosecutors and investigators on various human trafficking related topics,

• partner on human trafficking investigations and cases by being a second chair and assisting with prosecutions,

• lead prosecutions at an elected prosecutor's invitation (when we have the time and resources to work on these cases), and

• advise prosecutors and law enforcement through our 24/7 duty line, the HT Blue Line, at 512/936-1938. Call with any human trafficking investigation or case questions.

We would love to talk with you about your cases, discuss whether our analytical or investigative resources can assist, or partner to make sure all prosecutors across the state recognize trafficking and are armed with all the tools they need to achieve justice for the victims of trafficking. ❇

Endnotes

[1] DPS analysis of commercial sex internet sites, unpublished.

[2] Amendments in 2007, 2009, 2011, 2015, 2017, and 2019.

[3] Child pornography and sexual performance of a child, for example.

[4] §§20A.01(2), 20A.02(a)(1).

[5] Trafficking of adults becomes a first degree if it results in the victim's or the victim's unborn child's death. §20A.02(b).

[6] §1.07(9).

[7] §20A.02(a-1).

[8] Kellison, B., Torres, M. I. M., Kammer-Kerwick, M., Hairston, D., Talley, M., & Busch-Armendariz, N. (2019). "To the public, nothing was wrong with me": Life experiences of minors and youth in Texas at risk for commercial sexual exploitation. Austin, TX: Institute on Domestic Violence & Sexual Assault, The University of Texas at Austin.

[9] Tex. Penal Code §43.02(d).

The sudden interest in mail theft

We live in an age when we can tell our cell phones to tell our speakers to turn on our TVs, and then tell our TVs to tell a robot vacuum to clean the living room.

By James Hu
Assistant District Attorney in Harris County

In this context, physically dashing up to a mailbox and grabbing envelopes out of it sounds a little antiquated. However, mail theft appears to be a fairly straightforward, low-tech method to obtain private information without having to figure out how to scour the dark web for places to purchase other people's identities.

With increasing frequency, I find myself on the phone with the United States Postal Inspection Service (USPIS) linking facts together from multiple mail theft incidents to formulate probable cause for search and arrest warrants.[1] With increasing frequency, I find myself on the phone with various Harris County agencies inquiring about use of the new mail theft statute.[2] Ultimately, these types of cases boil down to three questions:

1) How are the suspects getting the mail?
2) What are they doing with it?
3) What can prosecutors do about mail theft?

I will attempt to address these questions in this article using some real-life investigations and case examples I have seen.

Getting the mail

Does mail theft ever get violent? Sure, it does. Our office has filed aggravated robberies in which postal carriers are robbed at gunpoint. What typically becomes apparent is that a good number of these robberies are related to a larger scheme. Certainly, there are robbers out there pointing guns at postal carriers just to steal 12-pack boxes of Poo-Pourri straight from the postal truck (true story). However, the big-ticket item mail robbers want is a mail key—specifically, what's called an arrow key. These are essentially universal keys to open those blue mailboxes sitting out in the open around town where kids drop their letters to Santa. It also opens the cluster/panel mailboxes in subdivisions and apartment complexes for both incoming and outgoing mail. I have also been told of cases where postal carriers provide arrow keys to mail thieves as well.

Once the arrow key has been secured, the suspect may have the key duplicated. These copies are then distributed to various groups of mail thieves. Once mail thieves have arrow keys, their job just got a whole lot easier. Mail thieves generally travel around in groups of three or four, where someone will drive the car and a couple others hop out and quickly gather as much mail as they can from a box or complex.

What thieves do with stolen mail

I have reviewed a number of search warrants to get into hotel or motel rooms in the deep of night on suspicion of stolen mail. Imagine this (very real) scene: Officers receive a report that an *entire* cluster mailbox unit has been stolen from an apartment complex (the thieves must not have been able to get a postal key). Three hours later, someone is wheeling a giant box, covered with a sheet, through a hotel lobby and checks into a room. That guest then comes out of his room without the covered box and tells the manager that he will be gone for a couple of days but will remain checked in.

As soon as the guest leaves, the hotel manager gets suspicious there may be an animal caged inside the room. The manager lets himself in to make sure there isn't a secret lion waiting to shred his hotel staff. Lo and behold, he finds a mailbox unit and stolen mail strewn around the room and stuffed into trash bags.

Rifled mail scattered through a hotel room is a common scene for investigators to come across; it is just as common to also find laptops and the printers for making fake driver's licenses. Stolen

What are offenders looking for when they're rifling through bags of mail? Anything with identifying information, such as names, dates of birth, Social Security numbers, driver's license numbers, and the like. A whole lot of information is already on the internet for fraudsters to find, but when they combine it with what they uncover in the mail, thieves can use the identifiers to create entire identities.

mail is the raw material necessary to fuel a fraud operation.

What are offenders looking for when they're rifling through bags of mail? Anything with identifying information, such as names, dates of birth, Social Security numbers, driver's license numbers, and the like. A whole lot of information is already on the internet for fraudsters to find, but when they combine it with what they discover in the mail, thieves can use the identifiers to create entire identities. With these identities, fraudsters can open bank accounts or access existing bank accounts, obtain loans through new credit lines, apply for new credit cards, and even obtain a loan to purchase a vehicle at a dealership (as long as they fabricate the fake ID to accompany the stolen Social Security number they are providing to the dealership). The possibilities are endless.

Another classic vein of fraud associated with mail theft is check forgeries. In the simplest scheme, mail thieves steal checks out of the mail and create fake IDs to match the names on the stolen checks. The thieves then cash the checks at local check-cashing businesses. In another slightly more labor-intensive scheme, suspects steal checks out of the mail, wash them, and write in their own names on the payee line to either deposit or cash.

More recently, I have come across a bank fraud scheme in which suspects recruit young people looking to make a quick buck to deposit washed checks into the youngsters' bank accounts. The youngsters then withdraw the deposited amount in cash, give most of it to the suspects, and keep a small kickback for themselves. This scheme allows bank fraud suspects to avoid being seen on bank surveillance while the youngsters take the heat from law enforcement for depositing stolen checks.

Postal inspectors may ultimately connect the suspects in this scheme through a traffic stop and phone dump. For instance, just after midnight one evening, a vehicle is seen pulling out of a post office parking lot, and officers make a traffic stop for failing to signal a turn. Officers then smell marijuana as they walk up to the vehicle and ask the driver to step out. As the driver does, officers hear the jingle and clank of a couple of keys falling to the ground. You guessed it, arrow keys. Inside the vehicle, officers find a trash bag full of stolen mail yet to be processed by the post office. The postal inspectors interview this suspect, dump his phone, and ultimately connect him to a bank fraud scheme using what is found on the phone.

Postal inspectors often get involved in state investigations when local law enforcement agencies encounter stolen mail or fraud associated with stolen mail. In the above example, as soon as the officer conducting the traffic stop identified the arrow keys and a large bag of stolen mail, he contacted a postal inspector who made the scene. USPIS has broad jurisdiction in the types of cases they handle, and in Harris County, they have been involved in investigations ranging from mail theft to murder. Most often, we see state charges filed by postal inspectors related to fraud, identity theft, and aggravated robberies of postal carriers.

What can prosecutors do about mail theft?

For the most part, existing fraud statutes give us a pretty good toolbox to work with for charging mail fraudsters. The mail theft statute is a relatively new tool, but in practice, it is not terribly useful for fraud purposes. Section 31.20 is the newest addition to Penal Code Chapter 31. This chapter covers theft offenses, and the mail theft statute became effective September 1, 2019. Section 31.20(b) states, "A person commits an offense if the person intentionally appropriates mail from another person's mailbox or premises without the effective consent of the addressee and with the intent to deprive that addressee of the mail." Subsection (c) then lists the number of addressees who must be deprived of their mail to reach each punishment range. Section 31.20(d) lays out the enhanced punishment ranges should the defendant be caught with identifying information and the defendant intended to commit Fraudulent Use of Identifying Information. Chances are, if the facts are available for §31.20(d), then a higher charge for Fraudulent Use or Possession of Identifying Information could also be available.[3] By the time investigators find identifying information within the stolen mail and facts show that the suspect intended to commit fraud, it is likely the mail has already been opened. At this point, it is likely that the mail thieves are in possession of more than just a few pieces of identifying information. Read on, and I will explain the basics of the Fraudulent Use or Possession of Identifying Information charge.

It would appear that §31.20 was created with an eye toward porch pirates and thus, in practice, it is not often used in fraud-related cases. Prosecutors have always been told mail theft is a federal charge and yes, USPIS does file a large number of these cases with the U.S. Attorney's Office. However, there are instances in which the USAO declines charges, and we end up filing state charges instead. State charges are often filed more quickly, and local prosecutors can file charges to get defendants into custody (or on bond conditions) while federal investigators finish their investigations to file federally.

Rarely do I file fraud charges under §31.20, as the majority of fraud cases fall within some flavor of Chapter 32 (Fraud) or Chapter 37 (Perjury or Other Falsification) of the Texas Penal Code. Ultimately, the goal of these offenders is to steal identities and profit from doing so. The most common charge we see is Fraudulent Use or Possession of Identifying Information under §32.51. When suspects are caught with trash bags or rooms full of stolen mail, we quickly get to a first-degree charge, which requires more than 50 pieces of identifying information.

Getting to 50-plus pieces of identifying information is not as daunting as it sounds. Section 32.51 defines identifying information as:

1) name and date of birth;

2) unique biometric data, including a person's fingerprint, voice print, or retina or iris image;

3) unique electronic identification number, address, routing code, or financial institution account number;

4) telecommunication identifying information or access device; and

5) Social Security number or other government-issued identification number.

Each of these options counts as one piece of identifying information. As an example, one fake driver's license and a stolen check (a common combination) containing information for one victim could potentially yield three pieces of identifying information: 1) name and date of birth on the fake DL, 2) government-issued identification number on the fake DL, and 3) the bank account number on the stolen check. The takeaway under §32.51 is that we are looking for the number of stolen *pieces* of identifying information, not the number of victims or identities.

When evaluating charges in these types of mail theft fraud schemes, consider the possibility of filing Engaging in Organized Criminal Activity (EOCA).[4] I have not yet seen a case where any defendant acted alone in this type of scheme. More often than not, it takes more than one person to steal the mail, make fake IDs, cash checks, apply for loans, apply for credit cards, make counterfeit credit cards, etc. In short, if you can prove that three or more people worked together to profit from an ongoing ID theft scheme, then consider filing an EOCA. Currently, §71.02 lists theft as a charge that qualifies for the EOCA statute. Notably, Chapter 31, the theft chapter, is not entirely incorporated under offenses that qualify for EOCA, and §71.02 does not explicitly list "mail theft" anywhere as a qualifying charge. On the other hand, Fraudulent Use or Possession of Identifying Information is certainly one of the charges available as an underlying charge to EOCA, and filing the EOCA bumps the degree of charge up one category.[5] Therefore, in an EOCA charge with an underlying first-degree ID theft case, a defendant without criminal history would be looking at a punishment range of 15 years to life or 99 years confinement in prison without the possibility of probation. This charge provides significant plea-bargaining power on our end and may incentivize defendants to give up bigger fish in the scheme.

In all likelihood, law enforcement will catch suspects at different stages of the schemes, and prosecutors are stuck with what evidence they recover at the time.

Other common charges

I am not saying that every one of these cases is going to end up in a 15-to-life EOCA charge—most will not include surveillance video of three suspects stealing vans full of mail and getting caught in a hotel room with an ID-manufacturing operation. In all likelihood, law enforcement will catch suspects at different stages of the schemes, and prosecutors are stuck with what evidence they recover at the time.

If a thief has stolen mail from a mailbox but has not yet rifled through it and all mail is intact, then perhaps the best charge is mail theft under §31.20. If the mail is unopened and sealed, investigators cannot ascertain what identifying information was in the possession of the mail thief, and the unopened mail is ultimately returned to the addressees. This may be the only scenario where we have actually used the mail theft statute.

If a mail thief is caught at the stage of cashing a stolen check with a fake driver's license, then perhaps the best charges available would be Tam-

pering with a Governmental Record,[6] Fraudulent Use of Identifying Information,[7] and Forgery.[8]

If a mail thief is caught purchasing a car with a fake driver's license and provides a victim's identifying information on the dealership loan application, then the defendant could be facing Tampering with a Governmental Record, Fraudulent Use of Identifying Information, and False Statement to Obtain Credit. False Statement to Obtain Credit is charged with a value ladder to determine the degree of charge, just like theft.[9] Depending on how flashy the ID thief is, it is easy to get to a third-degree felony or higher if the value of the vehicle is at least $30,000. Any time a mail thief provides stolen information to apply for a loan, False Statement to Obtain Credit should be considered. These cases get a little trickier when defendants apply for loans online, so be on the lookout for identity issues. Defendants may claim that another individual was actually the one who applied for the loan using the defendant's identity, so proving that a particular defendant was the one who applied for a loan online could certainly become problematic without IP addresses to help locate the subscriber.

Cyber and financial crimes–offenses that take advantage of resources designed to make our lives easier–are the crime trend of the future.

Finally, one growing trend is charging defendants with Fraudulent Use or Possession of Credit or Debit Card Information.[10] Like Mail Theft, this relatively new charge became effective September 1, 2019. It works similarly to Fraudulent Use or Possession of Identifying Information; however, each re-encoded or counterfeit credit card is counted as one piece of information. For example, if officers bust a room full of mail thieves re-encoding credit cards with stolen credit card information, then each counterfeit credit card counts toward getting to a higher charge pursuant to §32.315. If there are 50 credit cards or more, the offenders would be looking at a first-degree felony. To pursue this charge, investigators need to get their hands on a device called an ERAD, which is basically just a card reader most law enforcement agencies have; it spits out the information encoded into the magnetic stripe of a credit card. If the information on the magstripe does not match up to the account number on the front of the credit card, then you've got yourself a re-encoded credit or debit card.

Fraud is everywhere

Cyber and financial crimes—offenses that take advantage of resources designed to make our lives easier—are the crime trend of the future. New technology that becomes more useful every day also makes us increasingly vulnerable to fraud. Soon, our cars may be able to drive us to work upon command while we sip coffee and scroll through a newspaper from the driver's seat—but that same car will be storing or sending our personal information somewhere where it can be stolen. Point being, even if we miraculously tackle fraud from mail theft, the next fraud scheme is right around the corner.

However, the next time you see a mail theft case on your docket, consider that it could be your very own identity, your elderly neighbor's identity, or a loved one's identity on the line. In this sense, it might be worthwhile to do a little more digging to turn that stolen mail case into a fraud ring prosecution. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 2.122. In Texas, Inspectors of the United States Postal Inspection Service are considered special investigators and have powers of arrest, search, and seizure under the laws of this state as to felony offenses only.

[2] Tex. Penal Code §31.20.

[3] Tex. Penal Code §32.51.

[4] Tex. Penal Code §71.02.

[5] *Id.*

[6] Tex. Penal Code §37.10.

[7] Tex. Penal Code §32.51.

[8] Tex. Penal Code §32.21.

[9] Tex. Penal Code §32.32.

[10] Tex. Penal Code §32.315.

Specialty court leaves no veteran behind

After coming off a drug binge, Petty Officer Eric C. checked himself into rehab. As he laid in bed, he pulled the blankets over his head to hide the tears that were rolling down his face.

By Paul Love (at left)
Assistant Criminal District Attorney in Galveston County, and
Patrick Gurski
Criminal Defense Attorney (and former ACDA) in Galveston County

He cried all night as the reality of his relapse sank in. Just when he thought his life had taken a turn for the better, he felt the weight of the world collapsing in on him. There was a real possibility he could go to prison.

It would not be the first time he went to prison because of drugs. He knew if he went again, the relationship with his family that he worked so hard to re-establish would be destroyed. The overwhelming disappointment was all too familiar because he had struggled with addiction for over 20 years. But despite his relapse, he truly believed he was on the path to beating drugs: He was finally fed up with the constantly repeating cycle and did not want to continue down the path of destruction. For months, Petty Officer Eric C. had avoided prison for drug possession because he was participating in the Galveston County Veterans Treatment Court (GCVTC).[1] It was there that, for the first time, he saw life on the other side of addiction as a real possibility.

Unfortunately, at the moment, he was on the verge of being discharged from the program, and prison was back on the table. If he was allowed to remain, he was determined to prove to GCVTC staff—and more importantly, to himself—that he could overcome his addiction. He just needed that second chance.

The decision to allow Eric C. to remain in the program would not come easily for the GCVTC staff. There had to be assurances that he was serious about completing the program and that his remorse not just a ruse to avoid prison. One of the first stipulations was for him to demonstrate some self-initiative for sobriety to prove he was ready to live a sober life. Secondly, he had to agree to re-start the program from the very beginning.

During this cautionary probation period, he would make good on his promise, vigorously completing every requirement that was asked of him and staying clean and sober. Eric C. maintained his sobriety through an outpatient treatment program he located on his own, maintained stable employment, and even enrolled in community college. After some time, it became clear that it was worth the risk to give him a second shot. The GCVTC staff voted to take a second chance on Eric C. and allowed him to start the program again from the beginning.

Within a short time, the GCVTC staff saw a man restored, the proud man who served honorably in the United States Coast Guard for six years on active duty and four years as a reservist. Eric C. was grateful that GCVTC did not give up on him. He arrived at every monthly meeting with a huge smile and full of enthusiasm. You knew he was in the room because his smile and energy were infectious. His smile was as big as his stature, earning him the nickname "Smiling" Petty Officer Eric C. Also just as obvious was his determination to successfully graduate from the program this second time. He attributed the difference this time to his willingness to fully en-

Although based on the drug court model, veterans court is a little different. Regardless of the crime that brought an individual to the program, all of the participants share the commonality of being veterans. This common bond of honorably serving their country and being recognized for their military service sets them apart.

gage the mental health treatment aspect of the program. Depression was a problem he had kept hidden.

Like many veterans, Eric C. believed it was a weakness to discuss depression, never realizing until he came to GCVTC that his battle with depression contributed to his past failures with other treatment programs. Once he bought into the need to address his mental health just as much as the substance abuse, he excelled in all the program goals. It would become less challenging for him to maintain sobriety and employment and continue to have a healthy relationship with his family. He was taking advantage of all the resources the program provided, and life was finally looking bright for him. GCVTC staff were all smiles as we watched Smiling Petty Officer Eric C. graduate from the program.

The experience and treatment he received while in GCVTC inspired Eric C. to become a certified substance abuse counselor. He plans to earn a degree in social work and get a job at the Veterans Administration's Michael DeBakey Hospital in the Texas Medical Center in Houston to help other veterans battling substance abuse. He is dedicated and determined to leave no veteran behind with hopes of giving them that second chance—just like he got.

A little different from other specialty courts

This story highlights the value of a specialty veterans court. Like most specialty courts or diversionary programs, this court's objective is to break the cycle of criminal behavior by diverting individuals charged with crimes into treatment with a focus on rehabilitation, as opposed to incarceration. Although based on the drug court model, veterans court is a little different. Regardless of the crime that brought an individual to the program, all of the participants share the commonality of being veterans. This common bond of honorably serving their country and being recognized for their military service sets them apart. Veterans courts capitalize on the participants' understanding of the military structure and the principles of accountability and discipline that participants once adhered to as a method of establishing and maintaining compliance. The other unique aspect of veterans court is that funding and services are provided by the Veterans Administration. Since 2009, the VA has assigned Veterans Justice Outreach specialists (VJOs) to veterans courts around the country where they act as liaisons and advocates who obtain and coordinate the services and resources provided by the VA to address the identified needs of each participant.

How it works

A county commissioners court may establish a veterans court for those arrested for or charged with any misdemeanor or felony. As the Veterans Treatment Courts (VTCs) were first established, eligibility was open only to:

1) a veteran who

2) suffers from brain injury, mental illness, or mental disorder, including post-traumatic stress disorder (PTSD)

3) that resulted from the defendant's military service, including combat or other similar hazardous duty area, and

4) materially affected the defendant's criminal conduct at issue.

While this was good start and still remains the law today, the legislature changed the law in 2015 to include military sexual trauma as a qualifying injury, but also added a catch-all opening up VTC participation to all veterans whose "participation in a veterans treatment court program, considering the circumstances of the defendant's conduct, personal and social background, and criminal history, is likely to achieve the objective of ensuring public safety through rehabilitation of the veteran in the manner provided by §1.02(1), Penal Code."[2]

For our county's program, a person who is arrested and identifies as a veteran will complete a veterans court application. The program coordinator verifies the person's veteran status before forwarding the application to the prosecutor. The prosecutor then reviews the criminal charge and criminal history and will also determine whether the veteran's needs—such as mental health, substance abuse, or primary care services—can be met by the program or if they exceed the program's capabilities.

Unlike most treatment courts, the GCVTC does not automatically exclude veterans who are charged with violent crimes. However, the prosecutor will evaluate the concern for the well-being of victims and safety of the community. The duty to protect victims as well as maintaining a safe community will not be outweighed by the veteran's needs. Each case is evaluated on its own merits, taking into consideration the nature

of the case, criminal history, victim, safety of the community, and program resources to determine eligibility.

Once a veteran is approved, s/he completes a VA bio-psycho-social assessment, which allows for a treatment plan to be formulated and customized for that participant. Treatment plans can include anger management classes, relapse prevention, inpatient substance abuse treatment, PTSD support groups, 12-step programming, community engagement, and mentor support. The VA has also developed programs specifically for combat veterans who suffer from PTSD or substance abuse; who commit domestic abuse; and who need inpatient and outpatient mental health treatment, specialty substance abuse treatment, support groups for women, or services for LGBT populations.

The treatment plan is incorporated into the VTC contract. In addition to the standard probation requirements such as community service, substance abuse monitoring, and payment of fees, the treatment plan must be successfully completed like other conditions of the contract. In the same way that a probationer may be reprimanded for failure to complete community service, a VTC participant may also be reprimanded for failing to attend mental health appointments or relapse recovery sessions. The average time in GCVTC is 12 to 24 months, and treatment plans can be modified as different needs are identified.

When a participant successfully completes all the program requirements, the criminal charge is dismissed pursuant to the contract, and the Government Code provides for an automatic expunction.[3]

Staffing and court

A core function of the veterans treatment court is the court's "staffing" meeting, which takes place before each court session. During staffing, each applicant and participant is discussed by members of the VTC team. In Galveston County, in addition to the judge, prosecutor, and defense attorney, the staffing consists of the court coordinator, the court's compliance officer, the county's veterans service officer and, of course, the VA Veterans Justice Outreach (VJO) program.

The bulk of the work on the program is done during these meetings. While staffing is dedicated primarily to compliance issues, it is also time to leverage the court's personnel to help the veterans proceed. If a veteran is having a benefits issue, the judge may ask the veteran to see Jeff Gottlob, our county veterans services officer (VSO), who can advocate for the veteran with the VA. If the compliance officer notes that a veteran is entering a bout of depression, the VJO may make arrangements for him or her to see a VA psychiatrist. And if a veteran is relapsing, the staff will discuss the appropriate sanction to regain compliance and sobriety.

The staff then enters the courtroom and waits for participants to arrive. At the scheduled time, the bailiff calls the room to "attention" as the presiding officer, Galveston County Judge Major Mark Henry (USAFR Ret. 1989–2010) enters the courtroom. The courtroom remains at attention and will render a salute once the order to "present arms" is given to the U.S. flag as the national anthem plays. Judge Henry then calls up each veteran by his or her rank and name and requires them to approach, render a salute, and report on their progress from the last court appearance. This is when the judge and veteran have a one-on-one conversation to discuss what's working or not working in their treatment and where the veterans are held to account for their progress or lack thereof. The judge does this for each veteran, and when the session is complete, the courtroom will again be called to attention as the judge leaves the courtroom.

Galveston County's VTC

The Galveston County VTC was established in 2013. It was spearheaded by County Judge Mark Henry, who saw the success of other programs around the country and recognized the importance of addressing the needs of veterans in Galveston County. With the support of the Galveston County Commissioners Court and Galveston County Criminal District Attorney Jack Roady, the GCVTC was formed.

The GCVTC mission statement is "to assist veterans and their families to become integral and productive members of the community through a collaborative effort and to restore their dignity for their selfless services to our country; we shall leave no veteran behind." The GCVTC staff members are committed to helping every participant who enters the program with obtaining the services, resources, and support needed to successfully complete the program. The GCVTC goal is that every graduate is rehabilitated and, even more importantly, equipped with

Treatment plans can include anger management classes, relapse prevention, inpatient substance abuse treatment, PTSD support groups, 12-step programming, community engagement, and mentor support.

the necessary coping skills to avoid ever entering the criminal justice system again.

To date, 76 out of about 100 veterans have successfully graduated from GCVTC. All have stories similar to Smiling Petty Officer Eric C. Their success—and that of those who will follow their footsteps in the program—can be attributed to the commitment and tireless efforts of GCVTC staff.

For those who are wondering how to start a veterans court, the first step is getting buy-in from the community and government stakeholders. This means that the county commissioner's court must be willing to establish the court, appoint a supervising judge, and most importantly, *fund* its function pursuant to the Government Code. The district attorney must be willing to participate in the program and assign a prosecutor who will buy in to the VTC treatment model. Also, defense counsel participation is required to take over for retained and appointed attorneys once a veteran enters the program. For more resources regarding grants and funding, check the Texas Veterans Commission's website at www.tvc.texas.gov/grants/veterans-treatment-court-grants. For more on the function of veterans courts in general, check Justice for Vets, a project of the National Association of Drug Court Professionals. Specialty courts, such as veterans courts, must also be registered with the Office of the Governor's Criminal Justice Division (see https://gov.texas.gov/organization/cjd/specialty_courts) per Gov't Code Chapter 121. There are also grants available to help fund specialty courts.[4]

For those who are wondering how to start a veterans court, the first step is getting buy-in from the community and government stakeholders.

Special thanks to the GCVTC staff:

- Presiding Judge Mark Henry (USAFR Ret. 1989–2010),
- Veterans Court Coordinator Specialist Matthew Parrish (Alpha Company, 4th Battalion 64th Armored Regiment; 3rd Infantry Division, 2002–2005),
- Compliance Officer Staff Sergeant Johnathan Bouvier (USMC 1993–2007),
- Veterans' Services Officer Gunnery Sergeant Jeff Gottlob (USMC Ret. 1980–2001),
- Defense Attorney Amber Spurlock (USAF JAG 2008–2011, OIF 2009–2010, Baghdad),
- Defense Attorney Patrick Gurski (TXARNG 2008-2016, OEF 2012-2013),
- Assistant District Attorney Paul Love (First Lt. Paul Love, II, is on active duty in the USAF), and
- VA Veterans Justice Outreach Specialist Dr. Edward Henderson. ❇

Endnotes

[1] http://www.galvestoncountytx.gov/vs/Pages/VTC.aspx

[2] Tex. Gov't Code §124.002.

[3] Tex. Gov't Code §124.001(b); Tex. Code Crim. Proc. Art. 55.01(a)(2)(ii)(a).

[4] See https://egrants.gov.texas.gov/Default.aspx for a list of current grants.

Communicating with witnesses during COVID

COVID-19 and the changes it's wrought don't seem to be slowing down, and trial dockets, at least in our jurisdiction, are moving full steam ahead.

By Maritza Sifuentez-Chavarria
Assistant District Attorney in Brazos County

There's no step-by-step instruction manual to manage a public health crisis while also ensuring justice is done, but our office has tried several cases since August. We've seen some of our efforts snuffed out by COVID-related mistrials, but for the most part, we've tried cases successfully to verdict. While we surely don't have all the answers, we've discovered that trials during the chaos of COVID are possible.

As I write, it's on the heels of losing a powerhouse in our family to COVID-19. This article stresses the importance of protecting people from potential transmission of the virus not to be alarmist, but because the devastation of this virus is real. People's concerns are valid, and if prosecutors fail to respect them, we will find ourselves alienating the witnesses who make up the very backbones of our cases. Prosecutors will likely come across a witness who has lost someone they love to COVID or who is simply worried about the virus's transmission.

I am starting with the basics of effective communication with the added twist of navigating it with purposeful protective measures to ensure witnesses not only *feel safe* but also *are safe*. This article is designed to help prosecutors meet with witnesses before trial, get those witnesses comfortable in the courtroom, and use Zoom effectively when it becomes necessary.

Where to meet

One of the very first things to consider is where to hold a witness meeting. A witness's concerns about COVID can interfere with how comfortable and conversational he or she may be, so choose a space that allows the witness to feel protected from COVID. Also, try to be sympathetic to how alienated or intimidated a witness may feel in having to relay the facts of a crime to strangers in masks. Witness meetings are routine for prosecutors, so it is easy to forget how uncomfortable they may be to the average civilian witness. Even before the pandemic struck, simply serving a witness with a subpoena could have a startling effect. It instantly catapulted that person back to a situation that was humiliating or scary. Now, add COVID into the mix. By being situationally aware of these old and new concerns, prosecutors can make simple choices that will allow witnesses to be comfortable and insightful during their witness meetings.

Consider some of these tips to get the best information from a witness, and in turn, provide the jury with the best possible testimony:

1) If possible, meet with a witness at the office, but be mindful of drawbacks (more on those in a minute).

2) When a witness cannot come to the office, go to him or her.

3) Zoom is a great alternative, but Zoom should be just that, an *alternative*.

Meeting in a conference room

A spacious conference room is the best location for witness meetings. Hosting meetings in-office gives prosecutors better control over variables, ensures that we can enforce COVID safeguards, puts office resources at our disposal, and gives witnesses a chance to warm up to the idea of speaking to prosecutors in a courthouse setting.

Some prosecutors prefer to meet with witnesses in the comfort of their own personal office, rather than in a conference room, but an individual's office is probably too small for comfort or social distancing.

Some prosecutors prefer to meet with witnesses in the comfort of their own personal office, rather than in a conference room, but an individual's office is probably too small for comfort or social distancing. There just isn't a good way for an entire team (assuming two prosecutors, an investigator, and a victim coordinator) along with a witness to socially distance without being awkward.

Yet, even a conference room at the courthouse can have its own drawbacks. For example, some people experience anxiety simply because they are intimated by the courthouse setting or by the prospect of speaking to prosecutors. Unfortunately, prosecutors can't dispel witnesses' anxieties, completely.

However, we can take efforts to calm them and promote open and effective dialogue. Simply sitting in a particular spot at the table can influence the trajectory of a witness meeting. Studies show that sitting at the head of a table is "power sitting" and conveys that a person is the leader, is in control, and is there to intimidate.[1] Witnesses, especially victims, need to feel safe and understood. By merely choosing a different seat at the center of the table, the prosecutor can convey that the witness is part of the team, the prosecutor is approachable, and the prosecutor is listening.

Effective communication also calls for prosecutors to be inclusive with witnesses by using a conversational tone rather than leading them through question-and-answer format. The Q&A style of conducting witness meetings is common. Prosecutors take a pre-drafted direct examination into the meeting, lodge the questions, and wait to hear the witness's anticipated answers. When the witness replies in a way we didn't anticipate or goes on a tangent, we redirect him back to our initial question. But this practice can feel cold and short. It may also unintentionally cut off the witness's thought process. While we should control how long to indulge a witness to avoid getting completely derailed, we should also give the witness allowances to work through an answer on his own. It might provide insight that we didn't previously have. Being conversational also allows us to ask about significant sensory information that a police report doesn't reflect. How something felt (physically or emotionally). What the witness was thinking. Any smells they can recall. These are often left out of reports, but are compelling for a jury.

Effective communication also requires that we remove as many distractions as possible. One of the easiest ways to demonstrate respect and attentiveness is by putting away electronics. We've all had it done to us: Someone responds to a text while in mid-conversation, and it chills our willingness to continue engaging. Checking the phone signals the listener's loss of interest or that the speaker is unimportant. It's both frustrating and disrespectful. When prosecutors answer a text or email during a witness meeting (even if it's for the trial we are currently preparing), we've signaled the exact same thing.

Phones aren't the only distracting devices: So are our laptops, and it's a distraction for both the witness and for us. Typing everything the witness says requires us to look at the computer and disconnect our eyes from him or her—and with everyone wearing masks, eyes are the only facial features a witness has left to see. As a consequence, we are inadvertently alienating our witnesses when we take notes on a laptop. Taking our eyes off the witness may also interfere with our ability to observe how he or she responds through body language. We are already limited to what nonverbal communication we can observe from facial expressions because the mask, well, masks them. Nonverbal communication is so powerful it can actually reveal more than what a person says aloud, so we don't want to risk losing any more of the compelling evidence that's already lost to masks. There's an easy solution for this situation: If two prosecutors are on the case, plan for one person to transcribe (as best as possible) while the prosecutor leading the meeting uses pen and paper to jot a few notes.

Another method to promote effective communication is "mirroring." This is the process of repeating one to three things that a person says to encourage her to expand on her ideas.[2] Mirroring proves you were listening because you can directly quote the speaker. It also shows that you are engaged and want more information. As simple as it seems, mirroring works exceptionally well.

Take, for instance, a meeting we had with a victim's mother as she described a phone call with her daughter, the victim in an Aggravated Assault with a Deadly Weapon-Family Violence and Strangulation case.

Mother: "I was on the phone with my daughter, and I just knew something wasn't right."
Prosecutor: *"You just knew?"* [mirroring what the woman said]
Mother: "Yeah. That's my baby. I talk to her every day. I can tell when she's happy or scared. I can tell it by the way her voice sounds. She's a serious and quiet person, but I can tell if something is off with my daughter. I could just feel it in my gut. It gave me chills."

The benefit of mirroring is that a witness engages and clarifies without our having to ask more authoritative-sounding questions like: "How do you know that?" or "What do you mean?" Mirroring gets us the same result, but it is a soft way to prod for more information without coming off as aggressive.

Meet a witness at a place of his choosing

While meeting in office is ideal, sometimes witnesses will meet only at the time and place they designate. The possibilities for these locations are endless. In our office, prosecutors have gone out to witnesses' homes only to be attacked by bees and (almost) attacked by dogs. We've met with witnesses in restaurants when they refused to miss dinner. Another prosecutor found himself on horseback to talk to a child with autism who had difficulty opening up to strangers. The point is: We might have to do some things outside our comfort zones to break through with witnesses. And sometimes, we have only one shot at it, so if a witness doesn't feel comfortable coming into the prosecutor's office to speak with the trial team, you may find yourself on a horse in a field or running from bees—only now, you'll have a mask on.

Zoom in pretrial meetings

Our office consistently reinforces the importance of having face-to-face witness meetings. You want to be able to look at witnesses straight and deep into their optic stems. It gives prosecutors a true sense of the person's honesty, and you can read and connect to them. But what should you do when a witness is quarantined? Or in a land far away? You can't meet face-to-face. You could just pick up the phone and give your witness a call, right? Wrong. It's fine to touch base with a witness this way, but entire meetings shouldn't be confined to the blindness of a phone call. There are a variety of reasons phone conferences are no good, but importantly, people are more inclined to lie over the phone, and detecting the lie is difficult without seeing a person.[3] Now, when we truly cannot meet a witness face-to-face, use Zoom. It's free, easy to access, and simple to use.

The convenience of using Zoom regularly and in place of face-to-face meetings can be tempting, but Zoom has its own problems. Zoom meetings put prosecutors at the mercy of the witnesses and their surroundings. We've had witnesses fail to show up to scheduled meetings. Another witness attempted to conduct a Zoom meeting while driving. We've even had a witness try to hold the meeting as she relaxed laying down in her bed. In another meeting, the witness muted the Zoom video to use the bathroom. When he returned, he reassured us he missed reviewing only "like the last few minutes" of his extremely important recorded statement to police. Zoom meetings, while convenient, are out of the prosecutor's control and allow for surprising distractions. They are also wasteful when they flop, and we end up having to make the witness come in later to have a face-to-face meeting anyway.

Witnesses in trial: Zoom or live

Luckily, prosecutors aren't faced with the dilemma of deciding between trials conducted entirely by zoom trials versus live trials, but we do have the reoccurring problem of whether we should proceed with Zoom testimony versus in-person testimony for *particular witnesses*. How prosecutors navigate this decision largely depends on the type of witness.

First, just like in pre-trial meetings, the same awkwardness experienced during Zoom meetings can emerge in the trial itself. The witness you permit to testify via Zoom should be trusted to take the situation seriously—and not attempt to testify while lying in bed or pause the video to go to the bathroom. Second, for certain witnesses, testimony will be mainly unaffected by appearing remotely and are appropriate for Zoom testimony. Officers and medical experts fit this category. That sort of testimony doesn't usually require the same physical and emotional presence as we'd need from lay witnesses close to the crime. Be warned that this isn't always the case. For example, in our office, family violence trials rely heavily on the use of demonstratives

The convenience of using Zoom regularly and in place of face-to-face meetings can be tempting, but Zoom has its own problems.

and charts prepared through officers and other experts. The fluidity of the presentation loses some of its impact when we cannot build and present them in the well of a courtroom right before the jury's eyes.

Finally, we should be on guard that Zoom testimony can be a breeding ground for technology fails. Issues with technology create the risk that we completely missing what a witness says or—worse—hear him incorrectly. During the punishment phase of an October trial, a victim of family violence testified via Zoom from an inpatient treatment facility located out of town. Because of the facility's poor internet connection, her testimony took twice the time it should have. At times, it even appeared that she was not responding to the questions we asked. In reality, the system was intermittently pausing and skipping throughout her testimony. The complications came to a head when at one point, the entire system shut down as she was speaking. We felt that the impact of her testimony took a hit. However, in that scenario, due to COVID travel restrictions, the only option for her testimony was via Zoom—or nothing at all.

During the punishment phase of an October trial, a victim of family violence testified via Zoom from an inpatient treatment facility located out of town. Because of the facility's poor internet connection, her testimony took twice the time it should have. At times, it even appeared that she was not responding to the questions we asked.

Nevertheless, in this case, the defendant was convicted and sentenced to 30 years in prison for Indecency with a Child by Contact, so I'll be the first to admit that sometimes a situation can feel worse than it actually pans out. And (as in this case), most of the issues prosecutors will encounter will have little effect on acquiring a just and true verdict.

For many witnesses and jurors, being part of a trial is a first-time event. Being part of a trial during a pandemic will now be a once-in-a-lifetime event. At this point, you've likely heard the war stories from prosecutors who've faced challenges with the distractions and strangeness of trying a case during the COVID pandemic. (There are more stories in "How prosecutors are making it work," on the front cover.) But trials during COVID have several constants—the only things that have truly changed for judges, defense attorneys, and prosecutors are COVID protocols. On the other hand, consider what this set-up must be like for a witness. For someone who has never testified, everything about the situation is new and strange. So to alleviate the angst, prosecutors can duplicate the same efforts we put toward witness meetings and apply them in trial.

Just as in the witness meeting, establish a comfortable environment. This is a harder task because we have little control over the courtroom set-up, but we can do a few things to put the witness at ease. First, beginning back in the witness meeting, talk to the witness about what to expect at trial. Explain the protections in place to guard everyone from COVID transmission. Use the pre-trial meeting to determine if the witness has a physical problem testifying with a mask on. Discussing those issues beforehand saves you the catastrophe of someone clamming up on the witness stand. There are ways to allow a witness to remove the mask (say, if you can still safely socially distance or if there's a plexiglass barrier around the witness stand). Be aware of any restrictions in the courtroom so that you can inform witnesses before they take the stand. Prosecutors in our office often show witnesses the courtroom before trial so they can see the new measures in place.

Then, in trial, consider the same tips as before: Be intentional about putting the witness at ease. You can break the ice by pointing out what a witness may be feeling. Addressing the elephant in the room alleviates the tension and awkwardness. For instance, we can ask them about the anxiety they have from the face masks: "I know wearing masks is hot and awkward—it is for me too. It's totally OK to feel that way." Or if a witness takes the stand and clearly sounds nervous, we can ask about it. "Have you ever testified before? Are you feeling nervous?" Then let them know that's OK.

But be careful with this. I once asked a witness if she was nervous, and she said no—she was just out of breath from running up the stairs to the courtroom. It got a good chuckle from the jury, but it wasn't what I expected she'd say. The goal is to remove emotional or physical distractions so the witness can focus on the testimony.

Keep questions simple. Simple questions will minimize distortion from the mask and lessen the chance that a witness gets confused. Because you've already discussed the testimony during the witness meeting, the witness will be equipped with predictability in the questions and with you. It fosters trust. So when curveballs are thrown (as they often are during a *normal trial*, let alone these days) and we are forced to respond, the witness can trust where we are going with it, and she can answer questions with confidence and believability.

When questioning a witness, use highlighting. Highlighting (similar to mirroring, discussed

above) simply means we take something important the witness has said and restate it to highlight portions or transition into new topics. Highlighting is beneficial for several reasons: it ensures the jury hears what a witness said. It reiterates the most important parts of the testimony. It also helps witnesses feel secure in what they say by allowing them to confirm that you heard them correctly—or to correct us. That gives witnesses confidence to speak, knowing that they have power over their own words.

Minimize distractions. We already noted that in a witness meeting, a computer creates a physical distraction and barrier between you and a witness—and in court, it does the same with the jury. Instead of reviewing our questions from a laptop screen, print them out and set the computer to the side so you can talk to the witness without the computer blocking anyone's view. Also, if jurors are sitting behind you, they may be able to see questions on the computer screen. If the questions are on paper on counsel table, you have more control over anyone inadvertently seeing your questions and notes.

Embrace the situation. I hate masks. But if we can find a silver lining in this whole situation, we might as well embrace it. In the middle of November, my trial partner and I prosecuted a strangulation case. (Spoiler alert: It ended in a COVID-related mistrial two witnesses in, but I digress.) In a strangulation case, what better than a face mask to describe the panic of not being able to breathe normally? Everyone knows this feeling—like you're running out of breath after going up a flight of stairs or carrying a heavy package, but then not being able to remove the mask right away (because you're still in a public place), gulp air, and get some relief.

The anxiety and panic in those situations don't even scratch the surface of what a strangulation victim feels when her air or blood *is actually impeded.* And now, jurors can understand the gravity of an actual strangulation and panic when they, even if only slightly, relate to a mere fraction of what a victim might feel. And because relatability brings jurors into the fold, we should use whatever means available to help a juror relate.

Conclusion

With trials happening since August in Brazos County and no end to protective protocols in sight, prosecutors are called to simply adjust to the situation thrown their way. Trying cases during the pandemic is slowly becoming our new norm. It is still unknown whether we'll be carrying on as usual in the new year or if the COVID guidelines will be finally lifted in their entirety. Regardless, if your jurisdiction is anything like ours, we have trial dockets lined up for the foreseeable future. The prospect of attempting a trial during this time can seem daunting, but it's possible. Being respectful and responsible regarding COVID-19 and being effective in the way we communicate with witnesses will help us see justice done during COVID (and even beyond). ❇

If your jurisdiction is anything like ours, we have trial dockets lined up for the foreseeable future. The prospect of attempting a trial during this time can seem daunting, but it's possible.

Endnotes

[1] Tirado, Bernardo, PMP (2012, October 15) The Power Seat: Where You Sit Matters. Retrieved from https://www.psychologytoday.com/us/blog/digital-leaders/201210/the-power-seat-where-you-sit-matters.

[2] Masterclass, "Lesson 2: Mirroring." Chris Voss Teaches the Art of Negotiation. 17 Dec. 2019. www.masterclass.com.

[3] Maryke Steffens (2003, July 31), Natural Born Liars, retrieved from www.abc.net.au/science/articles/2003/07/31/2857387.htm.

A plea negotiation primer

Most courts have not conducted jury trials for months. Many don't plan to resume the practice until a COVID-19 vaccine has been widely distributed.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

This new status quo, unforeseeable at this time last year, has produced a case backlog of immeasurable proportions.

Plea bargaining has always been an important part of our jobs as prosecutors. About 98 percent of criminal cases end in plea bargains because it's simply impossible to try every single criminal case to a jury. There are not enough prosecutors, defense attorneys, judges, or juries in the state to pull that off.

With the mounting COVID-related backlog, plea bargaining is more important than ever because we, as prosecutors, should continue working to settle what cases we can. It will be even more important once trials resume and we are tasked with balancing the continued need to plead cases with a frenetic trial schedule.

There is an art to plea bargaining with the defense. It is unlikely that any two prosecutors approach the process exactly the same, but, like everything we do, planning and experience go a long way toward making the process more effective and efficient. There are important considerations that should go into every plea recommendation as we work to alleviate the COVID case backlog.

Victim-informed plea bargaining

Crime victims should be the primary consideration in any criminal prosecution. I could just leave it at that, but I won't.

If you spend your day immersed in eight to 10 different assault family violence cases, some with victims in a hurry to have the case dropped, it can be easy to forget how hurt and terrified a person can be after being brutalized by a spouse or significant other. Prepare an endless string of burglaries and a prosecutor might find himself numb to the concept that a homeowner can be so shaken by a burglary as to no longer feel safe in her own home. Simply put, we deal with crime so routinely that we can lose sight of the considerable harm those crimes inflict on the individual victims.

Please never forget how much these instances impact our victims. To you, the case might feel like "just another family violence case" in an endless series of family violence cases. But to a victim, this criminal case is likely the biggest thing going on in her life and might be the worst thing to have ever happened to her. She will likely be experiencing a lot of raw emotion and may want to see a punishment far worse than anything available under the law or anything likely to come from a jury. For that reason, it is absolutely critical that a victim is a part of the plea-bargaining process from the very beginning.

I always use my initial meeting with victims to accomplish two things: Feel out where they are coming from on an emotional level, and give them some idea about the most likely outcomes for the case.

When it comes to developing realistic expectations about an outcome, I recommend being prepared to discuss the initial plea offer with victims at the very first meeting. By doing this, we can set a realistic expectation in the victims' minds about what resolution might look like if it occurs by plea bargain. Explain the range of punishment and the variables of the case that cause you to believe that the initial offer is appropriate. If you already know that you are likely to accept a lower counter-offer from the defense down the road, let victims know that as well.

Use this initial meeting to provide victims with as much information about the entire crim-

inal process as you can. The more informed they are about the plea-bargaining process, the more likely they will accept the result. If you prosecute for any length of time, there will inevitably be cases where victims feel like they were "sold out" or that you were "afraid to try a tough case," but if you maximize your initial meeting with the victim, you will minimize how many angry victims you have.

Victim-informed plea bargaining doesn't end with the initial meeting, though. Plea offers can and often do change. When changes to the plea offer are made, work with your victim assistance coordinator to notify the victim. You will lose credibility with a victim if the 10-year offer you discussed at the initial meeting turns an agreement for five without any notice or explanation.

Remember also that the Victim's Bill of Rights specifically grants victims the right to have their victim impact statement considered by the prosecutor and judge before a plea bargain agreement is accepted.[1] Depending on the severity of the crime and the strength of the evidence, I may completely defer to the victim on whether to move forward with a plea bargain. However, it is more common, at least in my experience, for the prosecutor to retain the ultimate authority on whether to accept a plea. In those instances, it is important to repeatedly remind the victim that a victim impact statement can be considered by the judge as well, and by the use of that statement, he or she can explain to the judge why the plea bargain should be denied.

Office policies and values

Every prosecutor's office is headed by an elected official.[2] That official was elected because of the principles he or she displayed and the promises made to voters. An elected might have run on a platform of policies that emphasized pretrial diversion and rehabilitative community supervision programs over confinement in a penal institution. In another county, the elected prosecutor might have committed to aggressively prosecute certain types of crimes and seek longer prison sentences for individuals convicted of them. Whatever your elected prosecutor's policies are, know them and follow them.

The best example I can give is from my own experience. My elected prosecutor[3] recognized that home burglaries were far too prevalent in our very rural county. "What are you going to do about all these burglaries?" was a persistent question he heard while first running for office. For that reason, our office has a policy of not recommending probation for burglary of a habitation offenders. When I engage in plea negotiations with the defense attorneys on burglary cases, I always articulate this policy to them. It's not something most of them like to hear, especially those who aren't already familiar with it, but putting it out there early in the conversation will (I hope) save me from having to respond to a bunch of counteroffers for community supervision.

Considerations for the initial offer

As prosecutors, we have an obligation to see justice done.[4] Achieving justice via a plea bargain requires consideration of more than just the range of punishment prescribed by statute. The severity of the crime and the defendant's criminal history are also obviously considerations. Less obvious but equally important considerations are the interest of the victim, interests of law enforcement, any recent, similar case dispositions, as well as the interests of the community at large (as with our office's policy against offering probation for burglary).

Punishment prescribed by statute. I'm not going to waste any ink spelling out the specific punishment ranges for different grades of offenses. If you are unsure about these, check out Chapter 12 of the Penal Code or, better yet, TDCAA's *Quick Penal Code Reference* sheet (available at tdcaa.com/books). I do want to briefly talk about enhancements for habitual offenders and how that changes the punishment range available to the jury.

Even if you don't have a lot of felony experience, you might know that the base punishment range for most felonies can be increased if a defendant has previously been found guilty of a felony and sentenced to confinement in prison. The rules governing enhancements for habitual offenders are found in Chapter 12 of the Penal Code.[5] There is also a really great chart that explains the various ways of enhancing the punishment range in TDCAA's *Penal Laws of Texas* book.[6]

Familiarize yourself with the general structure of the enhancements for habitual offenders and your office's policy on the matter. Keep both in mind when engaging in plea negotiations. If enhancement is a legal possibility and your office

If you prosecute for any length of time, there will inevitably be cases where victims feel like they were "sold out" or that you were "afraid to try a tough case," but if you maximize your initial meeting with the victim, you will minimize how many angry victims you have.

There is no formula out there that will show you where on the "severity scale" a particular set of facts falls, so use your judgment. Talk it out with colleagues. Incorporate your thoughts into the plea offer.

policy doesn't prohibit it, I recommend telling defense counsel about your intentions to file an enhancement notice at the outset of negotiations. Knowing this ahead of time can help defense attorneys explain to their clients why a plea offer is a fair one and also reduce the possibility that defense counsel will view such an action as vindictive.

Severity of the crime. Absent aggravating factors, first-time driving while intoxicated (DWI) cases are usually Class B misdemeanors punishable by up to six months in the county jail. All Class B DWIs are not equal, however. There is a huge difference between a person who was pulled over for going 78 in a 70-mph zone while sporting a .09 BAC and a person who got black-out-drunk and drove her vehicle into a ditch. Unless there is an office policy to the contrary, do not treat these cases the same. There is no formula out there that will show you where on the "severity scale" a particular set of facts falls, so use your judgment. Talk it out with colleagues. Incorporate your thoughts into the plea offer.

A defendant's criminal history. Anybody can read over and count up convictions, but proper consideration of the defendant's criminal history requires more than this. As you go through the history, look at the types of offenses for which the defendant was convicted, when he was convicted, and what the disposition of the case was. Ask yourself questions like:

- Does someone who has been revoked from community supervision and sentenced to prison time twice before deserve a third bite at the community supervision apple?
- Does it make a difference, for plea negotiation purposes, in a DWI–2nd, that the defendant's jurisdictional prior occurred in 1986? What about in 2016?
- Does a defendant with multiple prior convictions, all prison sentences, deserve a chance at community supervision and drug rehab if he has never received it before?

Different prosecutors will answer these questions differently. Your answers to these questions will be derived from your own life experiences and moral philosophies and from any particular policy your office has on the issue. Never forget your office's policy.

Also consider a defendant's arrest history, even when those arrests don't result in convictions. A lengthy history of arrests without conviction might not make a person ineligible for community supervision, but it may mean he is a poor candidate for it. This is especially true for domestic violence and sexual assault offenses. If you see repeated arrests but no convictions on a person's criminal history, I recommend obtaining copies of the associated offense reports before making a decision on what an appropriate plea offer looks like. You might find a series of reports containing insufficient evidence to merit a conviction, but you might also find a pattern of escalating violence that ended without a conviction because the victim filed a non-prosecution affidavit. These are two very different situations, and any plea offer should reflect that.

Interests of the victim and law enforcement. As I have said before, the interests of the victim should play an important role in the plea-bargaining process. How big a role is dependent upon the severity of the crime, strength of the case, and office policy. We cannot always achieve the outcome that the victim wants, but if what the victim wants is both just and attainable, we ought to do our best to make it happen.

We also cannot forget our partner law enforcement agencies. Some offices require the approval of the arresting officer or investigator before settling a case. If that's your office, the interests of law enforcement are especially vital to you. If that is not your office, law enforcement's interest is still an important consideration. Our law enforcement partners have a unique perspective on the criminal problems facing the communities they serve. If a certain type of crime has become a big problem or a particular part of town or the county is experiencing a surge in crime, factor that information into plea negotiations.

For example, two state jail facilities in our county saw a boom in bribery cases. The Office of the Inspector General was seeing a lot of prison staff members take money in exchange for smuggling contraband to the offenders. As these contraband items (drugs and cellphones mostly) circulated through the prison population, they began to cause altercations between offenders, creating a dangerous situation for prison staff and inmates alike. When this crime and its consequences were brought to our attention by the investigator, we decided to no longer recommend community supervision on that type of case in the hope that such a policy would have a deterrent effect on the prison staff.

The interests of law enforcement are not always going to be geared toward more severe pun-

ishments. It is not at all unusual for a law enforcement officer to request prosecutors be lenient in a particular case because the defendant was very cooperative at the time of the arrest, showed genuine remorse, or was a model inmate in the county jail. Narcotics investigators may also request leniency for particular defendants in exchange for that person's cooperation.

Similar recent dispositions. While we cannot try every case submitted to our offices, every case we do try should factor into our plea negotiations. Are you consistently offering county jail time on DWIs while juries in your county are often returning verdicts recommending community supervision? Are you offering community supervision for offenses that juries are routinely sentencing to prison? If so, incorporate that data into the negotiation process and revise as necessary. Don't be afraid to take note of the messages sent to you by way of a jury verdict and make more lenient or severe plea recommendations as needed.

Criminal defense as a business

When I was first licensed, I took a "cut to the chase" approach to plea negotiations. I reviewed the case, figured out what offer I thought was appropriate, and made that offer to defense counsel. Because I communicated my best offer from the very beginning, I was forced to decline repeated counteroffers from defense counsel, which resulted in cases dragging on for months only to settle on the eve of trial. People also grumbled that I was hard to work with because most every counteroffer was rejected.

What I failed to realize then is that, while defense attorneys work hard to get the best possible outcome for their clients, they are also running a business. Part of running a business is producing demonstrable results for the clientele. Criminal defense practices are not immune to this reality. Every defense attorney wants to go back to a client and say something akin to, "The prosecutor was at X, but I negotiated him down to Y."

Don't forget the business aspect of the defense attorney's practice. When making an initial plea offer, consider building in some wiggle room. Start with an offer of X that you think could be an acceptable resolution, but with the understanding that you would still be satisfied with a result of Y. If you take this approach, you will leave yourself room to negotiate with the defense attorney and, consequently, move cases more efficiently and amenably.

The first offer and counteroffer

I strongly believe in making initial plea offers during case intake and communicating that offer to the defense attorney as soon as I have been notified that the attorney was hired or appointed. I do this because of "anchoring." Anchoring is a subconscious bias where people rely on an initial piece of information to determine future negotiations or offers. It means that if the State makes the first offer, the defense attorney will use that offer to inform all future counter offers. Therefore, if you set the anchor for negotiations, you can ensure that future negotiations are on a playing field of your choice.

The Board of Barristers at Texas Tech had advocacy competitions based on negotiations. One of the tactics that was stressed to participants was not to double-bid, as doing so undermined your leverage in the negotiation. Double-bidding is when you make an offer and then amend it before getting a counteroffer from the defense. Doing so incentivizes defense counsel to keep coming back over and over until you get to your bottom line, causing negotiations to needlessly drag on. I don't think this rule applies perfectly to criminal negotiations because our objective as prosecutors is not to get as much as we can out of opposing counsel but rather to see that justice is done. However, counteroffers are still a useful tool because defense counsel, as they should, are trying to get as much as they can out of us.

If a defense attorney tries to get you to lower a plea offer, I strongly encourage you to ask for a signed counteroffer, by which I mean an offer they have discussed in concrete terms with the client and one the client is willing to proceed with immediately. A signed counteroffer will benefit the prosecution in a number of ways. First, it requires the defense attorney to have a realistic conversation with the defendant about what he or she is willing to accept. Next, it will show opposing counsel that you are willing to listen and are someone they can work with. Finally, if the counteroffer is just, considering the facts of the case, it gives you a chance to settle the case quickly and move on to the next one.

Sometimes, you will get a counteroffer from a defense attorney accompanied by an argument for accepting it (e.g., the defendant is going to college, participating in drug rehab, caring for an invalid grandma, etc.). In such an instance, don't be

If a defense attorney tries to get you to lower a plea offer, I strongly encourage you to ask for a signed counteroffer, by which I mean an offer they have discussed in concrete terms with the client and one the client is willing to proceed with immediately.

afraid to ask for documentation to support the claim. Explain that you aren't doing it because you distrust anything the defense attorney said; rather, it is important for you and your office to "paper" the file with documentation to support a decision to accept a counteroffer. Papering the file is especially essential when accepting the counteroffer means going outside the punishment range you had previously discussed with supervisors, law enforcement, or the victim. Don't worry about defense attorneys balking at such a request. They have an obligation to achieve the best possible outcome for their clients and will often be happy to get you what they can. If they do balk, explain that acceptance of their counteroffer can't happen until you have appropriate documentation for the file.

Papering the file is especially essential when accepting the counteroffer means going outside the punishment range you had previously discussed with supervisors, law enforcement, or the victim.

Remembering all the tools in the tool chest

Successfully negotiating a plea in a criminal case isn't always haggling over years in prison or years on community supervision. There are a lot of other tools and resources available to attorneys that can be real difference-makers in striking a deal. If the result is just and not a violation of office policy, consider these options:

• pleading to a lesser-included offense. This is often a just option if office policy does not prohibit it.

• special terms and conditions of community supervision. There will come a time, if it hasn't already, where you will be on the fence about whether to offer community supervision or incarceration in a given case. When that happens, consider terms and conditions that the court could order: outpatient drug rehabilitation, ignition interlock devices, SCRAM bracelets, batterer's intervention programs, and the like can all be difference-makers when you're unsure if a defendant is suited to community supervision.

• pretrial diversions and specialty courts. I don't think any one county in Texas handles pretrial diversion programs and specialty courts the same way. Take the time to learn which, if any, of these resources are available locally, and familiarize yourself with the specific requirements to participate in each program. Utilize them when the situation calls for it.

Conclusion

When the COVID-19 crisis draws to an end and the court system gets back to normal, prosecutors and defense attorneys will have a monumental task before them. Reducing our backlog and getting back to business as usual will require peak performance from everyone, especially when it comes to plea bargaining. The best plea negotiation outcomes occur when the parties prepare in advance. My hope is that the considerations in this article help in your efforts to reduce the backlog of cases in a just and efficient manner. ❇

Endnotes

[1] Tex. Code. Crim. Proc. Art. 56A.051(a)(12)(A) (recodified from former Art. 56.02(a)(12)(A) as of January 1, 2021). For a free PDF copy of the non-substantive reorganization of former Chapter 56 and other non-substantive changes that took effect on Jan. 1, 2021, look for links along the right rail of TDCAA's publications webpage, https://www.tdcaa.com/books/.

[2] County Attorney, District Attorney, Criminal District Attorney or County and District Attorney. Always a good idea to know which of these four you work for.

[3] Mike Jimerson, County and District Attorney in Rusk County. He took a flier on me right out of law school. I wasn't exactly who he wanted for his misdemeanor vacancy (he plainly stated this when he offered me the spot), but he took a chance on me nonetheless. I wouldn't be the prosecutor I am today without his completely brutal critiques and genuine desire to see me succeed.

[4] Tex. Code Crim. Proc. Art. 2.01.

[5] Tex. Penal Code §§12.42 and 12.425.

[6] Buy it here: https://www.tdcaa.com/product/criminal-laws-of-texas-preorder-2019-21.

Navigating juvenile justice during the pandemic

The two of us were paired up late last year when Joshua was assigned to the Juvenile Division and partnered with Ellen, who had practiced primarily juvenile law during her career.

By Ellen Wheeler-Walter and Joshua Luke Sandoval
Assistant Criminal District Attorneys in Bexar County

Joshua was gaining confidence in procedure, hearings, and the services available to respondents[1]—and then the pandemic hit.

We would be remiss if we didn't take a moment to state the obvious. The procedural, technological, and statistical hurdles in the juvenile justice system pale in comparison to the devastating health and financial difficulties encountered by millions of Americans during this time. As prosecutors, we have an obligation, though, to learn from this unprecedented public health crisis, plan for the future, and find ways to improve things.

Whereas it goes without saying that the current pandemic has had deleterious effects on every area of criminal prosecution, this article will focus on the distinct struggles that juvenile justice specialists have encountered over the past year. Given the unique statutory, procedural, and policy considerations that go into prosecuting juvenile offenses, we are struck that the juvenile justice system has been hit particularly hard and in a manner that would appear foreign to those without familiarity in the area.

For purposes of this article, we will limit discussion to three main areas of impact: respondents aging out of the system, transport of respondents in custody, and docket management.

Aging out of the system

Let's get the formalities out of the way: If you are reading this article and you're a prosecutor, you likely have your case preparation checklist memorized like the ABCs. Have I contacted the victim? Do I have my witnesses? Have I checked for and made any necessary witness disclosures? The list goes on. For juvenile justice specialists, let's add one more to the list: How close is my respondent to aging out of the system? That's right, as if worrying about getting all of the witnesses together—let alone what they will say once they are on the stand—wasn't enough to keep us on our toes, those of us who prosecute juvenile cases also have to keep in the back of our mind a respondent's age.

In Texas, any offense committed by a youth between age 10 up to and including 16 falls under the jurisdiction of the juvenile court as delinquent conduct.[2] The court maintains jurisdiction over that conduct until the respondent reaches 18 years of age. It is important to note that offenses committed while one is a juvenile will always remain under the jurisdiction of the juvenile court, absent situations such as determinate sentence filing and certifying a juvenile to stand trial as an adult.

Where the situation becomes a little more problematic is when one considers issues of disposition. Like the adult system, in juvenile law, there are two distinct phases to resolving a case: adjudication (akin to guilt-innocence) and disposition (akin to sentencing).[3] These hearings are separate proceedings that can, but do not always, take place in quick succession. A finding of "true" for delinquent conduct can be entered by a judge regardless of the respondent's age (presuming

the conduct occurred while he was between the ages of 10 and 16). However, disposition presents a greater challenge.

For delinquent conduct in the juvenile system, there are three main methods of disposition:

- deferred contracts,
- probation, and
- commitment to the Texas Juvenile Justice Department (TJJD), which is an option only on felony offenses.[4]

A deferred contract is like deferred adjudication in the adult system in that it offers a respondent the opportunity to take various offense-specific courses and even receive counseling. Upon successful completion of a deferred contract, the case is dismissed. However, unlike the adult system, if a respondent does not comport with the terms of a deferred contract, the contract will be terminated, the case may be filed, and the process starts from the beginning.

Juvenile probation departments can monitor and offer various services to respondents up until the age of 18.[5] Respondents who are committed to TJJD for an indeterminate sentence can stay until their 19th birthdays.[6] There are a set of offenses in which, upon certification by the grand jury, a respondent may be assessed a determinate sentence.[7] In these situations, a hearing is required prior to the respondent reaching age 19 to determine whether he will be released to the Texas Department of Criminal Justice's parole or institutional division.[8] One of the final sentencing options at a juvenile prosecutor's disposal is waiver of jurisdiction and discretionary transfer to a criminal district court.[9]

Unfortunately, the laws of space and time didn't take a break while the courts did, so respondents continued to draw nearer and nearer to their 18th birthdays without resolution, potentially causing a misdemeanor case to lose jurisdiction.

With misdemeanor offenses, because TJJD is off the table by statute, the only disposition option is probation. As mentioned above, this is problematic because once a respondent reaches 18 years of age, the juvenile ages out of the system. This has always been true, and the COVID-19 pandemic has turned it into a consistent concern. Because of all-out delays in the beginning of the pandemic, followed by time in which courts, prosecutors, defense attorneys, and probation officers alike scrambled to adapt to virtual dockets, many respondents' cases progressed much more slowly than usual. Unfortunately, the laws of space and time didn't take a break while the courts did, so respondents continued to draw nearer and nearer to their 18th birthdays without resolution, potentially causing a misdemeanor case to lose jurisdiction.[10] The practical effect of losing jurisdiction is that once a respondent reaches 18, a misdemeanor case must be dismissed.

Felony cases, even with the State's ability to commit a respondent to TJJD, have similarly suffered potentially fatal delays. Even with the prospect of TJJD as a disposition, the pandemic has slowed down the ability to resolve cases for many of the same reasons as above. Furthermore, just because TJJD is an option doesn't mean that it is an appropriate option. Because the purpose of the juvenile system is to rehabilitate[11] and seek solutions in the best interest of the youth, often TJJD is reserved for more "habitual" juveniles or those who have committed violent offenses. Even for those cases where TJJD is in the best interest of the youth, it can keep respondents only until right before their 19th birthday. When a juvenile approaches his 19th birthday, there are typically three options depending upon the petition level that the respondent was adjudicated on: If the youth is still in TJJD, he can be released outright, released to TDCJ's Parole Division, or transferred to TDCJ's Institutional division.

These problems pertain only to those cases that can be resolved by a stipulation. As with the adult system, there are always those that can be resolved only with a trial. Given that the pandemic has put the brakes on juries—no in-person jury trials have taken place in our jurisdiction, and that seems to be the likely practice for the foreseeable future[12]—innumerable cases that ostensibly demand to be tried are waiting and continuing the slow lurch toward respondents aging out of the system.

While the situation may seem dire, there are options to prevent a difficult situation from becoming a catastrophic one. Knowing that the dreaded possibility of aging out of the system is slowly creeping up as the days go by comes as no surprise. As such, it is imperative prosecutors are proactive in triaging cases and paying close attention to respondents' ages. For those cases in which the threat of aging out is more than just a theoretical danger, inventive juvenile prosecutors should make prudent use of all the tools in the toolbox. First, identify cases that can be pled out. Not only does this alleviate pressures of a growing docket, but it also affords respondents the benefit of valuable probation services. Furthermore, where in-person jury trials have come to a halt, there is always the option of virtual bench trials. As both parties are becoming in-

creasingly accustomed to various technology used on a daily basis for status conferences and pleas, it is likely that virtual bench trials will become much more commonplace.

Transporting respondents in custody

Transportation of respondents in custody, whether they're in detention, placed with Child Protective Services, or living in a placement facility, is another area where the COVID-19 pandemic has created issues. Juveniles who are in locations other than with their parent(s) or guardian(s) in their homes are at the mercy of transportation protocols established by the facility. The pandemic-induced travel issues have created real obstacles to resolving cases and conferring between respondents and their counsel.

Part of the reason that transportation issues are so significant is because in the juvenile system, there are so many treatment and housing options available. Given that the whole purpose of the system is to keep the best interests of the youth in mind, it makes sense that there are many treatment options, but that variety has exacerbated the potential for transportation to throw a wrench in the system. Let's look into several of the many treatment options at the disposal of juvenile prosecutors.

Respondents who are awaiting trial and have a referral (have been arrested) can be detained presuming certain criteria are met.[13] Under Texas law there is a presumption in favor of release for a respondent held in detention unless, at a detention hearing, the court finds that:

1) there is not suitable supervision care or protection for him,

2) he has no parent, guardian, or other person to whom to release him who is able to return him to court when required,

3) he may be a danger to himself or may threaten the safety of the public,

4) he has previously been found to be delinquent in the past and is likely to commit an offense if released, or

5) the respondent is likely to abscond.[14]

Unlike a county jail, juvenile detention centers are not appropriate to house youths after disposition. Detention centers during the pandemic suffer from a variety of complications. Consider intake of new detainees, for instance. The staff must comport with a new screening protocol to catch potentially symptomatic youth being brought into the facility. Similarly, consider movement of youth within the center: If a detainee starts showing symptoms consistent with COVID-19 or tests positive for the virus, entire sections of a facility may need to be quarantined and closed off. The practical effect of such a shutdown is that no respondents can leave that section to confer with attorneys or probation officers or even to take part in Zoom hearings (if the equipment is outside that section). All of these concerns are in addition to obvious measures, such as maintaining social distance and wearing masks.

Let's turn our attention next to placement facilities. These are secure lockdown facilities in which respondents are placed on probation in the care and custody of the chief juvenile probation officer.[15] These locations have many of the same concerns as detention facilities, as discussed above. An additional consideration, however, is what happens when a placement facility, due to COVID-induced capacity limitations, is unable to accept new respondents. Respondents are still being placed on probation, albeit at a slower pace, and placement in a facility is a requirement. If there is not a facility available for a youth, many times he will remain in detention pending a vacancy. It's a less-than-ideal solution.

It is particularly difficult because for the most part, these concerns are outside the prosecutor's control. However, that doesn't mean that good old-fashioned collaborative problem-solving with other departments and agencies can't improve the way things operate. For example, communication and cooperation with our non-prosecuting partners in the juvenile justice system is crucial when it comes to juveniles in detention facilities. Plea paperwork can now be routed through detention officials for respondents to sign and review with their attorneys. Juvenile probation and detention officials have also been at the front lines ensuring technology is present and reliable for respondents and defense counsel to use.

How on earth do we work to alleviate increasing detention numbers, though? Ostensibly, this is something totally outside of the control of the prosecutor, right? Well, not necessarily. Keeping on top of one's docket and following up on cases are paramount to ensuring that the only youth remaining in detention are those who statutorily must remain in detention. If a respondent is awaiting transfer to a placement facility,

Part of the reason that transportation issues are so significant is because in the juvenile system, there are so many treatment and housing options available. Given that the whole purpose of the system is to keep the best interests of the youth in mind, it makes sense that there are many treatment options, but that variety has exacerbated the potential for transportation to throw a wrench in the system.

it is important for prosecutors to look at the facts, think critically, and make a determination if the youth needs to remain in detention until a bed opens up at the facility. Sometimes for lower-level offenders, release from detention on a GPS monitor can be a real option.

Transporting respondents to and from TJJD custody is also an issue. As with placement facilities, respondents are still being sentenced to TJJD. What happens, however, when TJJD isn't accepting youth and juveniles end up waiting in a detention facility until TJJD opens its doors again? In an effort to curtail COVID-19 spread within TJJD facilities, the institution imposed a variety of intake restrictions. Facilities did not receive new youth for roughly two weeks each during the months of May, June, and August. During July, movement into intake was restricted for the entire month. Our home jurisdiction of Bexar County was put on a restriction list at the end of June through the end of the summer, which meant that TJJD facilities were not accepting any respondents from our county that entire time—something that has happened to other large counties too.

When the pandemic brought the juvenile justice system to a sudden stop, it did more than just clog dockets, it also obliterated the conventional means of even moving our cases.

Movement out of TJJD can also present major issues. In situations where a respondent was assessed a determinate sentence that runs past his 19th birthday, the court must conduct a hearing prior to the birthday.[16] Because TJJD cannot keep a respondent past that birthday, if the hearing doesn't start before that, the respondent must be released.[17] As if that weren't enough to present potential issues, the respondent's TJJD file must also be made available to both the State and counsel for the respondent no less than five working days prior to the hearing.[18] Pre-pandemic, the TJJD master file, security file, and other necessary reports were physically mailed to the court to be made available to both sides.[19] But since the pandemic started, TJJD representatives have been granted greater freedom in making the same information available to all the required parties in electronic format. It is worth noting that the TJJD representatives we have worked with have been wonderful assets in sharing information and clarifying anything in a master file.

What happens when a respondent who is nearing age 19 is COVID-positive and unable to leave TJJD jurisdiction to take part in the hearings? You better believe this is a frustrating situation, but we still have options. In just such a situation, where we knew the youth would not be in our jurisdiction in time for the hearing, we began the hearing on the record, asked the court to take judicial notice of the appropriate files, and then asked for a continuance. (Of course, communicating this plan ahead of time to both the court and counsel for the respondent is key.) In this case we were able to begin the hearing prior to the respondent's 19th birthday and then request a continuance for a few weeks later, when we knew the respondent would be in our jurisdiction so defense counsel could confer with him. Even though the hearing commenced after the youth turned 19, the hearing had begun in accordance with the statute prior his 19th birthday.

Docket management

For countless prosecutors, this pandemic has destroyed any sense of docket management. While many jurisdictions eventually found remote methods to confer, plead cases, or even hold various hearings, the ability to have jury trials on a mass scale has eluded the overwhelming majority of prosecutors.

When the pandemic brought the juvenile justice system to a sudden stop, it did more than just clog dockets; it also obliterated the conventional means of even moving our cases. Both the infectious dangers of COVID-19 and the restrictions that have come along with it have hindered prosecutors from a business-as-usual approach.

Disclosure. The loss of in-person dockets, along with the absence of jurors, is probably the most obvious change that has occurred. All prosecutors have experienced it, but juvenile justice practitioners have encountered different encumbrances. Depending upon the jurisdiction, in-court conferring may have been a primary means of disclosing information that wasn't discoverable under CCP Art. 39.16 prior to the pandemic. Juvenile cases can be replete with such information given the minor status of the respondents. CPS records, forensic interviews, and TCIC files create practical problems for sharing with counsel, a problem that isn't always readily addressed by technological instruments such as Zoom.

Solving these problems takes a little more effort and scheduling zeal. Keep open the channels of communication with defense attorneys and try to work with them to make this information available. Sometimes this requires setting up appointments for attorneys to come by and view the information, and in our experience, keeping a

flexible schedule not only ensures that we comport with our ethical and statutory requirements, but it also helps move cases. If space permits, make an area of your office available for defense counsel to view the information, whether it be in print or electronic format. Oftentimes this accomplishes the same result that viewing the information during a docket did—but without the same time restrictions of defense counsel having to bounce around the courthouse from setting to setting.

Confidentiality. Given that negotiations and preparation of plea paperwork must now be done remotely, additional difficulties have arisen. Because the concept of confidentiality is a greater concern in the juvenile system, there is a need to maintain the privacy of the respondent or other minors who may be involved.

Work with other prosecutors in your section or office to create and maintain a uniform manner of disbursing such documentation, which will ensure accountability and standards to safeguard sensitive information. Whether it's done in print or electronically, prosecutors should ensure that the recipients of information, such as plea paperwork, acknowledge receipt and understand where the paperwork should be forwarded once appropriate signatures have been obtained. If your jurisdiction decides to use print copies, it might be prudent to have counsel sign for it once it is picked up.

Detention hearings. Under Texas law, respondents do not have the same rights to bail as adults do, but they are afforded the right to a detention hearing every 10 days.[20] These hearings require the presence not only of the usual parties but also a juvenile probation officer and some type of guardian for the youth (whether it be a parent or guardian ad litem).[21] Requiring additional participants often presents new difficulties. For instance, each party is present to offer unique insight at the hearing. Probation officers frequently are questioned on the progress a respondent is making while in detention or in other services. This additional knowledge isn't divinely bestowed upon them—it is the result of numerous interviews and case studies. The various restrictions that have accompanied the pandemic have greatly inhibited the ability for such information to be gathered, but it hasn't halted it.

For the most part, this process is still taking place, albeit at an understandably slower pace. Juvenile probation officers are often calling respondents and utilizing other means to supplement the traditional in-person meetings. We prosecutors are amazed and grateful for the dedication of these probation officers who have adapted to these dreadful circumstances. We keep in constant contact with these officers, who are valuable sources of information about youths in detention.

Specialty courts and specialized dockets. Whereas specialty courts and specialized dockets[22] aren't unique to the juvenile justice system, it is fair to say that the juvenile system makes more liberal use of them. As with specialty courts in the adult system, juvenile specialty courts strive to involve the accused in an effort to address underlying issues. The courts are constructed to assist not only the respondent but also his parents or guardians. In many cases the latter are an integral part of the specialty court process. While Zoom has been an effective means to meet for these dockets, many families in the specialty court dockets don't always have readily available internet access or, due to the pandemic, have variable work hours that sometimes make participation unduly burdensome.

To circumvent some of these challenges, probation officers and case managers have been working around the clock to ensure that effective and inclusive means of communication are created and maintained so that no one is left out. In numerous specialty courts and dockets conducted via Zoom, we have seen families and respondents call in to the case manager's phone and participate that way. Additionally, everyone is understanding regarding the economic hardships the pandemic has created on families, and if parents have scheduling issues, every effort is made to accommodate them.

Furthermore, an integral part of the specialty court process is additional services often offered by the juvenile probation office. These services consist of additional counseling, home visits, evaluations, and the like. The pandemic and social distancing protocols have greatly curtailed the ability of probation officers to offer these services in the same ways they did before, but much of the groundwork can be done telephonically or online. As prosecutors, we rely heavily on the information gathered by case managers and juvenile probation officers so as to make informed decisions. In our county, neither

In an effort to circumvent some of these challenges, probation officers and case managers have been working around the clock to ensure that effective and inclusive means of communication are created and maintained so that no one is left out.

the information gathering nor the offering of services have stopped. Though we did see a brief pause early in the pandemic, at this point numerous agencies have adapted to offering electronic courses, evaluations, and counseling services.

Interpreters. Another challenge arises with the use of court interpreters, namely, problems with internet connectivity or technological difficulties, which can prevent a solid connection for the individual in need of interpretation (often the respondent or a guardian). Reliable communication is a must for the hearing. In the best of scenarios where these problems occur, technical difficulties can be resolved and all that is lost is time. In the worst-case scenarios, hearings must be rescheduled to ensure fairness.

We can have more control over the manner in which we navigate future challenges if we take the time and effort to learn from this crisis and implement changes in the future.

Where we go from here

Regardless of how quickly the system is able to achieve any sense of pre-pandemic normalcy, it would be short-sighted to think that the lessons learned from the COVID-19 pandemic are applicable only during a catastrophic health crisis. Rather, the experience gained from this time must be applied to other situations in which the juvenile justice system's resources and communication abilities are placed under stress.

Furthermore, we should always be looking for ways to increase efficiency, fairness, and reliability of services. Without a doubt, the pandemic took the entire system by surprise, and its long-reaching effects were outside the control of everyone involved. However, we can have more control over the manner in which we navigate future challenges if we take the time and effort to learn from this crisis and implement changes in the future. ❇

Endnotes

[1] Due in part to the chimeric quasi-civil, quasi-criminal nature of the juvenile system, those accused of an offense are referred to respondents as opposed to defendants. Similarly, the State is, technically speaking, the petitioner.

[2] Tex. Fam. Code §§51.02 and 51.03.

[3] Tex. Fam. Code §54.04.

[4] Tex. Fam. Code §§53.03 and 54.04.

[5] Tex. Fam. Code §§51.02 and 51.03.

[6] Tex. Fam. Code §54.04(d)(2).

[7] Tex. Fam. Code §53.045.

[8] Tex. Fam. Code §54.11.

[9] Tex. Fam. Code §54.02.

[10] Tex. Fam. Code §§51.02 and 51.04.

[11] Tex. Fam. Code §51.01(c).

[12] The Supreme Court of Texas's 29th Emergency Order Regarding the COVID-19 State of Disaster.

[13] Tex. Fam. Code §54.01(e).

[14] *Id.*

[15] See Tex. Fam. Code §54.04(i).

[16] Tex. Fam. Code §54.11.

[17] *Id.*

[18] Tex. Fam. Code §54.11(d).

[19] *Id.*

[20] Tex. Fam. Code §54.01.

[21] Tex. Fam. Code §54.01(c).

[22] The distinction between specialty courts and specialty dockets is often one based upon from where funding is derived and varies from jurisdiction to jurisdiction.

‘Leading up’: a guide for leaders who are not in charge

Leadership is the art of influencing others to accomplish an objective.

By Mike Holley
First Assistant District Attorney in Montgomery County

Traditionally, we think of leading those we directly supervise, but this is only one aspect of leadership. We also seek to influence our coworkers and those outside our organizations.[1] One very significant class of “others” we influence are those who supervise *us*. This is what “leading up” means.

You may ask, why should I try to lead up? Why is this important? There are several reasons, and here are three:

First, if you can help your boss to more skillfully supervise you, you will enhance your own effectiveness. From a different angle, if you lead up well, you can mitigate a bad or struggling boss’s negative effects on your work. Additionally, you will improve your own supervisory proficiency as a byproduct of your efforts. You will have made yourself better.

Second, if you help your boss improve as a supervisor, you aid others in the office. Enhancing your boss’s skills benefits everyone your boss supervises now or will ever supervise in the future, not just you. The value you provide to your fellow employees multiplies over time and across your organization. You will have made the entire office better.

Third, if you can demonstrate how to follow well, other people in non-supervisory positions will emulate your example. Good leaders are good followers, and good followers tend to support one another. An office of good followers creates a powerful and effective team—and a happier one. Once again, you will have made the entire office better.

So, for at least those three reasons, leading up well is something to be pursued. And, unless you happen to be *the* county attorney or *the* district attorney, leading up is something you will have to do, whether you want to or not.

How to lead up

The starting point is the “grand unified theory” of leading up. This principle is not perfect (we will touch on its limitations at the end), but it will guide you in a thousand decisions. Here it is: “Be the kind of follower you want to lead.”

Simple, right? Yes, but deceptively so. This principle requires us to act with professionalism and dignity even when we are being mistreated. Which is hard. The principle calls on you to be your best self, even when others are not doing the same. Which is also hard. Still, as the Mandalorians say, “This is the way.”[2]

But what does leading up look like, practically? This article contains specific guidance to that end, but I have an important caveat before we go further. Some of you are struggling with your work so much on a daily basis that the thought of trying to lead your boss seems overwhelming. Please do not be overwhelmed. Seize what helps you now, and save the rest for later. “Leave the gun; take the cannoli,” if you will.[3]

Clear and effective communication

Your boss wants you to keep him “informed.” An immediate tension arises. He does not want to know everything, just what is “important.” And “important” is often a moving target, even and especially to your boss. (Here’s a quick set of definitions. Important: What you did not tell your

boss but should have. Unimportant: What you did tell your boss but should not have.)

Here are three suggestions to help strike the right balance:

Press information consistently upward. This may mean daily or weekly updates on your work, or it may mean periodic briefings on major projects or developing problems. Update with intention, but do not flood your boss with too many details. How many details are too many? This depends entirely on your boss. Some bosses require a level of detail that bleeds into micromanagement, something we will discuss below. Too few details, however, and your boss will be unprepared to answer to his or her own boss when information is sought, or to give you good counsel when needed. If you are concerned the level of detail you provide is too much or too little—ask your boss. Adjust. Periodically ask again. If little to no information is flowing upwards, you are doing it wrong. Trust me on this—keeping your boss well informed is a powerful tool in leading up, and good communication covers a multitude of sins.

"Set apart" things of significance. Your boss is busy and overwhelmed, although he may not appear to be. (The same is often true for you.) When something is important, you must find a way to set the information apart so he sees the significance and can act in a timely manner. You may do this in writing, in person, or both. As advocates, you know how to communicate the urgent and the important. (There is a difference between "we are doing routine inspections on the dam next Thursday" and "the dam is collapsing right now!") In extreme cases, it may mean grabbing your boss by both shoulders and saying, "Seriously, listen to what I'm telling you right now!" It may mean scheduling a formal meeting and making a PowerPoint presentation. It may mean a memo with the critical idea in red font at the top. It may mean repeating a message again and again, just as we do in trial. Figure out what works with your boss and do that thing. Be creative and adaptive, as leaders are required to be.[4]

Your boss is busy and overwhelmed, although he may not appear to be. (The same is often true for you.) When something is important, you must find a way to set the information apart so he sees the significance and can act in a timely manner.

Give your boss bad news before you share it with others. Put another way: Never communicate bad news to your boss's boss first. Never. You would not welcome this behavior from someone you supervise; do not do it now. Good news? Praise? Compliments? You may be able to share any of those with your boss's boss first. But bad news, never. Tell your boss first. *If you take away one thing from this article, make it this.* And when you tell your boss about bad news, have a proposed solution at hand or have the problem already fixed. But—and this is significant "but"—take care not to delay too long to do either. Most good bosses would rather know about bad news sooner rather than later, and there is a direct correlation between how easily your boss can fix a problem and how quickly you tell him about it.[5] Telling your boss bad news first is generally an act of loyalty, a topic we will cover next.

The duty of loyalty

Loyalty is a much-maligned and much-misunderstood concept. Often loyalty is used in a one-way manner: I am loyal to my boss, but my boss is not loyal to me. Or loyalty is described as blind allegiance irrespective of the truth. Neither of those descriptions is true loyalty.

Loyalty is a *principled* commitment to a cause or a person. In your case, it is both. You are committed to your office's mission, and you are also committed to the person you work for—in that order. At a minimum, loyalty includes the following three concepts:

1 **As a loyal follower, honor your boss with candor.** Candor means telling him what you honestly think about an important matter.[6] Do so in an acceptable way that your boss will receive—the right time, the right tone, and the right attitude. You express your opinion clearly to your boss. You do not withhold your views from him only to share with others. You offer your opinion—often asking for permission to do so first—*at any time you believe your opinion may be needed by your boss to accomplish the mission.* The acid test of loyalty comes after you express your opinion. If your boss chooses another option—assuming the choice is ethical—you adopt your boss's decision with the same passion and resolve you would as if the decision were your own. As you implement your boss's decision, no one—especially those you supervise—should know you initially thought otherwise. Further, you should not borrow your boss's authority when telling others about the decision. Do not say, "Well, the chief wants X done." This approach is not leadership; it is an abdication of leadership. Nor is it loyal. Say, "I want X done" or, if necessary, "The chief and I want X done."

2 **As a loyal follower, prioritize your boss's success over your own.** Work harder to make your boss look good than you do making yourself

look good. Will this sometimes result in unfairness? Absolutely. In fact, I guarantee it will. Still, the truth will eventually become apparent to all. If you do good work, people will ultimately see it. If you are mostly concerned about accumulating personal glory, people will see that, too. On the other hand, if you are more intentional about making your boss succeed and making him seen as a success, then sooner or later, things will work out for both of you. Or at least for you. In any case, this is what loyalty requires.

3 As a loyal follower, complain about your boss the right way.[7] We can all agree government employees have an absolute entitlement—nay, a duty—to complain. The right of a public servant to complain is in the U.S. Constitution.[8] Complaining can be healthy, right up until your complaining undermines your boss's ability to lead your team in accomplishing the mission. There is, then, a right way to complain and a wrong way to complain. Let us be honest with one another: You know the difference between the two. You do. Do the one, not the other. If you genuinely do not know the difference, there is some guidance in this endnote.[9]

One other point about loyalty: I said you have two objects of your loyalty—your boss and the office's mission. Your ultimate loyalty lies with the mission of the office. We should note together that the mission of every public office in the state of Texas requires ethical behavior in *all situations* and at *all times*. A boss who asks you to do something unethical is breaking loyalty with you and with the mission. Fortunately, this is not a common occurrence, so you should normally be free to serve your boss with confidence and to the best of your abilities. One of the ways you can serve your boss best is by helping him improve his own performance, which is our next topic.

Improving your boss's performance

Not every boss is great. There, I've said it! And even the best of bosses is not always perfect because people are not perfect. Leaders strive to improve performance with everyone with whom they interact, and improving our boss's performance is no different. Here are three considerations as you do so:

1 Work intentionally to make your boss better. Your boss likely takes actions (or fails to act) in ways that have negative consequences he does not fully appreciate. Gently, professionally, respectfully, but clearly explain those consequences to him at the right time. (You may want to ask for permission first.) Along those lines, you should encourage your boss, and do so regularly. Everyone needs encouragement, regardless of how strong he appears to be. Especially encourage good behavior or progress in problem areas. Does your boss have a propensity to yell? When he does not yell when correcting you or someone else, tell him how much you appreciate the professional manner he took in addressing the deficiencies at issue. Does your boss "bottleneck" decisions (meaning, hold on to things longer than he should so you cannot act)? Then be sure to recognize when he makes timely decisions, and tell him how much you appreciate his decisive action and how helpful his timely decision will be to the team. Does your boss struggle with leadership principles generally? Talk to him about leadership ideas when you can. Read leadership books yourself, and discuss those books and concepts with your boss. (Willink and Babin's *Extreme Ownership* and Lencioni's *The Ideal Team Player* are good examples to share.) In short, just as you help your subordinates develop, help your boss develop, too. We can all use help, and providing help is what leaders do.

Your ultimate loyalty lies with the mission of the office. We should note together that the mission of every public office in the state of Texas requires ethical behavior in all situations and at all times.

2 Identify the different varieties of micromanagement and deal with them accordingly. Micromanagement is a perennial complaint about bosses, and micromanagement works directly against a boss's effectiveness. But micromanagement comes in different flavors. Here are the main micromanagement categories and a response to each:

Boredom. Your boss is bored, so he begins taking your work as something to do. This type of micromanagement is the easiest to deal with—find something constructive for your boss to do. Direct his work in a way that meaningfully helps you or the greater mission: "If you have time, I'd appreciate it if you would look into this thorny jury charge issue for me."

Trust. Your boss does not entirely trust you. Ask why. Find out if there is something you can do to repair a breach of trust and raise the level of trust. Take it head-on and ask him directly.[10] Do not do anything to undercut this trust. Also, be patient. Trust usually comes with time.

Insecurity. Your boss is insecure. Insecurity is the most challenging type of micromanagement to deal with. A boss who is insecure will do the work himself as a guard against his fears. Fear is a challenging emotion which we all feel to vary-

ing degrees. To deal with this type of micromanagement, you may need to have a direct conversation with your boss, and likely more than one. Another option is to reassure the boss not only about your work but his. But, frankly, you may not be able to convince your boss to be more secure, especially if your office is a fear-based environment or your boss grew up in a fear-based culture. In that case—and I am sorry to say this—you may have to learn to stoically and professionally bear with the micromanagement.[11] And then promise yourself not to perpetuate this behavior when given the opportunity to supervise others.

Standards. Your boss does not think you are meeting the standard, so he gets involved in your work because standards matter. Ouch. If your boss is right, then you have to up your game. If your boss is wrong, you have to talk things through with him if you can. These debates are common in our profession as the nature of our job lends itself to different judgments as to how best to do our work. Standards are often a subjective thing in this sense.

In determining whose standard is correct, there is something important to remember. Specifically, remember that "your" case is not your case. The case belongs to the County Attorney or the District Attorney. You are formally entrusted with its care, and yes, you will get all the blame for the miscalculations and errors you make in handling the case, but make no mistake– it is not ultimately your case.

In determining whose standard is correct, there is something important to remember. Specifically, remember that "your" case is not your case. The case belongs to the county attorney or the district attorney. You are formally entrusted with its care, and yes, you will get all the blame for the miscalculations and errors you make in handling the case, but make no mistake—it is not ultimately your case. The county attorney or district attorney delegates his or her authority to a subordinate based on how s/he values that leader's judgment. That leader—your boss—has received this authority and now exercises his professional judgment to the best of his ability. Your boss sets the standard. So, as difficult as it may be, remember this important point before you decide that your way is right and your boss's way is wrong. Put another way: I suspect that when you are in charge, you will assume your standards, not your subordinates', are the ones to be followed. Be humble enough to follow well.

As we mentioned earlier, one characteristic of micromanagement is the demand for information at an unreasonable level of detail. By unreasonable, I mean a level of detail that prevents you from getting work done or that creates excessive, unnecessary labor. In responding to this challenge, I am reminded how my friend Jud Waltman handles a similar situation. Mr. Waltman is an exceptional civil lawyer who deals with clients in serious cases. Some of these clients insist on constant updates. Jud will tell these clients something like, "Mr. Jones, I understand and appreciate you want to know what's going on, but if I'm talking to you all the time on the phone, that means I'm not working on your case." Jud's statement captures the essence of the problem: "If I am spending so much time telling you everything I am doing, I cannot do anything substantive for you, and you want and need me to do substantive things for you." See if this approach works with your boss. It may not. Micromanagement is an intractably annoying problem; the fire ants of boss behavior, if you will.

3 Set reasonable and healthy boundaries. Setting boundaries is as difficult as it is important. Yes, you owe good communication and consistent loyalty to your boss, but you also owe yourself, friends, and family something else: a resolute commitment to your well-being. Ironically, setting healthy and necessary boundaries helps your boss as much as it helps you, partly because an unwell follower will eventually be an ineffective follower.

As we consider where to place boundaries, we have to make a distinction between playing hurt and playing injured. Playing hurt is something we all must do from time to time. It involves dealing with the daily challenges and the hardships of the work. Our job is tough, and tough people are needed to do this job.

Playing injured is different. Playing injured is a situation where you can no longer work effectively, where you have significantly harmed your physical or mental health, where addictive behaviors seriously compromise your effectiveness or where your relationships fracture in a serious way. *Being injured is not shameful*, but it is something we should be honest about and we should all seek to avoid, individually and together.

To avoid injury, you have to set appropriate boundaries. Once set, you have to respect these boundaries yourself and then train your boss to respect them. This process looks different for everyone, but I want to emphasize (after having failed at this personally and profoundly) that *you* will ultimately create the boundaries that exist, not your boss.

For example, electing to take non-emergency calls or respond to non-urgent emails during your family vacation? You have set the standard. Choose not to ask for more help when needed, and instead work such long hours your

health and your relationships start to suffer? You have set the standard. The kid cases you are working beginning to get to you in such a way that real mental health problems are developing, but you are too proud or private to say so? You have set the standard. Allowing your boss to push your ethical boundaries so far you do not recognize yourself anymore? You have set the standard. Ultimately, these standards become the boundaries between you and your boss. If these boundaries are in the wrong position, everyone suffers, including your boss.[12] You can understandably rail at your boss when this occurs, but, as a leader, you can only rightfully blame yourself.

Ultimately, your efforts to set boundaries may not be completely effective. What you may have to do to serve your boss, your office, and your own wellbeing best is to simply say, "No more of X behavior." How hard is that? Well, it does not get any harder.[13] But it is the thing to do before you walk away, burn out, or blow up. It is what leaders do.

A few other suggestions

Spend time understanding what is important to your boss, and make those things important to you, too.

Defend your boss and your office against all others, even if you do not particularly feel like it.[14]

Do not put your own professional development solely on the shoulders of your boss. His shoulders cannot bear that weight, and you will be unnecessarily and constantly frustrated.

Look for ways to make your boss's job easier.

Recognize your boss's strengths and weaknesses. Promote the former and shore up the latter.

Consider that your boss may see things from a different vantage point than you do and may have challenges you do not fully appreciate. Remember that being a boss—any boss—is not as easy as it looks.

When you have a significant dust-up with your boss, and you will, begin the next day with a fresh start, like a professional. Grudges are for amateurs.

Make the decisions you were hired to make so that your boss does not have to. If you need your boss's input for a decision, one technique is to say, "I intend to take course of action A." Then give your boss enough time to say, "This is the wrong course of action. Take course of action B."[15] This method works very well until it does not.[16]

The worthwhile is rarely easy

We started by saying that the grand unified theory of leading up is to "be the kind of follower you want to lead," and we said this principle would guide you in many of your decisions. We also said this principle has some limitations. For one, you may not yet appreciate what is required to be a boss at the next level, so your judgment on a particular issue may not be fully formed. For another, you may find that your boss has a different leadership style than you do. What you would expect in a situation is not necessarily what your boss would choose. Make this allowance for your boss. Communicate well and adapt accordingly.

Make one other allowance for yourself: Remember that leadership is tough. Nothing you do to influence your boss—or anyone else—happens easily or quickly. There is no "one and done" technique that will bring automatic results, and there never has been. Leading is the long game. You may have to fight the micromanagement problem during your entire time with your boss, making only incremental headway. You may make progress with your boss in one area, only to see a setback in another. Such is the nature of leadership. Nevertheless, keep at it. Keep the faith. Keep working. Keep leading up. This is the way. ❇

Do not put your own professional development solely on the shoulders of your boss. His shoulders cannot bear that weight, and you will be unnecessarily and constantly frustrated.

Endnotes

[1] Consider your relationship with law enforcement as an example. We are continually seeking ways to positively influence our colleagues in the law enforcement community. This, too, is leadership.

[2] Mandalore is an Outer Planet marked by savage and unrelenting war. The Mandalorians are–ah, just forget it.

[3] Peter Clemenza, Corleone Family capo, *The Godfather*. Paramount Pictures, 1972 (Francis Ford Coppola, dir.).

[4] If you want to see an excellent example of this concept in the negative, go back and watch officials from the Department of Public Safety brief lawmakers on the new hemp law and THC testing. (Yes, I went there.)

[5] ADA Donna Berkey likens a boss to a firefighter. If you alert the firefighter to a fire early, he may be able to save the house and your property. If you wait to let the

fire really get going, you may not be so fortunate. And for heaven's sake, don't try to cover up your mistake. As the Watergate scandal and every episode of every sitcom has taught us, covering a mistake only makes things worse.

[6] Candor involves your best judgment on matters of consequence, not merely your preference. Preference is reserved for those in charge, which you may lament now, but you will appreciate when you are in charge.

[7] Here's some ancient wisdom about speaking out of school about your boss: "Even in your thoughts, do not curse the king, nor in your bedroom curse the rich, for a bird of the air will carry your voice, or some winged creature tell the matter." Ecclesiastes 10:20. We might update "bird" for "social media platform."

[8] Don't bother trying to find the source. The language is found between the emoluments stuff and recess appointments. In that generalish area. Just trust me on this one.

[9] Please do not be offended, but I do not believe you. I think you do know. As Justice Oliver Wendell Holmes once famously said, "Even a dog distinguishes between being kicked and being stumbled over." The same is true about complaining about your boss. But, OK. Imagine you are a British soldier in the trenches of World War I. Complaining about the High Command, the cold, the mud, the rats, the war, your allies the French, your enemies the Germans, the food, the equipment–all fine. Complaining about officers, generally, is fine. This type of complaining is good for your mental health and can bond you with your fellow privates in the trench. But when you start talking about how your particular officer–probably named Lieutenant Reginald Wadsworth Highsmith or something equally ridiculous–does not know what he's doing, how you are sure he will get you all killed, how many mistakes he's made, how unprepared he is to lead, and how poorly Lt. Highsmith has done in previous assignments, you are doing it wrong. Now you are now simply undermining your boss, sowing destructive doubt with your coworkers, and endangering the mission. And you are not exhibiting appropriate loyalty.

[10] "When you take my tasks from me, I am left with the impression you don't trust me to do them. Is this the case? Do you not trust me with this work? Why not? What more can I do to gain your trust?"

[11] A great and terrible leadership opportunity is bearing with a bad boss as a professional. Your example in difficult circumstances will be instructive to others, and it will hone your character to a fine edge, an edge you can later use to stab the bad boss. I kid. No stabbing.

[12] One significant negative consequence of setting unhealthy and unwise standards with your boss is that it trains your boss how to treat others who follow after you.

[13] I have been instructed by TDCAA that if you get fired because you said "no" to your boss, TDCAA is not legally responsible for anything I have advised. Or ever will be. In fact, they don't even know me, and they are not sure how this article made it into the journal. They also say they have a great job bank to check out if you do get fired.

[14] "Fredo, you're my older brother, and I love you. But don't ever take sides with anyone against the family again. Ever." –Michael Corleone

[15] This guidance comes from the aforementioned Mr. Waltman. I would add that you should be careful about saying, "If you are going to make all the decisions, then why do you need me?" Sometimes the response is, "That's a very good question. Why *do* I need you?" Then it's back to the TDCAA job bank.

[16] Remember that your boss is deluged with information. If the decision is important and you did not "set it apart" so that your boss could react in time, and then later your boss disagrees with the decision, then, yes, you will have documentary proof that you asked for guidance beforehand, but you will also leave a very negative impression in your boss's mind. You will have "won the battle, but lost the war."

Keeping personal info confidential

Prosecutors can choose to make certain personal identifying information, such as home addresses, telephone numbers, and emergency contact information, confidential. Here's how.

By Monica Mendoza
Assistant District Attorney in Brazos County

What information can be kept confidential?	Authority	How to request confidentiality
Certain State Bar records, including home address, home telephone number, Social Security number, email address, and date of birth.	Government Code §552.1176	Notify the State Bar of Texas in writing or electronically by searching **texasbar.com** for the "Restriction for Public Access of Personal Information form."
Qualified property owners, such as state or federal judges and district, criminal district, or county attorneys, to restrict public access to their home address information.	Tax Code §25.025	Fill out the form on the Texas Comptroller of Public Accounts website at **comptroller.texas.gov/forms/50-284.pdf**.
Home address, home telephone number, emergency contact information, or Social Security number; can also conceal whether a person has family members.	Government Code §552.117; the attorney general has stated in numerous informal rulings that the protection of §552.117 applies only to information a governmental body holds in its capacity as an employer.	Personal information is automatically excepted from public disclosure.
Home address, home telephone number, emergency contact information, date of birth, Social Security number, and family member information.	Government Code §552.1175; this section affords the listed persons the opportunity to withhold personal information contained in records maintained by the governmental body in any capacity.	Notify your employer of your desire to request restricted public access to this information (which includes your DOB, unlike §552.117) on a form the employer must provide for that purpose.
Voter registration information that includes a Social Security number, Texas driver's license number, residence address, or telephone number of an applicant described by Gov't Code §552.1175.	Election Code §13.004	Provide your local voter registrar with an affidavit or completed form approved by the secretary of state for the purpose of determining eligibility.
A government-operated utility may not disclose personal information in a customer's account record or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage.	Utilities Code §182.052	A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form or any other written request for confidentiality.

Texas District & County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701

PRSRT STD
US POSTAGE PAID
PERMIT NO. 1718
AUSTIN, TEXAS

RETURN SERVICE REQUESTED