The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

Handling a tough child porn case, both at trial and in therapy

Lamar County, home of the second-largest Paris in the world, is a rural county about an hour and a half northeast of Dallas on the Oklahoma border. Our office handles all the usual crimes you might expect, ranging from drugs and thefts to child sexual abuse and the occasional murder.

By Benjamin I. Kaminar
First Assistant County & District Attorney in Lamar County

However, one thing that we see relatively little of is child pornography. When we do have a child porn case, it either reaches a plea agreement or our friendly neighborhood Assistant U.S. Attorney takes it off our hands.

Sammy Evans, a 70-year-old child porn distributor who was tried to a jury by our office, was a rarity.

The investigation

Evans's case actually came to us by way of Investigator Lee McMillian of the Collin County Sheriff's Office. Investigator McMillian holds a Ph.D. in computer science and works primarily with internet crimes against children. In addition, he was an amazing resource for helping educate us and, later on, the jury about the technical side of child porn.

McMillian has computer servers that are constantly searching online for Texas IP addresses that share or download child porn files. With the size of the state and the volume of internet activity involved, McMillian focuses on the worst of the worst: graphic, violent abuse. One IP address with a lot of activity shared several videos with McMillian, including one that depicted the rape of a 7- or 8-year-old girl.

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Honoring the Texas Prosecutors Society's Class of 2022

At the Elected Prosecutor Conference, the Foundation hosted Wednesday night's reception in honor of the 2022 inductees into the Texas Prosecutors Society.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

The photo below shows those new inductees who attended the reception, and the list below is the whole crew. Welcome to all y'all—this is a great group of folks:

Alva Alvarez
Michael Butera
Kevin Dutton
Jen Falk
Philip Mack Furlow
John Gillespie
Joe D. Gonzales
Wally Hatch
Cheryl Henry
Dee Hobbs
Jana Jones
John Kimbrough
Lance Long
Audrey Louis
Jennifer Meriwether
Ann Montgomery
Sarah Moore
Suzy Morton
Jacob Putman
Will Ramsay
Nick Socias
Gary Young

Mandatory *Brady* training reminder

Just a friendly reminder that if you are due for your refresher course for the mandatory *Brady* training or if you have just started in the profession and need to take the course for the first time, you can complete that requirement with TDCAA's free online training at www.tdcaa.com/training/mandatory-brady-training-2022. If you are new, you must complete the course within the first 180 days of your employment. After that, you must complete a refresher every fourth year. ❇

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About *The Texas Prosecutor*

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Welcome to the newly elected and appointed prosecutors

In this year's election cycle, criminal district attorneys were up for election, with district and county attorneys generally running in a presidential election year (with some exceptions).

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Here is the list of all the new prosecutors who have taken office by appointment in 2022 and those who took office on January 1, 2023. If these folks are your neighbors, reach out and say hi!

Jon Bates, County Attorney in San Augustine County
Jennifer Broughton, County Attorney in Brown County
Trey Brown, County Attorney in Somervell County
Courtney Cain, Criminal District Attorney in Madison County
David Chapman, County Attorney in Karnes County
Todd Dillon, Criminal District Attorney in San Jacinto County
Keith Giblin, Criminal District Attorney in Jefferson County
Kelly Higgins, Criminal District Attorney in Hays County
Michaela Kee, County Attorney in Bailey County
John Moore, Criminal District Attorney in Gregg County
Rene Montalvo, County Attorney in Starr County
Terry Palacios, Criminal District Attorney in Hidalgo County
John Price, County Attorney in Shelby County
Sara Rodriguez, Criminal District Attorney in Calhoun County
Rickie Redman, County Attorney in Lamb County
Paul Robbins, District Attorney in San Augustine and Sabine Counties
Che Rotramble, County Attorney in Wise County
Shelly Sitton, Criminal District Attorney in Polk County
Phil Sorrells, Criminal District Attorney in Tarrant County
Josh Tetens, Criminal District Attorney in McLennan County
Greg Torres, County Attorney in McCulloch County
Jon Whitsitt, County Attorney in Wilbarger County

Thanks for your service!

In the last edition of *The Texas Prosecutor*, I thanked some of our outgoing prosecutors for their service. I want to thank two more folks who retired at the end of 2022: **Dan Heard**, now the former Criminal District Attorney in Calhoun County, and **Tom Watson**, formerly the Criminal District Attorney in Gregg County. Thanks for your service to your communities and the state.

TDCAA leadership report

At the Annual Business Meeting in conjunction with our Elected Prosecutor Conference, TDCAA's leadership was set for 2023. We have a great group of folks to lead the association into the new year. Here is the executive committee lineup:

Jack Roady, Criminal District Attorney in Galveston County, Chair of the Board

Bill Helwig, Criminal District Attorney in Yoakum County, President

Erleigh Wiley, Criminal District Attorney in Kaufman County, President-Elect

Kriste Burnett, District Attorney in Palo Pinto County, Secretary-Treasurer

In addition, two at-large Board officers and four Regional Directors were elected to two-year terms:

Joe Gonzales, Criminal District Attorney in Bexar County, Criminal District Attorney at Large

Natalie Cobb Koehler, County Attorney in Bosque County, County Attorney at Large

Landon Lambert, County Attorney in Donley County, Region 1 Director

Laura Nodolf, District Attorney in Midland County, Region 2 Director

Carlos Garcia, District Attorney in Brooks and Jim Wells Counties, Region 4 Director

Jeff Swain, District Attorney in Parker County, Region 7 Director

Finally, I would like to offer a heartfelt thanks to some folks who ended their Board service in December. Thanks to **John Dodson**, County Attorney in Uvalde County; **Leslie Timmons**, County Attorney in Wheeler County; **Randall Sims**, 47th Judicial District Attorney; **Philip Mack Furlow**, 106th Judicial District Attorney; **John Hubert**, DA in Kleberg and Kenedy Counties; and **Laurie English**, 112th Judicial District Attorney. They did an outstanding job of guiding the association through the pandemic years!

A new Life Member of the association

In the last edition of this journal, I wrote about our 2022 award winners, a great group of folks who richly deserved recognition. What you didn't read about was one person whom the Nominations Committee singled out for the rarest of TDCAA recognitions: a Life Membership in TDCAA. Under the TDCAA bylaws, this recognition can be awarded only by the entire membership at the Annual Business Meeting, held in conjunction with the Elected Prosecutor Conference.

I am pleased to announce that **Lisa Tanner** is now a life member of TDCAA (that's her in the photo below, addressing the crowd at the Elected Prosecutor Conference in December). Lisa began her career as an ADA in Brazos County, but the genesis of this honor is her 28-year career as an assistant attorney general in the prosecutor assistance division. Lisa didn't just try the hardest and most challenging cases in the state—she tried them for *you* when you were conflicted out or needed her expertise. She was dedicated to serving the members of TDCAA and seeking justice. And even in "retirement," she still is. Rumor is that Lisa is continuing to assist prosecutor all over the state, which is terrific. Thank you, Lisa, for all you have done and all you are still doing!

Shannon Edmonds and Sarah Halverson

I want to take a moment to thank two TDCAA staffers, **Shannon Edmonds** and **Sarah Halverson**, who hit the 20-year mark of service in 2022. Shannon and Sarah were my first two hires when I took the executive director job in 2002, and I have to say I could not have hired more hard-working, dedicated, and loyal employees. And when I say loyal, I mean loyal to you and the profession which we all serve. Thanks, and here's to another 20!

"What You Do Matters: Lessons from the Holocaust"

"What You Do Matters: Lessons From the Holocaust" is a course produced by the United States Holocaust Memorial Museum and the Arizona District Attorneys Advisory Council. It was the keynote at December's Elected Prosecutor Conference. Tough subject matter to be sure, but its focus is how in 10 years German law enforcement went from defenders of the people to an instrument of abuse toward German citizens. The cautionary note for prosecutors is that maintaining your independence is a cornerstone to the duty to serve the public. The course got excellent reviews from attendees, but one fair criticism was that it was light on specific practical suggestions. As one conference attendee wrote in an evaluation, "I enjoyed the talk, but if I am going to cry, I want some practical payoff at the end." Fair enough—we will pass that along to the presenters.

If you want some additional reading on prosecutor independence in Nazi Germany, you may recall a book I mentioned in this column in the past: *Hitler's First Victims: A Quest for Justice* by Timothy Ryback. It tells the story of a courageous prosecutor who in 1933 sought to prosecute two SS (Schutzstaffel) guards for the murder of four Jewish prisoners at the Dachau concentration camp. It is a fascinating read about a prosecutor who tuned out all the noise around him and stuck to the facts and the law.

Mental Health videos are up—and awesome

We want to again thank the Court of Criminal Ap-

Continued on page 7 in the yellow box

Lisa Tanner didn't just try the hardest and most challenging cases in the state–she tried them for you when you were conflicted out or needed her expertise. She was dedicated to serving the members of TDCAA and seeking justice.

We're all part of 'the network'

When I raised my hand and took the oath of office as the new County Attorney in Coke County in 1980, I had no idea nor understanding that I was about to become a member of something great—I call it "the network."

By Bill Helwig
TDCAA Board President & Criminal District Attorney in Yoakum County

The network is all of us within the realm and breadth of the world of prosecution, each of us doing our jobs and functioning as the circumstances require. Our network consists of administrative and legal assistants, victim assistance coordinators, investigators, and all forms of assistant and elected prosecutors. Each one of us is a cog in the gears of prosecution. By necessity and opportunity, we interact with each other, regardless of place or position. We communicate and interact for a common purpose, and we are committed to our colleagues in the network regardless of the city, county, state, or even nation.

As that young Coke County Attorney, I was the only prosecutor in the county. I was also the only attorney. However, within a couple weeks, I had received a few "welcome" calls from several adjoining and regional prosecutors. Each was pleasant and cordial, inviting me to call if I had any questions. It was at that point that I learned the power and usefulness of our network in prosecution.

Even before the calls from neighboring prosecutors, I inadvertently found that the network existed in my county even though there were no other prosecutors. As I tried to learn the trade and understand the nuances of prosecution, the two county attorneys who had served before me were my first introduction to the network. I had their files in my office, and I sat atop a gold mine of their work and the work of local defense lawyers.

In those early days, the network functioned through phone, mail, and eyeball-to-eyeball communications, which was both effective and personal. Now, we communicate by text, email, Zoom, cell phone, office phone, and fax—probably in that order. Technology has made the network incredibly efficient, highly expeditious, and terribly functional. It is also highly impersonal. Over my 26 years in prosecution, I have used all these modes of communication to reach out to the network within our state, the country, and, on a couple of occasions, Canada and Mexico. If I have used all these tools from rural Yoakum County, I know each of you have had many, many similar experiences and utilizations. We face similar battles, whether with defendants, defense attorneys, judges, or cases. Collectively, our united group of prosecutors and office colleagues face these challenges. As a group, that is our mission, and the network enables us to take these experiences and, utilizing the technology referenced earlier, communicate to one and all.

In the upcoming year, I encourage you to continue and increase your activity and involvement as a member of the network. This means contacting, calling, and even making a personal visit to a colleague—just dropping by the office to shake hands, say hello, and engage in some war stories. When you hear about the success of a colleague, take a minute to email, text, or otherwise extend a collegial note. The network needs to be cultivated and nourished with interaction and involvement. Regardless of age, rank, or position, remember how you felt encouraged and uplifted by someone taking note and making a positive comment.

In addition to the "work" portion of the network, our biennial event, the legislative session, mandates a strong and efficient network. From the professional staff at TDCAA to all the elected

prosecutors, as well as those assistants who specialize in legislative matters, our ability to communicate and interact through the network is essential for our interests to be represented during the session. If you have the time to "work the legislature," contact TDCAA to speak to Shannon Edmonds to learn how you can be most effective.

In the upcoming year, we will attempt to host regional meetings for in-person interactions and strengthening the network. This initiative comes from TDCAA's Long-Range Planning Committee. You can support this action by attending, participating, and being involved. The Board's regional directors will be the point people, so try to know the director in your region and interact with him or her. (A list of regional directors is on page 3 of this journal.) It is hoped that when these meetings occur, offices can participate fully and that such gatherings will be a continuing endeavor.

Forty-two years ago, when I took the oath of office for the first time, I was not aware of the existence of TDCAA. Now, I am privileged and humbled to begin 2023 as the Board President of this fine and distinguished organization. I welcome all comments and contributions from you, one and all. Call, email, text, or even come by for a good ol' face-to-face exchange of a few war stories. That's one of the many things we do if we are in the network. ❇

peals for funding our online mental health course. The first three segments are on the TDCAA website (tdcaa.com/training/#online-training), and more than 400 people have already viewed them. More segments are on the way, so if you want to hone in on mental health issues in criminal cases—for free—this course is for you. Thanks to our (now former) assistant training director **Gregg Cox** for developing this course.

Law school representatives at the Elected Prosecutor Conference

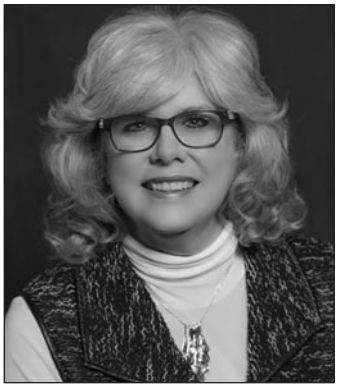
At the Elected Prosecutor Conference in December, we invited people from the career services departments of several Texas law schools to spend the day visiting with prosecutors looking to recruit new assistants. By all accounts it was a success, as prosecutors got on the radar of the law schools when it comes to our job opportunities. We highly recommend doing something similar if you are having trouble getting qualified applicants for your job openings. For a good contact list, check out the article that our own **Gregg Cox** wrote in the May–June 2022 edition of this journal: www.tdcaa.com/journal/help-for-filling-vacant-attorney-positions.

Rise of the paralegal?

On page 26 of this journal, you will find an article by **Meredith Gross**, a Certified Paralegal at the Criminal District Attorney's Office in Rockwall County. It is about how paralegals can contribute greatly to the work of a prosecutor's office, and it offers a clear roadmap on the requirements to get a certificate or become certified (those are different things—as I learned from reading the article!). As offices find ways to staff up, reduce trial backlog, and address some of the burdens of discovery under the Michael Morton Act, recruiting paralegals in addition to new assistants may be a trend in prosecutor office staffing. ❇

2022's KP–VAC Conference

In November 2022, the Embassy Suites Landmark in San Antonio was the venue for a very successful conference for key personnel and victim assistance coordinators (VACs) from across the state.



By Jalayne Robinson, LMSW
TDCAA Victim Services Director

A record number of more than 320 attendees gathered to hear speakers on a number of helpful topics. Many, many thanks to our very informative speakers! We appreciate your time and valuable assistance.

This conference is held annually and provides key personnel and victim assistance coordinators a chance to network and get new ideas from others who do similar jobs; it is a very worthwhile training experience for all. Mark your calendar for next year's conference to be held November 15–17, 2023, at the Marriott Champion Circle Hotel in Fort Worth. We hope to see you there!

KP–VS Board elections

At the conference, elections were held to elect representatives for the West (Regions 1 & 2) and North Central Areas (Regions 3 & 7). Karen Suarez, a VAC in the 112th Judicial District Attorney's Office, was elected to serve as the West Area Representative, and Jake Wright, a key personnel staff member in the Palo Pinto County Attorney's Office, was elected as the North Central Representative. Both Karen and Jake will serve on the KP–VS Board for a term of two years, which began January 1. Welcome Karen and Jake!

Adina Morris of the Palo Pinto County DA's Office was elected as the 2023 KP–VS Board Chair.

I'd like to thank those Board members who are rotating off: Amber Dunn, VAC in the Criminal District Attorney's Office in Denton County; Lori Zinn, VAC in the County & District Attorney's Office in Lamb County; Casey Hendrix, VAC in the Criminal District Attorney's Office in Collin County; and Katie Etringer Quinney, Board Chair, VAC in the 81st Judicial District Attorney's Office. Many thanks to each of you for your time and dedication by serving on the board!

This Board assists in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region. To be eligible, each candidate must have the permission of the elected prosecutor, attend the elections at the Annual Conference or be appointed, and have paid membership dues.

If you are interested in training and want to give input on speakers and topics at TDCAA conferences for key personnel and VACs, please consider running for the Board. If you have any questions, please email me at Jalayne.Robinson@tdcaa.com.

National Crime Victims' Rights Week

Each April, communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 23–29, 2023; the theme is "Survivor Voices: Elevate. Engage. Effect Change." 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.

If your community hosts an event, we would love to publish photos and information about it in *The Texas Prosecutor* journal. Please email me

at Jalayne.Robinson@tdcaa.com to notify us with information and photos of your event.

PVAC application deadline is January 31

PVAC recognition 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).

Applicants must either have three years' experience providing direct victim services for a prosecutor's office or five years' experience in the victim services field, one of which must be providing prosecutor-based victim assistance. They must also have proof of 45 hours training; an applicant who has 10 years' experience in direct victim services (five of which must be in a prosecutor office) may sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts. Lastly, applicants must provide five professional letters of recommendation.

January 31 is the next deadline for applications, which can be found at www.tdcaa.com/wp-content/uploads/Victim_Services/Duties_Victims/Professional-Victim-Assistance-Cerftification-Application.pdf. Submit completed applications to me by email at Jalayne.Robinson@tdcaa.com.

Victim services consultations

Are you a new victim assistance coordinator who works in a prosecutor office? Would your office benefit from group victim services training? Do you or your office need a victim services refresher? I am available to provide victim services training and technical assistance to you and your office in individual or group presentations. The services are free of charge.

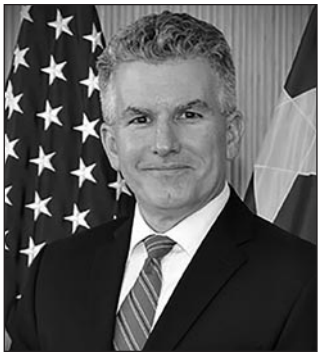
If you would like to schedule a victim services consultation, please email me at Jalayne.Robinson@tdcaa.com. ❇

Lone Star Award

TDCAA was pleased to present State Rep. J.M. Lozano (R-Kingsville) with a Lone Star Award during its 2022 Elected Prosecutor Conference in recognition of his legislative work last session. Representative Lozano, who served as Chairman of the House Select Committee on Youth Health and Safety during the most recent interim, has been a leader in passing legislation to crack down on human smuggling, and he has strongly supported his local prosecutors on public safety and related border security issues at the legislature. Pictured here with Chairman Lozano (center) are Shannon Edmonds (left), TDCAA's Director of Governmental Relations, and John Hubert (right), District Attorney for Kleberg and Kenedy Counties, who presented Chairman Lozano with his award.

Our online training library is growing

TDCAA provides high-quality, live training around the state on a variety of topics.



By Gregg Cox
Former TDCAA Assistant Training Director in Austin, now First Assistant Criminal District Attorney in Hays County

Recognizing that it can sometimes be difficult to attend a live training, we have been working to build a library of online courses for our members to provide relevant, on-demand training. By the end of January 2023, we will have approximately 22.5 hours of online CLE available on the TDCAA training page, and over 17 of those hours will be available to you at no cost.

If you have not been on TDCAA's website recently, you should check it out at tdcaa.com. You will find useful information for Texas prosecutors and staff including training opportunities, case summaries, legislative updates, current and past editions of *The Texas Prosecutor* journal, a catalog of books TDCAA publishes, the job bank, and a resource tab with information related to *Brady*, DWI, and victim services. The prosecutor forum that allows you to post questions on a message board is also located on the resource tab in case you have wondered whether that still exists.

Once you are on the website, clicking on the "Training" tab will take you to the catalog of live conferences that are available for registration and those that are coming soon. If you dig a little deeper and click on "Online Training," you will find the catalog of online courses currently available and coming soon. This article describes the current online offerings and some of what is on the horizon for online training. You will be able to register for any of the following courses on the website.

What's currently available

Mandatory *Brady* Training. Government Code §41.111 mandates that all Texas prosecutors representing the State in the prosecution of felony and misdemeanor criminal offenses (other than Class C misdemeanors), including special prosecutors, must complete a course relating to the duty to disclose exculpatory and mitigating evidence. That statute, and rules adopted by the Court of Criminal Appeals in accordance with the law, require each prosecutor to complete a one-hour course within 180 days of assuming duties as a prosecutor. It also requires prosecutors to stay up-to-date on developments in the law by taking the training again every four years thereafter. TDCAA's Mandatory *Brady* Training course was created to fulfill this obligation and is offered at no cost. To stay current and in keeping with this law and CCA rules, TDCAA produces a new version of this training every four years. The newest version was approved by the Court of Criminal Appeals and was released in late September 2022.

The course is free and provides 1.25 hours of MCLE, all of which counts as ethics. It addresses the different and overlapping obligations under *Brady*, the Michael Morton Act, and Rule 3.09. It features video clips from interviews of elected prosecutors from across Texas and includes a mix of written materials and quizzes to test the user's understanding of the content. It includes optional access to information about conviction integrity units. The *Brady* resource page on the website provides copies of the underlying caselaw and sample documents.

Mental Health Video Series Part I: What Every Prosecutor Should Know About Mental Illness. This 3.5-hour course is designed to provide prosecutors and other criminal justice professionals with an understanding of how mental illness can impact a criminal case and what tools are available when handling a case where the defendant's mental health is an issue. Presentations include:

1) Mental Health 101, covering common mental illnesses seen in criminal defendants and presented by Dr. Maureen Burrows, a forensic psychiatrist in Central Texas,

2) Mental Health Legal Basics, presented by Jeff Matovich of the Harris County District Attorney's Office,

3) Case Assessment and Intake of MH Cases, presented by Lee Pierson of the Dallas County District Attorney's Office, and

4) Connecting with Local Resources, presented by Sarah Moore of the Dawson County Criminal District Attorney's Office.

This course is free of charge.

Mental Health Video Series Part Two: Litigation in MH Cases: Insanity, Competency, and Restoration. This 4.25-hour course focuses on the most common types of litigation in mental health cases and provides detailed information about what happens when a defendant is sent to the state hospital system. Presentations include:

1) Competency and Restoration, presented by Lee Pierson and Kendall McKimmey of the Dallas County Criminal District Attorney's Office,

2) Sanity, presented by Jeff Matovich and Bradford Crockard of the Harris County District Attorney's Office,

3) Mental Health Defenses, presented by Gilbert Sawtelle of the Harris County District Attorney's Office, and

4) The Texas State Hospital System and the Continuum of Care, presented by Dr. Felix Torres and Meghan Kempf of the Texas Health and Human Services Commission.

This course is free of charge.

Mental Health Video Series Part III: Alternatives to Traditional Prosecution for MH Cases. This 3.0-hour course focuses on alternatives to traditional prosecution for mental health cases. It includes presentations on:

1) how to set up and run a specialty docket or specialty court for MH cases, presented by Erica Winsor of the Harris County District Attorney's Office,

2) diversion options for mental health cases, presented by Michele Oncken of the Harris County District Attorney's Office and Audrey Garnett of the Dallas County Criminal District Attorney's Office, and

3) a discussion of how to develop diversion options with limited resources, presented by Comal County Criminal District Attorney Jennifer Tharp.

This course is free of charge.

Fundamentals of Child Welfare Law. This six-part course is designed to provide the fundamentals for any prosecutor assigned to take on the important responsibility of representing the Department of Family and Protective Services (DFPS) in legal proceedings related to child welfare. Topics include an overview of DFPS, the removal decision, pleadings and parties, preparing for contested hearings, required filings, and closing the case. This course is taught by highly experienced attorneys in this field and provides 5.25 hours of CLE; it costs $100.

What's coming soon

Mental Health Video Series Part IV: Using the Sequential Intercept Model (SIM) to Decriminalize Mental Illness. This 2.5-hour course for criminal justice practitioners consists of a panel discussion about how the sequential intercept model can be used in a community to reduce the number of mental ill people who end up in the criminal justice system. Each intercept point is discussed in detail, and useful information about how a community may request an assessment is included. The panel is moderated by TDCAA Executive Director Rob Kepple, and the panel of experts includes Travis Parker, Program Area Director for Policy Research Associates; Dr. Jennie Simpson, State Forensic Director from Texas Health & Human Services Commission; and Jason Steans, Assistant County Attorney in Williamson County. The course will be free of charge.

Prosecuting an Intoxication Manslaughter Case: A Panel Discussion. This 3.0-hour course covers the essentials of trying an intoxication manslaughter or intoxication assault case and includes discussion of charging decisions and the grand jury, common defenses, crash reconstruction, toxicology evidence, jury selection, trial preparation, and working with victims and their families. The panel includes prosecutors with a great deal of experience with these cases and is moderated by TDCAA DWI Resource Prosecutor W. Clay Abbott. The panelists are Andrew James

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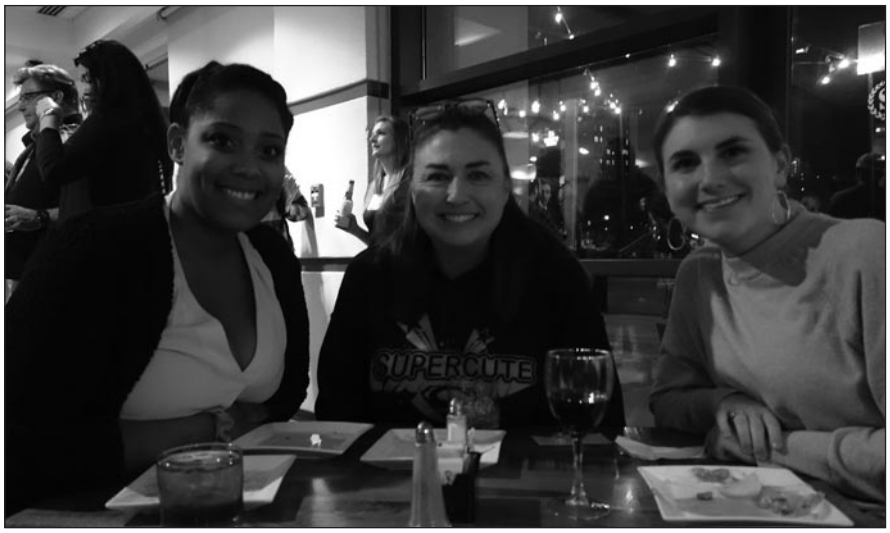
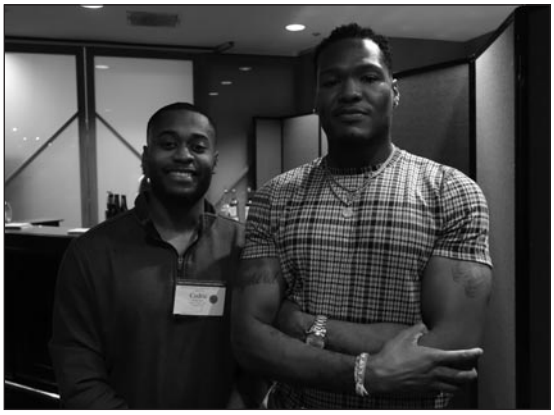
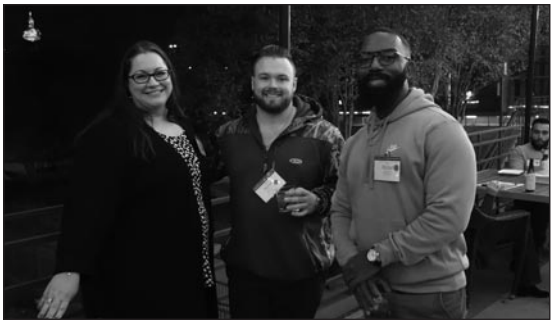
Recognizing that it can sometimes be difficult to attend a live training, we have been working to build a library of online courses for our members to provide relevant, on-demand training.

Photos from our Prosecutor Trial Skills Course







Handling a tough child porn case, both at trial and in therapy (cont'd from front cover)

McMillian was able to geolocate the IP address to the Paris area, but not to a specific individual or location.

At that point, McMillian contacted Special Agent Chuck Cannon, who works in the Department of Public Safety's CID Organized Crime Section and who is based out of Mount Pleasant. Special Agent Cannon's area of responsibility includes Lamar County, so he assumed lead on the case. Cannon was able to subpoena internet service providers to find the physical address associated with the IP address that McMillian had identified, which led him to a house in Reno, a small town adjacent to Paris. While law enforcement now had a location for the suspect device, officers still didn't know who the user might be, so they began conducting surveillance of the house. Over the next several weeks, they eventually identified Sammy Evans as the only person at the residence during all the times there was child pornography-related activity.

Finally, in March 2022, Cannon obtained a search warrant for the Reno house to seize devices that could store child pornography. Cannon, McMillian, and other DPS special agents served the warrant the morning of March 29; Cannon and McMillian made contact with Evans and interviewed him while the other agents searched. During the search, they found two laptops and a number of external storage devices in his bedroom. Throughout the interview, Evans denied knowing anything about child pornography, even when McMillian opened his laptop to perform forensic triage and found child porn videos in the "Recent Downloads" folder, including the same videos previously shared with McMillian.

Charging and pre-trial

After Evans was arrested, his devices were sent to the DPS Computer Information Technology and Electronic Crime (CITEC) Unit for forensic analysis, and the case was filed with our office. When he was arrested, Evans was initially charged with a total of eight counts, two for possession with intent to promote child pornography (for the two files transferred to McMillian) and six more for possession of child pornography (for the files in the "Recent Downloads" folder). Evans's court-appointed attorney quickly contacted me to request discovery and inquire about a pre-indictment plea offer. During our early conversations, I explained that due to the extremely violent nature of the videos he was sharing, I was offering a partially stacked sentence of 50 years, where we would stack the two promotion counts and one possession count, then run the remaining ones concurrently. I was also upfront with him that we were awaiting the forensic analysis and intended to file additional counts should more child porn be discovered. Evans rejected pleading to anything other than possibly probation, which was a non-starter. In June, Evans was indicted on those eight counts.

Before Evans's arraignment, we received the report from CITEC. Six of the seven devices from Evans's bedroom had child porn on them, totaling more than 300 photos and videos. I quickly adjusted my earlier plan to add a count for each additional file and instead stopped at a total of 30 counts, representing about 10 percent of his material. We were able to re-present the case to a grand jury and obtained a superseding indictment a few days before Evans's arraignment hearing in August. Meanwhile, Evans wrote the judge a letter demanding a speedy trial and asking to fire his court-appointed attorney, who he claimed wouldn't show him the evidence. The defense attorney saw his opportunity to avoid having to look at child porn and promptly filed a motion to withdraw. At arraignment, the judge granted both requests and appointed a new attorney before setting the case for trial in November.

Unfortunately, I didn't have the option of withdrawing from the case and I refused to simply dump it on another prosecutor, so I was stuck with the unenviable task of reviewing and preparing the evidence. CITEC had provided us an encrypted hard drive containing the device extractions, and I expected reviewing those would be difficult, even when compared to cases I'd handled in the past. After over a decade as a prosecutor, I had begun seeing a therapist to help deal with the accumulated secondary trauma, so I decided to set aside time to review the extractions on a morning immediately before my next scheduled therapy session; that way, we would be able to start working through the latest stressor without delay.

That morning, once I was ready, I retrieved the hard drive, turned my sound off, and plugged it into my computer. There was a separate ex-

traction report for each device, so I started working up a list by device of which files we would present at trial. I didn't have much of any reaction while going through the material; I very calmly typed out file names such as "12yo & 8yo pedo" and "5 Y0 Peggy Rape" while flagging particular files as evidence. Once finished, I returned the hard drive to storage and went out to my truck to head to my therapy session. It wasn't until I sat down in the waiting room that what I had just watched hit me, first as a wave of nausea, then a full-blown anxiety attack. The material had turned out to be far more triggering than I had anticipated and would become the focus of many sessions over the next few months.

Computer science for ~~dummies~~ prosecutors

As we prepared for trial, we grappled with how to present the case to the jury. We felt that we would lose jurors in the weeds if we got too technical with testimony about file-sharing networks, but we knew we would have to be able to explain how we knew that particular files came from Evans. Investigator McMillian was an amazing asset here, and over the course of many phone calls and meetings, he taught us about hashing and file-sharing, including eMule, the program Evans used.

A hash is essentially a digital fingerprint. It is a mathematical function that takes an input file and produces an output value, which is unique to that particular input. As long as there are no changes in the input, the hash will be identical, but if anything is altered, a completely new hash results. For example, when I finished drafting this article, the .docx file could be hashed and would produce a hash value. I could copy the file, email it, or save it on another device, and it would still have the same hash value. However, when Sarah Halverson, our intrepid editor, opens it and fixes all my typos and bad puns, it will have a different hash value.

File sharing was a bit more complicated. Fortunately, McMillian got us through that with the aid of some Legos. When a file is shared over eMule or BitTorrent, users don't share a full, continuous file. Instead, it is broken up into pieces, which can be obtained in any order and from multiple sources. The pieces are then reassembled into a complete file on the downloader's computer. To demonstrate, McMillian brought a pair of large Lego boards with identical rows of different colored bricks across them. As

of the Dallas County Criminal District Attorney's Office, Jessica Frazier of the Comal County Criminal District Attorney's Office, and Alison Baimbridge of the Fort Bend County District Attorney's Office. The course will be free of charge.

More future topics

TDCAA will continually refresh and expand the library of available online training. We are planning to produce a Juvenile Prosecution video series in 2023. The course will include topics such as juvenile statements, determinate sentencing, progressive sanctions, certification hearings, confidentiality of juvenile records, and more. Additional details will be published as this project moves forward.

We plan to work with the Department of Public Safety's DNA section to produce a course on the science of DNA, an explanation of how to read and understand a DNA report, tips on how to present the testimony of a DNA analyst, and detailed information about interacting with the DNA lab.

We will provide some free online ethics training in 2023 as a benefit for paid TDCAA members only.

We will produce a series of "pro tips"-style instructive videos that will be available at no cost for our members. These will be short (10- to 15-minute) videos with no CLE attached. The idea is to provide clear instruction for prosecutors who are preparing for court and need a refresher or help for how to perform a particular skill correctly. These videos will feature experienced prosecutors explaining and possibly demonstrating specific skills. Topics may include how to properly impeach a witness with an inconsistent statement, how to impeach a witness with a prior offense, *Daubert* hearings, handling a motion to suppress, motions to revoke, and forfeiture by wrongdoing. ❇

he described the process, he would randomly take one brick off the first board and snap it onto the matching brick on the second board, then repeat the process until all the bricks had been moved. That visual demonstration helped us quickly grasp how eMule worked and later proved to be a valuable demonstrative for the jury.

The final piece of preparation was readying the visual material for the jury. Preparing it for trial also meant preparing myself, which I worked on during therapy sessions. Working with it didn't get any less stressful, but knowing what to expect, I was able to employ some strategies I had developed with my therapist. I also made a point to plan little things to look forward to when I knew I would have to work with the files, such as dinner out or watching the latest episode of "Andor."[1] Having something "normal" to look forward to helped when dealing with the decidedly abnormal. Another strategy we developed was to focus on the goal of convicting Evans and securing a maximum sentence, rather than focusing on the content of the material. Each of the strategies we developed had a common element of not becoming mentally "stuck" on the child pornography.

I wanted to set jurors' expectations and prepare them to eventually have to view the child pornography on the large courtroom television. "Watching the evidence in this case will be difficult," I told them, "but I expect making a decision won't be."

Much like a forensic interview of a child, Code of Criminal Procedure Art. 39.15 requires that child pornography remain in the State's custody but prosecutors are to provide reasonable access to the defense. In this case, the defense scheduled an appointment to meet with me in our office, and we reviewed the files that I intended to present off each device. I had already provided the list of files I planned to use, so we limited our review to just those videos. With each video file, we reviewed a few seconds until the defense let me know they were ready for the next one, enough for them to be aware of the contents.

Jury selection

Going into jury selection, we knew that this voir dire would be different from many others. We normally focus on educating the jury about the law and looking for biases or panel members who might not be receptive to our witnesses. In a child sexual abuse case, we often discuss delayed outcries and why the State might not have physical evidence. In an aggravated assault case, we talk about deadly weapons and how everything can be a deadly weapon. With this case, though, we thought there were two areas we would need to focus on. First, we would have to make sure that we didn't let people strongly disliking child porn turn into an inability to be fair. Second, we would have to ensure they could consider the full range of punishment.

With these in mind, I spent less time covering the elements of the offense than I would in other cases. We talked a little bit about some things that people generally understand intuitively, such as seeing an image of a young child and being able to recognize he or she is under 18 based on physical maturation. We also talked about how not every image of a naked child is pornography with some examples. (Photo of baby's first bath? Not child porn. Photo of 6-year-old posing in lingerie and masturbating? Child porn.) We spent much more time talking about the burden of proof and not letting a dislike of child porn substitute for the State meeting its burden. We discussed how having a strong dislike of child porn is normal, that it is OK for a juror to feel that way, but jurors still needed to make us prove possession, venue, and identity. We were able to get all the jurors to agree that they would indeed hold us to our burden.

For punishment, I started by contrasting different images that would fall under the child porn statute. For that, I pointed out that an explicit photo of a 15-year-old that an adult relative gets ahold of and a video of a 3-year-old being raped both qualify as child porn. The panel agreed, however, that they didn't necessarily need to be treated the same. That example seemed to make jurors much more receptive to being able to consider the low end of the punishment range when I presented the actual punishment ranges involved.

The defense voir dire was relatively short and focused on reasonable doubt and the State's burden. It mostly covered ground I'd already been over and didn't last terribly long. At the end, we lost only one juror for cause due to personal history. We had made it through the first gauntlet of the trial.

Two and a half minutes

Evidence started the next morning. For opening statement, I laid out the investigation and what had been found in Evans's room. I wanted to set jurors' expectations and prepare them to eventually have to view the material on the large courtroom television. "Watching the evidence in this

case will be difficult," I told them, "but I expect making a decision won't be." The defense opening, again, discussed the State's burden of proof and asked the jury to keep an open mind.

With that, we called Investigator McMillian as our first witness. Once I walked him through his qualifications and had him admitted as an expert, I let him talk without drawing any objections to narrative. He spent a while simply educating the jury about all the things we had prepared before (Legos included), then we started covering the specifics of this case. At the end of his direct examination, we were granted permission to publish one of the two videos that Evans had shared with McMillian online.

During pre-trial conferences, we had planned to play one video in full and then play just a few seconds of each other one to prove what they were. I felt that we needed to impress upon the jury that there could be no mistake about what Evans was promoting, and that was sexual violence against children. The video we selected was a little under four minutes long. It was also the first time I'd had the sound on while working with it.

We made it through two and a half minutes.

When we stopped the playback, almost no one in the courtroom was looking at the screen anymore. The only exception was Evans. Although he couldn't see the screen from his seat, he was leaning around his attorney so he could watch the video. Several of the jurors stared Evans down, and many of them stopped taking notes for the rest of the trial.

We played a few seconds of the second video that Evans had shared, then passed McMillian. After a short cross, we called Special Agent Cannon to walk the jury through the search and seizure, then called Special Agent Aric Hagy from CITEC to testify about the forensic analysis. Special Agent Hagy explained that part of his analysis was not only to recover imagery but also to look for signs of user attribution or things that identified who used the device. He testified about recovering Evans's credit card information, his email addresses, and a Skype account in his name from the two seized laptops while not finding anything associated with other individuals. He also explained some of the acronyms in Evans's Google searches, such as "pthc," which stands for "pre-teen hardcore." Finally, we walked through a few seconds of each of the 28 remaining files, just enough to prove that each was child porn and support a conviction on those counts.

To everyone's surprise, Evans took the stand against his attorney's advice after the State rested. (His attorney also disavowed sponsorship of the testimony outside the jury's presence.) Evans testified that while he was indeed downloading child porn, he was doing it so that he could identify the adults in the videos and post their identities to the dark web. He was never able to quite explain why he was sharing the pornography or why he had to watch "10yo preteen lesbians" to identify adults as part of his internet vigilante scheme. One would think after eight months awaiting trial, he could have come up with a better story.

The jury charge

When it came to the jury charge, one thing we wanted to avoid was reading 30 repetitive application paragraphs, which we thought would lose the jury. Fortunately, an unpublished opinion from the Fourth Court of Appeals helped us. *Solis v. State*[2] addressed a jury charge that submitted multiple counts in an indictment in an "and/or" fashion, but it instructed the jury that they had to consider "separately and distinctly each count as presented ... individually before proceeding to the next count ..." and provided separate verdict forms for each count. We gave the judge and defense a draft charge in that format along with the *Solis* opinion. When the defense announced they had no objection to the charge, the judge approved the disjunctive application paragraph and printed the charge.

Closing arguments were straightforward. In the first part of closing, we discussed a few of the definitions and reserved the bulk of our time for rebuttal. The defense, no longer able to effectively contest the allegations after Evans volunteered that he was, in fact, downloading tons of child porn, instead addressed the State's burden of proof. Our rebuttal walked through the evidence and pointed out that whether or not jurors believed his justification, Evans had confessed to the crimes on the witness stand. Twenty minutes later, the jury returned verdicts of guilty on every count.

The video we selected was a little under four minutes long. It was also the first time I'd had the sound on while working with it. We made it through two and a half minutes.

Punishment

We had no additional evidence for punishment other than an old probation judgment for injury to a child. However, knowing the general mindset of our citizens, I thought they would place significant weight on the evidence from guilt–innocence when setting punishment. We offered the judgment, re-urged the evidence from earlier, including the 300-plus files that had not been published, and rested. Evans thought better of testifying this time around and the defense rested, too. The punishment charge was again in the disjunctive with 30 separate verdict forms.

The defense's closing asked for the jury to set something reasonable and consider Evans's age and health; Evans was 70 at the time of trial, but no evidence had been presented of any major health issues. We took the jury back to McMillian's testimony earlier that day, when he had described the numerical classifications for child porn as a 1–9 scale, with 8 and 9 being violent abuse, including mutilation or torture. Evans had drawn McMillian's attention for downloading and sharing nothing but 8s and 9s. I reminded the jury of what they had heard from that video and asked if they were willing to do everything in their power to combat child pornography.

After 15 minutes, the jury returned maximum verdicts of 20 years on the two possession with intent to promote counts and 10 years on the 28 possession counts. To underscore their condemnation, they fined him $10,000 on all 30 counts. However, there was one last shoe to drop for Sammy Evans. After receiving the punishment verdicts, the judge ordered them all stacked: 320 years in the Texas Department of Criminal Justice and $300,000 in fines.

I learned that processing and dealing with this trial's secondary trauma would be an ongoing task, though one that has become easier with time and happier activities. Baking bread with my daughter, trying out new varenyky fillings, and visiting family for the holidays all helped re-establish a sense of normalcy and gave me something to look forward to each time I found myself recalling the case.

Aftermath

The judge released the jurors before he pronounced sentence, but three of them remained to watch from the balcony. Afterward, the investigators and I thanked each one as they came back downstairs. When the foreperson remarked that she didn't know how we could stand that part of our jobs, McMillian told her that protecting children from abuse made the work worth it, unknowingly echoing one of my therapy strategies.

I was done with the imagery, but it wasn't quite done with me. A couple of days after the trial, I was driving to work and out of nowhere found myself seeing and hearing the video again. That wasn't the only time I would hear the girl's pleas of "take it out, it hurts!" playing on a loop in my head. When discussing that in therapy, I realized I had treated playing the video at trial as a one-time event and thought I wouldn't have to employ my coping strategies once it was over. Instead, I learned that processing and dealing with it would be an ongoing task, though one that has become easier with time and happier activities. Baking bread with my daughter, trying out new varenyky[3] fillings, and visiting family for the holidays all helped re-establish a sense of normalcy and gave me something to look forward to each time I found myself recalling the case.

Final thoughts

In some ways, this was a strange case. Even without the defendant's bizarre story, the State's case was extremely strong—yet it was far more stressful than any other major case I've tried. Our jurors can feel proud of their work, though; Evans's conviction won't singlehandedly end child exploitation, but every time we remove someone from that marketplace, we shrink it a little bit. One fewer Sammy Evans on the internet makes Lamar County and all of Texas a better place. ❇

Endnotes

[1] Easily the best *Star Wars* show to hit television–10/10, would recommend.

[2] 2012 Tex. App. LEXIS 7512.

[3] Ukrainian dumplings similar to pierogies.

Is your case paper thin?

Would you try a case where an officer seized a baggie of a substance believed to be cocaine without lab results to confirm it?

By Robert Buss (left)
Assistant District Attorney in Harris County
With assistance from Michael Chiu (right)
Intern and 2L student at South Texas College of Law

Would you prosecute a serious bodily injury case involving internal injuries without testimony from a doctor or medical records? Of course not: You would make sure you have the necessary evidence for trial first.

Fraud and theft cases that do not involve the physical taking of cash or objects (aka, "paper cases") have their own evidentiary concerns that are just as necessary to the prosecution as a lab report or medical records, but prosecutors often overlook them. Some common issues are securing admissible business records, obtaining verifiable identifying information in identity theft cases, and getting other supporting documentation that would be helpful (or necessary) at trial. This article addresses each of these issues and offers some solutions.

First things first

Perhaps most importantly, do not forget evidentiary law when preparing for trial in paper cases. More than once I have invested large amounts of time going through documents and obtaining more paper evidence by subpoena before realizing that a bad traffic stop, an inadmissible custodial interview, or an illegal search wrecked my case. Sometimes as prosecutors we are given imperfect situations and must cut our losses. None of us has time to waste building cases that cannot be prosecuted.

Business records

TRE 902(10) makes business records accompanied by an affidavit self-authenticating evidence so long as the records meet the requirements of TRE 803(6) (Records of Regularly Conducted Activity). These records are admissible without a sponsoring witness if served on opposing counsel at least 14 days before trial with an accompanying affidavit substantially complying with Rule 902(10). A live witness can also introduce the records as a custodian of records. Personally, I prefer to use business records affidavits when possible because the custodian of records for a financial institution will not have knowledge of the case, and I have had trouble when that custodian (including employees of the complainant) answers predicate questions on the stand—often the legalese nature of the questions confuses them.[1]

Paper cases often start with a complainant printing out some records she accessed online and turning those over to police. All too often those records are the only ones on file when the case is set for trial. Prosecutors and investigators tend to overlook that financial records of a bank or other institution are not necessarily the business records of the complainant. I have encountered numerous criminally charged embezzlement theft cases where the only evidence of theft are a few cherry-picked portions of bank statements the complainant printed off the internet. Sometimes the complainant even scribbled notes on the statements. Unless the complainant is the bank, the bank records she printed out are arguably inadmissible hearsay because the complainant is merely using the records and did not create them.[2] There are instances where a document created by a third party could be admissible as business records of a complainant if they are kept in the course of the testifying witnesses' business, the business typically relies on the accuracy of the document's contents, and the circumstances otherwise indicate the document's trustworthiness,[3] but the sure way to introduce business records of a financial institution at trial is to get the records from the institution itself.

If the complainant has written investigation

notes on the records, then the writings were prepared for legal proceedings and are not admissible under the business records exception.[4] I have had to introduce a business's internal records where the business owner wrote on the original copies of paper ledgers to document theft. There was no other source where I could get "clean" copies of the records, so I asked for an evidentiary hearing and introduced a copy for court appellate records (but not for the jury) that included the writings. Afterward, I was able to introduce a copy of the ledger where the extra writings were redacted for the jury.

I have had to introduce a business's internal records where the business owner wrote on the original copies of paper ledgers to document theft. There was no other source where I could get "clean" copies of the records, so I asked for an evidentiary hearing and introduced a copy for court appellate records (but not for the jury) that included the writings. Afterward, I was able to introduce a copy of the ledger where the extra writings were redacted for the jury.

Business records affidavits can occasionally be defective. TRE 902(10)(B) includes a template for an affidavit for records of regularly conducted activity. My office sends fill-in-the-blank business records affidavits so responding parties can stick to the prescribed form, but banks often incorrectly fill in the blanks with erroneous responses or ignore the template and send us a document they prepared themselves. The good news is the affidavit is still acceptable so long as it substantially conforms to the model affidavit,[5] but if it goes too far off the rails it will no longer be acceptable.[6] Always review business records affidavits when you receive them to see if they are notarized or sworn to under penalty of perjury and to ensure the affidavits meet the essential requirements of the statute.[7] If an affidavit is defective, you can request a new one.

Identity theft cases

Fraudulent Use or Possession of Identifying Information (Penal Code §32.51) is used to prosecute identity theft; it is an offense for a defendant, with an intent to defraud, to possess or use the identifying information of another person without that other person's consent.[8]

Identifying information is information that identifies a person. When prosecuting these cases, the State must prove the items of identifying information actually identify the complainants.[9] If the case involves a limited number of complainants, the complainants can each testify that the item(s) the defendant possessed accurately identify the complainants and were possessed or used without the complainants' consent. With a large number of complainants, prosecutors may wish to change strategy, perhaps by using circumstantial evidence. Circumstantial evidence surrounding how the items are possessed or used can lead a jury to reasonably deduce the defendant possessed identifying information without the complainants' consent.[10] If you are using circumstantial evidence to prove the items are held without consent and you are not calling the complainants as witnesses, you will need to use other means to prove the identifying information, such as a credit or debit card number or some other financial account number, actually identifies the complainants.[11] Subpoena the financial institution for business records for the account number that identifies the account holder. And ensure the subpoena duces tecum makes it clear that account and credit card numbers cannot be redacted—credit card companies often redact portions of credit card numbers and other material that prosecutors need to show that the number the defendant possessed matches the complainant, unless the subpoena tells them otherwise.

When the identifying information is Texas driver licenses or identification cards, request certified copies of those IDs from the Texas Department of Public Safety at its Austin office. The fax number for law enforcement driver records is 512/424-5190, and the email for requests is LRS_driverrecordsexempt@dps.Texas.gov.

Penal Code §32.315 (Fraudulent Use or Possession of Credit Card or Debit Card Information) is a relatively new statute that criminalizes possession of counterfeit credit and debit cards. The penalty depends on the number of counterfeit cards ("items") possessed. Counterfeit cards look to be issued by a financial institution, but that institution either did not actually issue them or the cards were altered in a number of ways—generally, the magnetic stripe on the back has been re-encoded with stolen card information so the number on the front of the card doesn't match the number on the magnetic stripe. Identity thieves will often use stolen card numbers by re-encoding them onto the back of gift cards. This statute makes it easier to prosecute such crimes because the State does not have to figure out to whom the fraudulent card numbers written on the magnetic stripe belong, just that the number on the back does not match the front of the card.[12]

Federal caselaw says that there is no extra expectation of privacy on the magnetic stripe of a card, so if an officer legally holds the cards, then he can use a card reader to figure out the number on the back of the cards without a warrant.[13] At trial, the officer must testify about using the card

reader to show that the numbers on the magnetic stripes does not match the numbers on the cards' fronts; you may want the officer to bring a card reader into court to demonstrate for the jury how it works.

Social Security numbers are often misused by identity thieves. One would think that it would be easy enough to get records from the Social Security Administration to show that a Social Security number matches a person. In practice, this is not the case. I have never been able to get records from the federal government to verify Social Security numbers. An officer can look up the numbers in a law enforcement database for charging purposes, but it would likely be hearsay for an officer to talk about verifying these numbers this way. Instead, prosecutors will have to call the complainants to verify their own Social Security numbers.

Other helpful documentation

If the charging instrument alleges a complainant is a nonprofit organization, then prosecutors must prove that the organization was a nonprofit at the time of the offense. Do not assume the complainant organization is a nonprofit just because the complainant's representative thinks it is one. Oftentimes the defendant was the employee who was supposed to be taking care of nonprofit registration but never followed through. Obtain material from the Texas Secretary of State to show the complainant's corporate filings and proof the organization was a nonprofit.

Employment records can be useful in embezzlement cases. Records showing work responsibilities regarding money and salary information establish how much money the defendant was supposed to be receiving from the complainant. The complaining witness should explain the records and testify about them. It is always useful to compare the defendant's legitimate salary to what the defendant was taking from his workplace. The complainant will (let's hope) have internal paperwork showing what the defendant was supposed to be paid and the limits of his job's responsibility.[14] Ideally, the State's case will include the defendant's financial records with business records affidavits from banks, credit cards, loans, and other ways to follow the money and see how the defendant took the complainant's property for personal use.[15]

Contracts and other legal agreements are important pieces of evidence in many fraud cases. Misapplication of Fiduciary Property (PC §32.45) requires proving a fiduciary misapplied property; "misapply" means to deal contrary to an agreement or law. Technically, the agreement does not have to be in writing,[16] but for practical purposes there should be a written agreement that prosecutors introduce as evidence. In contractor theft cases, the State must show the defendant had no intention of fulfilling an obligation under an agreement and that the promise to perform work was a ruse to accomplish theft by deception.[17] If there was a contract, the State needs to introduce it. If there was not a traditional contract, prosecutors will want to supplement the complainant's testimony with anything that shows what the agreement was supposed to be, such as emails, text messages, endorsements on checks, or notes on transactions made through a payment app.

Tax paperwork is also helpful evidence in fraud and theft cases. If the defendant failed to report ill-gotten income, it goes toward showing that the money was received illegally. The Internal Revenue Service will not give prosecutors a defendant's tax returns, but you may be able to acquire tax information through other means: for example, through the defendant's accountant or a tax-preparing service.[18] Likewise, a defendant will often have to turn over tax statements when obtaining loans, and prosecutors can subpoena the loan records. If a defendant filed for bankruptcy, the prosecutor may be able to get tax paperwork through bankruptcy court records. (Bankruptcy filings and hearing records can be a goldmine of evidence in theft and fraud cases.)

In conclusion

One of the most rewarding aspects of presenting a paper case to a jury is the level of certainty prosecutors should have in the case. We believe the defendant is guilty, and the jury can sense our confidence. If the case is worked up correctly, the defense is left with unpersuasive arguments that have to explain why the defendant changed internal records and received four times his income in one year, or why he possessed the identities of 50-plus people when living in a hotel room rented with a stolen credit card. With paper cases, the evidence we need is printed in black and white—we just have to go out and get it. ❇

Employment records can be useful in embezzlement cases. Records showing work responsibilities regarding money and salary information establish how much money the defendant was supposed to be receiving from the complainant.

Endnotes

[1] *West v. State*, 124 S.W.3d 732, 736 (Tex. App.–Houston [1st Dist.] 2003, pet. ref'd). Failure to elicit the proper predicate language for business records from a live witness will result in inadmissibility of those records.

[2] *Sw. Indus. Inv. Co. v. Scalf*, 604 S.W.2d 233, 237 (Tex. Civ. App.–Dallas 1980, no writ). The statute does not authorize admission of records of information received from other sources.

[3] *Simien v. Unifund CCR Partners*, 321 S.W.3d 235, 240–41 (Tex. App.–Houston [1st Dist.] 2010, no pet.); *Harris v. State*, 846 S.W.2d 960, 964 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd). It was proper to admit certificate of origin from an automobile manufacturer where it could be considered part of the business records of an automobile dealership due to a high degree of trustworthiness.

[4] *Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990), decision clarified on reh'g (Oct. 21, 1992). Reports that are not ministerial and are created solely for the purpose of litigation do not meet TRC 803(6) as business records. See also, *Hardy v. State*, 71 S.W.3d 535, 537 (Tex. App.–Amarillo 2002, no pet.); *R.R. Comm'n of Tex. v. Rio Grande Valley Gas Co.*, 683 S.W.2d 783, 789 (Tex. App.–Austin 1984, no writ).

[5] *Dominguez v. State*, 441 S.W.3d 652, 657 (Tex. App.–Houston [1st Dist.] 2014, no pet.); *Reyes v. State*, 48 S.W.3d 917, 921 (Tex. App.–Fort Worth 2001, no pet.).

[6] *Venable v. State*, 113 S.W.3d 797, 800-01 (Tex. App.–Beaumont 2003, pet. ref'd).

[7] See *Rosenblatt v. City of Houston*, 31 S.W.3d 399, 404 (Tex.App.–Corpus Christi 2000, pet. denied). "Substantial compliance" has been defined to mean performance of the essential requirements of a statute. A deviation from the requirements of a statute which does not seriously hinder the legislature's purpose in imposing the requirement is in substantial compliance.

[8] I wrote an article for the July–August 2017 issue of *The Texas Prosecutor* journal, "Don't Give Credit to Identity Thieves" that gives more information about prosecuting offenses under Penal Code §32.51. In that article I proposed being able to aggregate the number of uses of the same item of identification information by a defendant to increase the level of offense. To my knowledge there is not any caselaw regarding aggregating uses of identifying information, but after a few more years of experience I do not recommend indicting §32.51 cases in that manner. If there are multiple fraudulent uses of the same identifying information, the more conservative approach is to treat them as separate offenses.

[9] See, *Ford v. State*, 282 S.W.3d 256, 265 (Tex. App.–Austin 2009, no pet.). Fictitious cards and accounts are not items of identifying information unless they identify a real human being.

[10] *Grimm v. State*, 496 S.W.3d 817, 825 (Tex. App.–Houston [14th Dist.] 2016, no pet.).

[11] *Cortez v. State*, 469 S.W.3d 593 (Tex. Crim. App. 2015).

[12] You still have to prove intent to defraud so you may want to figure out who at least some of the human victims are or have other evidence the defendant knows these cards are illegally altered.

[13] *United States v. Turner*, 839 F.3d 429, 435-6 (5th Cir. 2016).

[14] The complainant could testify without records, but the records make a complainant more believable. Juries expect employers to have written agreements with their employees or official documentation of salary.

[15] See Tex. Penal Code §31.08(d); *Riley v. State*, 312 S.W.3d 673, 679 (Tex. App.–Houston [1st Dist.] 2009, pet. ref'd). If the defendant introduces evidence that appropriated money was used for the benefit of the complainant, then the defendant can reduce the value of the charged theft. Be ready for arguments that the defendant took money to get reimbursed for expenses or extra work.

[16] *Bynum v. State*, 767 S.W.2d 769, 777 (Tex. Crim. App. 1989).

[17] *Jacobs v. State*, 230 S.W.3d 225 (Tex.App.–Houston [14th Dist.] 2006, no pet.).

[18] Financial records can show payments to tax preparation services or an accountant. Send a new subpoena to that entity for its records.

The civil approach to confronting a government contract

The county purchasing agent calls and has a request for an "urgent" contract review matter.

By Amy Davidson (left)
First Assistant County Attorney, and
Bushra F. Khan (right)
Assistant County Attorney, both in Montgomery County

Your first thought is "I'm a trial lawyer. Why is he calling me?" Then you remember the transactional attorneys are out of the office this week. You're his last resort. Your second thought is, "How can anything be 'urgent' when it comes to contract review?" Nevertheless, you decide to pour yourself a cup of coffee and tackle this review. This article will give you a few tips on common provisions and pitfalls for government contracts.

Government contracts come with a minefield of rules, and compliance requires drafting terms in a manner that not only sets out mutual expectations but also demonstrates an intent to conform with governing laws. Admittedly, neither all contracts nor all circumstances are created equal, but familiarity with certain general and specific provisions can provide a helpful backdrop when negotiating, drafting, or reviewing government agreements.

General provisions

There are certain standard provisions in any agreement addressing, for example, term or duration, a procedure describing termination for cause and for convenience, monetary or other consideration, a description of subject services or items, and a description of mutual obligations. These provisions are all fairly routine in commercial bargains, but there are certain other generally included clauses that warrant close attention in relation to government contracts:

Non-appropriation or funding out. Cities and counties are subject to Art. XI §7 of the Texas Constitution, which provides that no debt for any purpose shall ever be incurred in any manner unless provision is made, at the time of creating the debt, for levying and collecting a tax sufficient to pay the interest on that debt and provide at least 2 percent as a sinking fund. (A sinking fund is a fund established by a municipality or county to make interest payments and retire the principal on a long-term debt or bond, thereby sinking the debt.) However, a contract does not create a "debt" if the parties lawfully and reasonably contemplate, when the contract is made, that the obligation will be satisfied out of current revenues for the year, or out of some fund then within the immediate control of the governmental unit.[1] This constitutional requirement is further codified under Local Gov't Code §271.903. Essentially, absent the city or county establishing such a sinking fund, if a contract is anticipated to exceed a one-year term and its correlating budget, then inclusion of a non-appropriation provision that allows the city or county to terminate the contract at the end of each budget year is critical.

Venue and governing law. In this current era, there is a significant likelihood that certain procurement sources, in particular IT software and hardware providers, whether contracted directly or ancillary to another purchase, will proffer contracts that limit governing law and venue to the jurisdictions where those providers are headquartered—often not in Texas. In fact, software licensing agreements are notoriously adhesion contracts, and there may not be an option to ne-

gotiate either governing law or venue. In the rare instance when a vendor happens to be feeling magnanimous, a federal district court located within the local government entity's geographic region might be proposed as venue (but a successful negotiation outcome is not guaranteed).

Texas Public Information Act. With maddening frequency, private contractors will demand that everything they have ever provided or ever will provide a governmental body, including the very documents being discussed, be kept confidential. Some will go so far as to require, unsuccessfully, the execution of an ancillary non-disclosure agreement (NDA) by the government client. While such confidentiality terms and NDAs might be a matter of routine in the corporate world, it is critical to point out both to opposing counsel and within the body of the agreement that government contracts in Texas are subject to release under Chapter 552 of the Government Code and associated rules prescribed by the Office of the Attorney General. This may not thrill counsel, but at least an explanation affords a party the opportunity to identify particular proprietary or confidential material within the document set, whereby such material could later be forwarded to the Attorney General for an opinion, should a public information request be received later by the government client. "To the extent allowable under Texas law ..." can sometimes be an appropriate compromise if at an impasse with opposing counsel.

An often-overlooked provision, the indemnity clause must be reviewed carefully to ensure that the governmental client is not somehow committed to indemnifying a third party for damages arising from that third party's acts, in contravention of Art. XI, §7 of the Texas Constitution and any other applicable statutes.

Indemnity. An often-overlooked provision, the indemnity clause must be reviewed carefully to ensure that the governmental client is not somehow committed to indemnifying a third party for damages arising from that third party's acts, in contravention of Art. XI, §7 of the Texas Constitution and any other applicable statutes.[2] Likewise, a contract term that ostensibly seeks to exceed a local government entity's authority may be found void and unenforceable, for instance when seeking indemnification beyond the limits granted under Local Gov't Code §271.904 in relation to procurement of architectural or engineering services. In terms of bolstering protections for a government client, the indemnity or insurance clause within the document can require the other contracting party to carry appropriate insurance coverages, including workers compensation coverage, and to agree to a waiver of subrogation.

Specific provisions

Certain recitals, inclusions, or addendums are specific to the type of agreement at hand, and these are highlighted below:

The procurement contract. The famous astronaut Alan B. Shepard once said, "It's a very sobering feeling to be up in space and realize that one's safety factor was determined by the lowest bidder on a government contract." Truly, procurement contracts should not be taken lightly; they invariably prove to be that delicate branch upon which a crucial project finds itself resting.

Local Gov't Code Chapters 252 (for municipalities) and 262 and 263 (for counties), and Government Code Chapters 2254 (for professional and consulting services) and 2269 (for construction-related projects), are the primary authorities in relation to procurement, competitive bidding, and any exemptions or alternatives thereto. An agreement finalized after the bidding process is complete and the winning bid awarded would ordinarily incorporate the Request for Proposal (RFP) or Request for Qualifications (RFQ), as well as the responsive proposal within the document. Given that not all areas of concern might be covered by such incorporation alone, the agreement's language should specifically address any outstanding topics, such as desired quality, milestones, or benchmarks; required safeguards against fraud or criminal activity; situations warranting procedural deviation; controlling exhibits in the event of a conflict; and perhaps even liquidated damages in the event of a dispute, especially for procurements involving a high dollar value.

Procurement contracts reached via the Texas Department of Information Resources (DIR) or authorized purchasing cooperatives may legally bypass the competitive bid process but typically carry pre-set terms for end-user entities. A government body may have no option but to submit to such terms as controlling when procuring via these means, and the conflict resolution provisions within the end-user purchase agreement would accordingly need to reflect that.

The Interlocal Agreement (ILA). These agreements typically derive their authority from Chapter 791 of the Government Code, the Interlocal Cooperation Act, which lays out certain functions and services that may be the subject of ILAs. On occasion, ILAs may be impacted by specific statutory authorities, for example, the

Health & Safety Code, Chapter 421 of the Gov't Code, or the Code of Federal Regulations (CFR). As part of the review, a quick confirmation is needed that the agreement's envisaged purposes reasonably fall within Chapter 791 or other applicable body of statutes, and the identified public purposes are reflected within the recitals.

Commonly encountered ILAs involve law enforcement services, leases, service sharing, and emergency assistance or mutual aid, and frequently one finds that the agreement is grant funded. If an ILA (or for that matter a procurement agreement between the local government entity and a private vendor, or a welfare services agreement with a nonprofit) is grant funded, or one that involves a federal or state program, the language must incorporate by reference all grant or program requirements as well as any governing statutory authorities implicated thereby. For instance, the American Rescue Plan Act of 2021 (ARPA) provides for payments to state, local, and tribal governments that are navigating the widespread impact of COVID-19 on communities; therefore, an ILA or other contract involving such funds would need to refer to the Act, as well as the body of associated rules, as a mutual obligation. FEMA (and pass-through state grants) additionally require express inclusion of certain contractual terms imposed on all tiers of non-federal sub-recipients (whether they are vendors, nonprofits, or governmental bodies).[3] A missing provision, or a provision that overtly contradicts a statute or grant, may potentially subject the ILA or other grant-funded agreement to audit-related challenges later.

Mutual aid agreements generally, including their terminology and provisions, must be viewed in light of Gov't Code Chapters 418 (Texas Disaster Act of 1975) and 421 (Homeland Security) and Code of Federal Regulations, Stafford Act Title 44, Chapter 1, Part 201 (44 CFR Part 201). Government Code §421.062, for instance, offers certain immunity from civil liability in relation to a homeland security activity, provided that requisite language is included in the agreement. Because local government entities may eventually seek FEMA reimbursement or other recovery assistance following a declared disaster or emergency, both the language and substantive provisions of a mutual aid agreement must remain consistent with applicable state and federal requirements.

Ancillary agreements. Ancillary agreements are mandatory when entering into certain types of primary agreements. For example, contracts related to medical or behavioral services involving the use or disclosure of protected health information (PHI) must be accompanied by a separate Business Associate Agreement (BAA), as mandated by the Health Insurance Portability and Accountability Act of 1996 (HIPAA); prosecutors can be thankful the U.S. Department of Health and Human Services has provided sample BAA provisions for ease of drafting.[4] In certain circumstances, an ancillary agreement may be advisable if not otherwise mandatory, e.g., for continuity of operations in relation to transition of services when the government entity anticipates a turnover of providers. When not otherwise limited by HIPAA or other governing regulations, the draft of an ancillary agreement should follow the same overarching guidelines that govern the primary agreement.

In certain circumstances, an ancillary agreement may be advisable if not otherwise mandatory, e.g., for continuity of operations in relation to transition of services when the government entity anticipates a turnover of providers.

Conclusion

Government contracts may not always be riveting, but they remain an inevitable reality for a practitioner in the civil arena. The many cups of coffee downed during this process are probably unavoidable, but maybe the above suggestions will help with the resulting heartburn. ❇

Endnotes

[1] *McNeill v. City of Waco*, 33 S.W. 322, 323 (Tex. 1895), as cited in Tex. Att'y Gen. Op. No. GA-0652 (2008).

[2] Tex. Att'y Gen. Op. No. GA-0176 (2004).

[3] Contract Provisions Template by FEMA Office of Chief Counsel Procurement Disaster Assistance Team is available at www.fema.gov/sites/default/files/2020-07/fema_procurement_contract-provisions-template.pdf; and Contract Provisions Guide, Navigating Appendix II to Part 200- Contract Provisions for Non-Federal Entity Contracts under Federal Awards, by Procurement Disaster Assistance Team (PDAT) June 2021, is available at www.fema.gov/sites/default/files/documents/fema_contract-provisions-guide_6-14-2021.pdf.

[4] Sample Business Associate Contracts are available at www.hhs.gov/hipaa/for-professionals/covered-entities/sample-business-associate-agreement-provisions/index.html.

How hiring more paralegals can help everyone in the office

How many times has someone said to you, "You should go to law school," or "I bet if I handed this code book to you, you could prosecute this case yourself"?

By Meredith Gross, ACP, TBLS-BCP
Certified Paralegal in the Criminal District Attorney's Office in Rockwall County

Maybe law school isn't in your plans right now—or ever. And maybe you don't want to be the one at counsel table calling the shots and being in the thick of trial. But you've worked a long time and know criminal law procedure better than some attorneys—you may have even helped train some of the office's "baby" prosecutors. For you, your role in a prosecutor office is more than just an 8 to 5, Monday through Friday job; this is your career. It's what you are great at doing. You may want to do more, to be more—but how?

One way is by becoming a Certified Paralegal. With this title and training comes not only investment in yourself and your office but also added responsibilities, income possibilities, and deeper involvement with the cases your office prosecutes.

What is a paralegal?

According to the American Bar Association (ABA), a paralegal is a "person qualified by education, training, or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency, or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible."[1]

Paralegals are allowed to do much of the legal work that an attorney would otherwise do. In a law firm setting, a paralegal's time spent on substantive legal work is billed to clients, similar to attorneys, but often at a lower rate. This distinguishes paralegals from other non-lawyer staff members. Utilization of paralegals in a law firm ultimately reduces the cost to the client and frees up attorneys' time for other tasks. Working under the supervision of an attorney, the paralegal's work product is merged with and becomes part of the attorney work product for a client. In communications with clients and the public, the paralegal's non-lawyer status must be clear.[2] Public sector and civil attorneys' offices have relied on paralegals for years to do the groundwork, review, and research.

There are several things a paralegal *cannot* do. Only licensed attorneys may give legal advice to consumers of legal services; paralegals are prohibited from doing so. Paralegals also are prohibited from accepting a case, setting a fee, representing a client in court (unless authorized by the court), or performing any duty specifically reserved for licensed attorneys. All states require attorneys to be licensed, and most have statutes imposing penalties for those found to be engaging in the unauthorized practice of law.

Why would you want to become a paralegal?

How many prosecutor offices have been short-staffed over the last few years? How long does it take to fill those positions, and how much work piles up in the meantime? Lately, prosecutor offices are struggling to find qualified attorneys for several reasons, including the rising cost of living and salary restrictions at a government office.

Paralegals can take on some of the work attor-

neys might otherwise do, including doing intake, reviewing charging instruments, drafting motions and orders, electronically filing pleadings, preparing jury charges, redacting discovery, contacting witnesses, and attending court hearings and trials with a prosecutor. They can also write and sign correspondence, provided their paralegal status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice. Ultimately paralegals can do the legwork throughout a case that some attorneys find to be time-consuming or consider "busy work."[3]

Plus, training a new attorney takes time. Yes, supervisors will have to cross that bridge when you hire a prosecutor, but capable staffers may already be in the office. Chances are, key personnel already know how to assess cases. All offices use their staff in different ways, so think outside the box: What tasks are prosecutors doing that could be better assigned to a paralegal?

For myself, as a new staff supervisor four years ago, I was managing young clerks fresh out of school who had taken American Bar Association-approved paralegal courses and were planning to get their certifications. I didn't know what that meant at that time, but I figured that if I were going to be supervising them, I should probably be at their level in training. Turns out, I already was—I just didn't have the credentials to claim it. And so, I began my journey to become a Certified Paralegal.

While I have been rewarded with career advancement, I started this journey for me. I have gained more confidence and pride in myself and my work product. I am more invested in my daily activities at the office. I am eager to get involved with our local bar association and serve on TDCAA's Key Personnel–Victim Services Board.

I want to help my office and make life easier for my people. I am available to assist my prosecutors more. They relied on me before, but now they too are more confident in my abilities. In situations where they would normally do research themselves, they will ask me to assist instead. The more information I glean from CLE and the accreditation processes, the better equipped I become in helping my staff understand criminal law processes.

I like when my prosecutors point out that I am a Certified Paralegal to other attorneys, law enforcement, and member of other agencies. They are proud of my accomplishment, and it makes me feel valued.

How do you become a paralegal?

You can call yourself a "paralegal" if you do a paralegal's work, even if you don't have the training. Or you can become a Certified Paralegal, and there are two ways to do that. You can earn a paralegal certificate or you can become a Certified Paralegal. People are frequently confused by this similar nomenclature. In short, if you have completed a paralegal education program for which you have a certificate hanging on your wall, you can say you are "*certificated*." This is different from being *certified*.

If you have successfully passed a paralegal certification exam through the National Federation of Paralegal Associations (NFPA) or National Association of Legal Assistants (NALA), you are a Certified Paralegal. This certification confers a credential you put after your name, such as Jane Doe, RP or Jane Doe, CP. Maintaining this credential requires ongoing continuing legal education (CLE). These credentials can be verified by prospective employers by contacting the issuing organization.[4]

An added benefit with certifications through NALA and NFPA is that they are nationally recognized, meaning you are a Certified Paralegal anywhere in the United States.

In addition to formal education and on-the-job training, an exam is required to attain paralegal certification. Here's what you need to know to qualify for certification with one of these organizations:

National Association of Legal Assistants (NALA). Candidates for certification must meet one of the following requirements:

1) graduation from, completion of, or current enrollment in the last semester or quarter of a paralegal program that meets one of the following criteria:

- a paralegal program approved by the American Bar Association,
- an associate degree program in paralegal studies,
- a post-baccalaureate certificate program in paralegal studies,
- a bachelor's degree program in paralegal studies, or
- a paralegal program consisting of at least 60 semester hours, of which at least 15 are substantive legal courses; or

2) a bachelor's degree in any field plus one

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year of experience as a paralegal or successful completion of at least 15 semester hours (or equivalent quarter hours) of substantive paralegal courses; or

3) a high school diploma or equivalent, plus seven years of experience as a paralegal and a minimum of 20 hours of continuing legal education completed within the two-year period prior to application for the examination.[5]

An application and fee are required to take the two-part examination. Additional information can be found at https://nala.org.

National Federation of Paralegal Associations (NFPA). Candidates for certification must meet one of the following requirements:

1) a Bachelor's degree in:
   - paralegal studies,
   - any subject plus a paralegal certificate,

or

   - any subject with no paralegal certificate plus six months of substantive paralegal experience and one hour of NFPA®-approved ethics CLE within the year preceding application;

or

2) an Associate's degree in:
   - paralegal studies, or
   - any subject plus a paralegal certificate,

or

   - any subject with no paralegal certificate, plus one year of substantive paralegal experience and six hours of NFPA®-approved CLEs, including one CLE hour of ethics within the year preceding the application; or

3) paralegal certificate plus with one year of substantive paralegal experience and six hours of NFPA®-approved CLEs, including one CLE hour of ethics within the year preceding the application; or

4) military paralegal rate job plus substantive paralegal experience defined by rank and one CLE hour of ethics within the year preceding application; or

5) NFPA® Assurance of Learning Education Partner Students; or

6) high school diploma or GED plus five years of substantive paralegal experience, and 12 hours of NFPA®-approved CLEs, including one CLE hour of ethics within two years preceding the application.[6]

Along with verifying documents, an application and fee are required to take the examination. Additional information can be found at www.paralegals.org.

These exams require a great deal of studying. They are no joke, so don't think just because you do this every day that you know it. You don't. The exams cover all *areas of law.*

These exams require a great deal of studying. They are no joke, so don't think just because you do this every day that you know it. You don't. The exams cover *all* areas of law. After studying for the NALA exam, I know more now about corporate, family, and real estate law than I care to. I did, however, gain valuable information while studying wills and trusts which opened my eyes to things I needed to take care of in my personal life.

What does it cost to become a Certified Paralegal?

There are costs and fees involved with the initial education and CLE trainings required to qualify for certification. Additionally, there are application fees, costs for study guides, testing center fees, and if you decide to join an organization, annual dues. You may be required to pay some or all these costs yourself.

Sit down with your supervisor or elected prosecutor and discuss the benefits of this certification and how it can help the office—maybe they can help with some of the fees. Maybe instead of attending a big out-of-town training, you can offset the costs by attending online training and using the training funds to pay for the certification exam. Find out whether your county offers education pay. It costs less to employ a paralegal than an attorney.

How many hours of CLE are required yearly?

Sometimes I think I need an assistant to keep up with the hours for reporting! I'm sure you have heard legal assistants or paralegals say, "Well, it's not *my* bar card"—but it could be. Qualified paralegals can become members of the State Bar of Texas Paralegal Division (SBOT-PD). Establishment of this division was the first such action by any state bar association in the country,[7] with the Texas division recently having celebrated its 40th year.

Renewing active and associate members must complete six hours of substantive CLE, at least one hour of which must be legal ethics.[8] (More about substantive and non-substantive CLE below.) Additional information can be found at https://txpd.org.

Other organizations you may consider joining are NALA, NFPA (both mentioned above), Texas Bar College, Texas Board of Legal Specialization

(TBLS), or a local bar association. The NALA requires Certified Paralegals to complete 50 hours of CLE, including five hours of legal ethics, during each five-year recertification period.[9] To renew a CORE Registered Paralegal (CRP™) license with NFPA, you must complete eight hours of substantive CLE.[10] The Texas Bar College requires 12 hours of accredited CLE in the previous or current calendar year, which must include two hours of ethics.[11] To recertify with TBLS, applicants must complete 75 hours of CLE in the specialty area by December 31st of each fifth year of certification.[12]

How do you get CLE hours?

There are many ways:

- attendance at a live CLE program, including live video conferences,
- viewing or listening to an online CLE program,
- participating in a CLE teleconference,
- attendance at a showing of a CLE video,
- self-study, reading legal articles, daily legal work activities, and caselaw research,[13] and
- other activities in the specialty area, to be determined on an individual basis, such as teaching a CLE course for attorneys or paralegals, participation as a panelist or speaking on a symposium or similar program, attendance at a lecture series or similar program sponsored by a qualified education institution or bar group, authorship of a book or article published in a professional publication or journal; and active participation in the work of a professional committee dealing with a specific problem in the specialty area.

For the most part, it's simple: Ask yourself, "Does this course address my or my office's daily activities?" If the answer is yes, then count it as CLE. If the answer is no, then you don't. Your CLE should be primarily in the area of law you encounter.

Also, there are three main categories of CLE: substantive, non-substantive, and legal ethics. Generally, programs that are from reputable companies, that feature attorneys or attorney-paralegal teams, and that are on subjects of a substantive nature related to the law practice sections will qualify for CLE credit. For instance, mock trials, expunctions, bond forfeitures, judgments, contract law, and trusts all qualify for substantive credit.

Non-substantive credits include mediation, law office management, computer programs or applications, communications, office technology, self-help, mental health, or prevention of substance abuse courses.

Ethical courses that do not include material relating to the "delivery of legal services" will not count as courses for which you can claim credit. For purposes of CLE, legal ethics is defined as the code of professional responsibility detailing the moral and professional duties required in the delivery of legal services.[14]

Do TDCAA conferences count toward your CLE hours?

Yes, most do. CLE with State Bar course numbers that are already approved for attorneys will count for Certified Paralegals too; TDCAA's Legislative Updates are one example. TDCAA's Key Personnel & Victim Assistance Coordinator Conference does not have a State Bar course number, but many of the courses focus on criminal law, so those specific presentations count as substantive CLE hours.

I have not encountered an issue with course approval when reporting the hours to the organizations of which I am a member. If I have a question whether the hours will count and I am unable to get an answer, then I don't report them. They may still be used as non-substantive hours for certification.

How do you report CLE hours?

Each organization will have a portal or procedure for logging hours to report CLE. The SBOT-PD online log is used by the Texas Bar College too, so you need to report it in only one location.

I keep the approval emails for my records just as if it were a certificate of attendance. This way when I report my hours, I have all the verification. You may want to create a personal log or spreadsheet for keep track of these hours.

Any hours for TBLS can be submitted for approval prior to the event, meaning you can have TBLS approve the hours before you sign up for the class. This is important to remember if your county pays for training. You may be trying to decide between conferences and this approval may make the decision easier. Just because a course is not TBLS-approved does not mean that you can't count it toward certification or other CLE requirements for organizations of which you have become a member.

Use your best judgment. Certified Paralegals are held to a high level regarding ethics, i.e., in-

I have not encountered an issue with course approval when reporting the hours to the organizations of which I am a member. If I have a question whether the hours will count and I am unable to get an answer, then I don't report them. They may still be used as non-substantive hours for certification.

tegrity, so if you don't feel like a course pertains to your daily activities or your office as a whole, then don't count it.

If you still have concerns, contact TBLS or other organizations and ask whether they will approve a course. You may need to provide the organization with a course agenda. Keep the confirmation emails with your course certificate of attendance or completion. You will need all this information if you are audited. Each organization has a thorough list of what they consider qualifying CLE. Check the individual organizations for all the specific qualifying CLE.

What are some other CLE resources and tips?

Don't turn on a webinar and walk away. We all know the difference between merely sitting through a course and actually gleaning any information from it.

Use your best judgment. Certified Paralegals are held to high level regarding ethics, i.e., integrity, so if you don't feel like a course pertains to your daily activities or your office as a whole, then don't count it as CLE.

Don't pass up an opportunity to get free hours. I have sat through many webinars because they were free. Some were not related to criminal law, but I found the information to be personally beneficial. The Texas Center for Legal Ethics and SBOT-PD division offers free lunch CLE: Bring your lunch to work that day and take the free training over the lunch hour. The SBOT-PD division of the State Bar does a great job of having not only speakers that offer good information but who are also entertaining.

Many offices do in-house training for their prosecutors and request CLE credit from the State Bar. These hours also count for paralegals.

The Texas Victim Assistance Training (TVAT) Online is a statewide foundational victim assistance training focused on victim-centered service delivery and professional development. TVAT Online complements other victim service initiatives and enables new victim service professionals to acquire baseline professional skills and competence. This free training is provided by TDCJ Additional information can be found at www.tdcj.texas.gov/divisions/vs/tvat_online.html.

Find out who your regional representative is through the SBOT-PD division and ask if he or she knows of local bar associations that offer CLE. You usually don't have to be a member to take the course, and some offer them for as little as $5.

Even if your local bar association doesn't have a paralegal division, see if it will still let you attend trainings with attorneys who are members. Maybe the local bar is waiting for more paralegal interest before allowing them to become members or to establish a paralegal branch of the association.

Conclusion

I don't claim to be an attorney, and I don't want to be one. I respect the title and the years of hard work and education it takes to become an attorney. It's called the *practice* of law for a reason—it requires years of practice! I love my prosecutors and the work they do. I enjoy being the woman behind the curtain making things happen. For me, becoming a certified paralegal was an easy choice. I'm not going to go back to school, but I want my daughters and granddaughter to see that it is never too late to improve yourself and reach a goal for higher recognition and self-satisfaction. ❇

Endnotes

[1] www.americanbar.org/groups/paralegals/profession-information/current_aba_definition_of_legal_assistant_paralegal.

[2] https://nala.org/paralegal-info.

[3] https://nala.org/what-do-paralegals-do/2021.

[4] https://www.paralegals.org/i4a/pages/index.cfm.

[5] https://nala.org/certification/eligibility-requirements.

[6] www.paralegals.org/i4a/pages/index.cfm.

[7] https://txpd.org/about-pages/history.

[8] https://txpd.org/cle-requirements.

[9] https://nala.org/certification/recertification-process.

[10] www.paralegals.org/i4a/ams/meetings/index.cfm.

[11] https://texasbarcollege.com/wp-content/uploads/2022/10/Paralegal-Member-Application-Form.pdf.

[12] http://content.tbls.org/pdf/lasstdcr.pdf.

[13] www.tbls-bcp.org/CLE.

[14] https://nala.org/wp-content/uploads/2021/10/2021-CLE-Categories.pdf.

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