The Texas Prosecutor

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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

What every trial prosecutor should know about cognizability

Cognizability is a big, ugly word. Microsoft Word's spellcheck doesn't recognize it, and if you don't do criminal appeals for a living, you probably don't either.

By Clinton Morgan
Assistant District Attorney in Harris County

But the Court of Criminal Appeals has been wrestling with the concept for a few decades, and recent developments in the caselaw make cognizability an important concept for every trial prosecutor; knowing what claims can and can't be raised in pretrial habeas can save the State a lot of time on inappropriate appeals.

What is cognizability?

"Cognizability" is simply the word for determining what sorts of claims can be raised in a habeas corpus hearing. Cognizable claims can be raised; noncognizable claims cannot.

A writ of habeas corpus is an extraordinary remedy. If a defendant gets a trial court to hold a hearing on his pretrial writ and the trial court does not give the defendant what he asks for, the defendant may appeal before trial. Because pretrial appeals disrupt the system, the law limits the claims defendants can raise in a pretrial writ.

Arguing cognizability is how one avoids pretrial appeals. If the defendant raises a legitimate claim, a pretrial appeal is fine, even if the delay is frustrating. But—and this may come as a shock—sometimes criminal defendants raise illegitimate claims. A pretrial appeal will take at least six months, but most take a year or more. It's not unheard of for a defendant to want to delay his trial, and a pretrial habeas appeal is one way to do it.

This article explains the concept of cognizability so prosecutors can distinguish legitimate pretrial habeas claims from illegitimate ones and fight off the illegitimate claims in a way that keeps us out of the appellate courts. First, I'll walk through some peculiar habeas terminology. Then I'll show

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Mike Hinton Memorial Scholarship

Mike Hinton, a legendary Houston prosecutor and defense attorney, was memorialized after his passing with a scholarship to the TDCAA Annual Criminal & Civil Law Conference.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

It has been a success, as it allows prosecutors who otherwise do not have the money to attend the Annual.

The Foundation board has decided to expand the scholarship opportunity to *all* TDCAA conferences. So if you don't have the resources to attend a TDCAA course, you can apply for the scholarship. The only qualifications are that you're a paid TDCAA member and you fill out the application in full.

Look for the application on our website, www.tdcaa.com, in this issue of the journal, or search for "Mike Hinton scholarship application."

Congratulations to theTexas Prosecutors Society Class of 2023!

I'd like to congratulate the Texas Prosecutors Society's Class of 2023, who were honored at a reception in conjunction with the Elected Prosecutor Conference at the end of November. Society membership is by invitation only and is extended to those who have demonstrated enduring support for this wonderful profession, whether currently in prosecution or those who were prosecutors and went on to other endeavors. This year's inductees (who are pictured below):

Joe Bailey
Kriste Burnett
Erin Faseler
Carlos Garcia
Roger Haseman
David Holmes
Rebecca Lundberg
Clint Morgan
Sunshine Stanek
Hilary Wright

Congratulations to this great group!

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About *The Texas Prosecutor*

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TDCAA's leadership for 2024

Congratulations to those members who have been elected to TDCAA leadership positions for 2024.

By Rob Kepple
TDCAA Executive Director in Austin

The Executive Committee lineup:
Bill Helwig, Criminal District Attorney in Yoakum County, Chair of the Board
Erleigh Wiley, Criminal District Attorney in Kaufman County, President
Kriste Burnett, District Attorney in Palo Pinto County, President-Elect
David Holmes, County Attorney in Hill County, Secretary-Treasurer

In addition to the Executive Committee, some at large and regional positions were filled:
Brian Middleton, District Attorney in Fort Bend County, District Attorney at Large
Jessica Frazier, Assistant Criminal District Attorney in Comal County, Assistant Prosecutor at Large
Shane Deel, County and District Attorney in Callahan County, Region 3 Director
Will Durham, Criminal District Attorney in Walker County, Region 5 Director
Jacob Putman, Criminal District Attorney in Smith County, Region 6 Director
Dusty Boyd, District Attorney in Coryell County, Region 8 Director

Thanks in advance for your service. It is going to be a busy year!

Elected Prosecutor Conference recap

In the last week of November TDCAA hosted our annual Elected Prosecutor Conference. It is always an excellent opportunity for our elected leaders to gather and compare notes. We had some great presentations, but one of the centerpieces of the training are the forums. The District Attorney Forum was moderated by **Kenda Culpepper**, CDA in Rockwall County, and **Staley Heatly**, the 46th Judicial District Attorney, and the County Attorney Forum was hosted by **Eddie Arredondo**, County Attorney in Burnet County, and his First Assistant, **Colleen Davis**. The chance to discuss the most important issues facing our offices and profession as a whole is invaluable.

And I would be remiss if I did not thank TDCAA's very own **LaToya Scott** for arranging the Wednesday night reception at The Star, the Dallas Cowboys' training facility in Frisco. Because the team was in town and needed their meeting rooms, our little party was moved to the practice field, which turned out to be a lot of fun. (The photo, below, of TDCAA staff with Rowdy the mascot is an amazing keepsake!) We also got the chance to see who shined when kicking field goals: **Brian Baker**, First Assistant DA in Brazos County; **Dusty Boyd**, DA in Coryell County; and **Val Varley**, C&DA in Red River County all have some real skills! ❇

It's a wonderful life, and what we do matters

It's a Wonderful Life is a movie most of us have seen and re-watch each holiday season.

By Erleigh Wiley
TDCAA Board President & Criminal District Attorney in Kaufman County

As I watched the movie again last month for the hundredth time (it seems), I still felt bad for poor George Bailey. I've seen the movie enough to know that it all turns out all right, but you cannot help but empathize with Jimmy Stewart's character, who is frustrated with his life's circumstances. George, like many of us, from time to time thinks that what he does may not matter.

But not long ago I was reminded how very important our jobs are. I sat with a presenter at a recent event. I had no idea that her daughter was a survivor of physical abuse and that she had been in our office regarding her daughter's case. She shared with me her heartache and feelings of failing her daughter, whose abuse happened at daycare. This mother had not understood why her daughter was being clingy—until the 4-year-old told her she was being hurt at "school." My staff of concerned victim assistance coordinators made the referral for counseling, and she had attended. She said she had forgiven herself, and she thanked me for all that my office had done for her. What would have happened to that family without concerned advocates?

And what would happen to victims of crime and our community's safety without each person's role in a prosecutor office? Every single person is important!

The support staff assist attorneys and law enforcement, often behind the scenes. They are the masters of scanning, saving, and producing masses of evidence. They comply with discovery demands in a timely manner, and without them evidence would not be introduced into court. What would happen if evidence was not prepared for admission in a criminal prosecution?

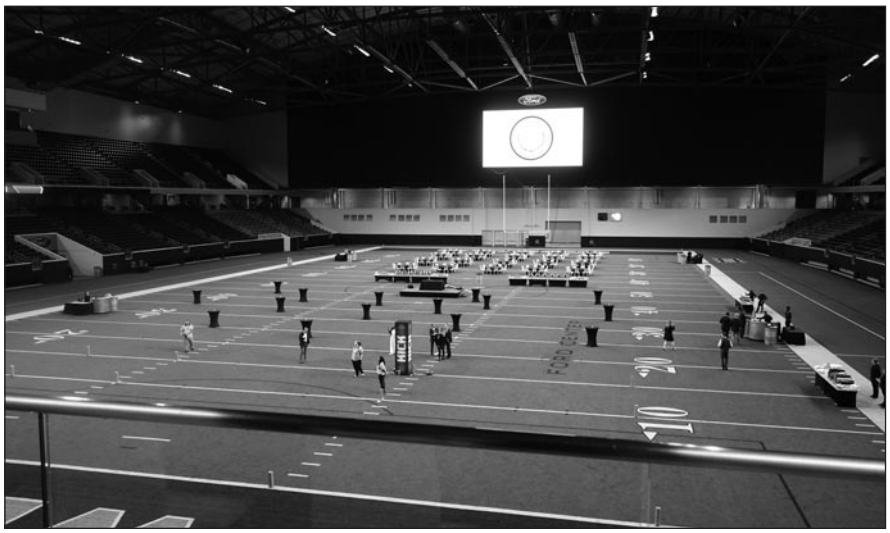
Civil practitioners represent our county, elected officials, and commissioners court (thank goodness). Without them, our counties would not operate as efficiently. Road work, resolutions, and reviewing legal documents are standard practice. If these matters weren't handled by our hard-working civil practitioners, how would that impact other elected officials and our communities?

Trial prosecutors handle hundreds of cases from indictment to disposition. With the type of cases and the volume of them, the legal work can be overwhelming, but prosecutors continue to keep working—alongside our investigators. Investigators assist prosecutors by tracking down witnesses, serving subpoenas, and interacting with our law enforcement partners. Every day prosecutors and investigators are on the front lines with victims and their families. They represent the state and county, advocating for the survivors who would not have a voice in the legal system without them. What happens to those victims, families, and our communities if we do not prosecute?

So, though I am no Clarence (the Christmas angel), I would like to remind those in TDCAA's service group—everyone in a prosecutor's office—that what you do matters. Lives are forever improved because of what we do. When tough days hit and you wonder why we do this job—and we all have those days—remember that we're all in this together, and we *are* making a difference in people's lives.

Hope your holidays were blessed and wishing you a wonderful new year! ❇

Photos from our Elected Prosecutor Conference

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Photos from our KP–VAC Conference

Photos from our Prosecutor Trial Skills Course

What every trial prosecutor should know about cognizability (cont'd from the front cover)

the basic principles about cognizability. Finally, I'll go through some fairly recent cases showing examples of cognizable and noncognizable claims.

Olde tyme lingo

Habeas law has its own language, and it's not intuitive if you don't understand the history of the writ. A writ of habeas corpus "is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint."[1] In a modern context, the writ will look something like a capias, instructing the sheriff to bring a defendant to court. That may seem unnecessary—sheriffs bring defendants to court on a regular basis these days, and many defendants who apply for habeas writs are actually on bail and bring themselves to court—but the writ is an ancient procedure. It has roots in the distant past, where some earl or sheriff might have improperly imprisoned someone, and the writ of habeas corpus forced the local official to show up to court with the restrained individual to justify the continued restraint.

There are "applicants" and "petitioners." The "applicant" is the person who's being restrained and whose release is sought.[2] A "petitioner" is a non-party who files an application on an applicant's behalf. This distinction may seem odd in the modern world, but again it harkens back to medieval times. If the shire reeve shackled you in the gaol for no good reason, he might not be willing to forward your legal correspondence. You'd need someone else petitioning on your behalf. In 21st Century Texas, this won't happen often. It's almost certain the person seeking pretrial habeas relief in a case will be the "applicant."

In habeas law, "restraint" is the thing the applicant wants to get rid of. Restraint can be either literal, i.e., jail, or figurative, i.e., a felony conviction where the defendant has already served his sentence but his criminal record is keeping him out of Harvard. While there are interesting ways to litigate "restraint" in post-conviction habeas applications, for pretrial habeas anyone with a pending charge is considered restrained.

Starting or stopping the writ process

The applicant must begin the process by making a legal claim in an application for a writ. Then the judge must determine whether to issue a writ.

This is the point where the prosecutor and the judge must look at cognizability. If the State can show the claim is not cognizable and get the judge to refuse to issue a writ, there is nothing to appeal. The defendant's remedy is to apply to a different district judge with geographical jurisdiction over the case.[3] For felonies it must be a district court judge, but for misdemeanors either a district judge or another county-level judge with jurisdiction over the case will do. If the defendant tries that and fails, or if that is somehow impossible—many places will have only one judge with appropriate jurisdiction—he can try for a writ of mandamus from an appellate court ordering the trial court to issue the writ. Both of those methods are uncommon, and if prosecutors have gotten one judge to believe the claim is not cognizable, that argument will likely work on the others.

If the trial judge issues the writ, the fun starts. The writ creates a new case with its own docket and timeline.[4] The habeas case gets a separate cause number and the name *Ex parte [Applicant]*.[5] "Ex parte" is a throwback to when habeas applications were filed without the involvement of the person in jail; in state court we are unlikely to litigate an *ex parte* case *ex parte*.

The next relevant word is "relief." Relief is whatever the applicant wants. If a judge denies relief in whole or in part, the applicant may appeal immediately. That's true whether or not the claim was cognizable.[6] If a judge denies relief on the merits of a noncognizable claim, the State can use noncognizability as a basis to get the court of appeals to affirm, but that's going to take a while. (Ask me how I know.[7]) While a trial court *can* choose to proceed with trial while the habeas appeal is pending[8]—and I encourage you to try that if a defendant is appealing a noncognizable claim—my observation is that a judge who has issued a writ for a noncognizable claim will want to wait for the appeal to resolve.

What that means is that if prosecutors want to avoid a time-consuming interlocutory appeal, they will need to litigate cognizability *before* the judge issues the writ.[9] Bringing it up at the writ hearing, even if the State is right, won't head off an appeal if the applicant wants delay.

Cognizability concepts

Now that you know why you want to litigate cognizability, what is it? This section of the article isn't meant to list every situation ever held cognizable or not. Instead, I'm going to give some basic principles and examples so you'll know what to look for when assessing a writ application.

Broadly speaking, a claim is cognizable if it asserts a right that would be "effectively undermined if not vindicated before trial."[10] However, if the defendant's claim could be better litigated through a trial and on appeal—what the courts call "an adequate remedy at law"—then it is not cognizable.

A second principle is that a claim is cognizable only if it could result in the defendant's immediate release.[11] If a claim would merely influence a trial—such as a motion to suppress—it is not cognizable.[12]

A third principle is that most claims are not cognizable if they require factual development.[13] If a claim requires factual development, it probably should be litigated through ordinary pretrial and trial motions. The main exceptions to this principle are bail cases—which are cognizable, but the applicant must adduce evidence that bail is excessive—and Double Jeopardy claims, which are cognizable, but the applicant must prove his prior jeopardy.

Cognizable and noncognizable claims

In light of these background principles, in *Smith*, the Court of Criminal Appeals explained there are three broad categories of cases that are cognizable on pretrial habeas: "First, the accused may challenge the State's power to restrain him at all. Second, the accused may challenge the manner of his pretrial restraint, i.e., the denial of bail or conditions attached to bail. Third, the accused may raise certain issues which, if meritorious, would bar prosecution or conviction."[14]

Smith's first category includes facial challenges to statutes.[15] A facial challenge is a claim that the statute is void because it is unconstitutional in all situations.[16] That type of claim comports with the three background principles: Forcing an applicant to be tried on a facially unconstitutional statute would vitiate the right, declaring the statute unconstitutional would result in the applicant's immediate release from restraint, and litigating the claim requires no factual development.

But a facial challenge to a statute is cognizable only if resolution in the applicant's favor would result in immediate release from restraint. The court discussed two variations on this idea in *Ex parte Couch*.[17] In one variation, the indictment alleged four manners of committing a single offense. That applicant alleged two of those manners were based on an unconstitutional statute. That wasn't cognizable, the court held, because even if she prevailed on that claim, she would still be facing the charged offense. However, in the other variation in *Couch*, an applicant facing three separate charges raised facial challenges to two of them. The court held that *was* cognizable because if she was successful, she would be immediately released from the restraint of those two charges. It did not matter that she would still have one charge pending; the claim was cognizable because it could finally dispose of a criminal charge.

An as-applied challenge to a statute—a claim that a generally constitutional statute is being applied unconstitutionally in a particular situation—is not cognizable on habeas because it does not attack the State's power to charge the defendant, just its ability to convict him in particular fact patterns. Thus, it needs factual development that only a trial can bring.[18] The exception to this was *Ex parte Perry*.[19] Then-Governor Rick Perry's claim was that the statutes he was charged with violating were generally constitutional, but the acts underlying the charges were constitutionally protected. The Court held this was cognizable because the rights at issue would have been undermined by forcing Perry to go to trial. This is a hard case to explain and apply, as one might expect from a *sui generis* fact pattern.

In *Ex parte Sheffield*, the court revisited what it called "the *Perry* rule" to emphasize that most rights are *not* undermined by going to trial.[20] In *Sheffield*, the applicant raised a speedy-trial claim in a pretrial habeas application, but the court held that was not cognizable because the delay from a pretrial writ hearing and appeal actually undermined the right to a speedy trial.

For decades the Court of Criminal Appeals allowed applicants to use pretrial habeas to raise statute of limitations claims. However, those cases were based on the idea that a defect in an

Broadly speaking, a claim is cognizable if it asserts a right that would be "effectively undermined if not vindicated before trial." However, if the defendant's claim could be better litigated through a trial and on appeal–what the courts call "an adequate remedy at law"–then it is not cognizable.

indictment made it "fundamentally defective" and did not vest the trial court with jurisdiction.[21] After the 1985 constitutional amendments, which practically did away with the notion of a "fundamentally defective" indictment, the court has limited the sorts of limitations claims that are cognizable.

If an indictment on its face appears to be outside the statute of limitations, but information in the record shows the indictment could be amended to include language that would fix that, such as a tolling paragraph or language regarding an exception to the statute of limitations, it is a "reparable defect" and the claim is not cognizable on habeas.[22] If an indictment contains a tolling paragraph, a claim that the allegations in that paragraph are false or inaccurate is not cognizable.[23] But if there is no tolling paragraph and the record shows there is no exception to the statute of limitations the State could plead, then a limitations claim is cognizable.[24]

If a claim requires factual development, it probably should be litigated through ordinary pretrial and trial motions.

A Double Jeopardy claim is cognizable on a pretrial writ and is one of the few cognizable situations where factual development is appropriate. Double Jeopardy includes the right not to be retried after having already been convicted or acquitted, so forcing a defendant to go through a retrial to raise the claim would vitiate the right.[25] This rationale extends to claims of collateral estoppel that are based on the Double Jeopardy clause.[26]

And finally, bail

The final type of cognizable issue I'll discuss here is bail. Bail writs are common enough and obviously cognizable if the applicant challenges the amount of his bail or the court's authority to make him post bail.[27] An example of the second type of claim is *Ex parte Gomez*,[28] where the applicant posted bond but the trial court revoked him and ordered him to post another. Based on his reading of Code of Criminal Procedure Art. 17.09, the applicant claimed the trial court was without authority to do that. That was a cognizable claim, which he lost on the merits.

On remand in *Gomez*, the First Court of Appeals held, in an unpublished opinion, that some of the applicant's other complaints (which did not challenge the amount of bail or the trial court's power to require bail) were not cognizable. For instance, Gomez complained that the trial court should have applied the Rules of Evidence at the hearing where it revoked him. The First Court held this was not cognizable because the remedy for that sort of procedural error was a new hearing, not immediate release.[29]

Conclusion

There's a whole world of habeas claims out there—the only limit to noncognizable claims is the creativity of the defense bar—so obviously I can't list them all here. But the examples and principles I've offered here should help prosecutors be on the lookout for noncognizable claims. If prosecutors can spot the noncognizable claims in time to keep a judge from issuing a writ, we can save a lot of delay on needless appeals. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 11.01.

[2] Tex. Code Crim. Proc. Art. 11.13.

[3] *Ex parte Hargett*, 819 S.W.2d 866, 868 (Tex. Crim. App. 1991). *Hargett* involves a post-conviction writ, and it has been superseded by Code of Criminal Procedure Art. 11.072 in some contexts, but the statement of the traditional rule is correct and still applies to pretrial writs.

[4] *Greenwell v. Court of Appeals for Thirteenth Judicial Dist.*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005).

[5] *Ex parte Anderson*, 902 S.W.2d 695, 701 n.1 (Tex. App.–Austin 1995, pet. ref'd).

[6] *Ex parte McCullough*, 966 S.W.2d 529, 531 (Tex. Crim. App. 1998).

[7] I won *McKeand v. State*, 430 S.W.3d 572 (Tex. App.–Houston [14th Dist.] 2014, no pet.) on that basis, but that resulted in a year and a half of delay in a misdemeanor DWI prosecution. If you use the courts of appeals's websites to look up the cases I cite in this article, you will see that delays of over a year are the norm for noncogizable claims, with some taking over three years to conclude. Spending years getting a court to declare the writ should never have issued in the first place is the appellate prosecutor's version of "You might beat the rap but you won't beat the ride."

[8] *Ex parte Sheffield*, ___ S.W.3d ___, No. PD-1102-20, 2023 WL 4092747, at *12 (Tex. Crim. App. June 21,

2023). As *Sheffield* explains, a defendant can apply to the court of appeals for a stay, but if he does not or if the court denies the stay–if the claim isn't cognizable, that's a good reason to deny a stay–then the trial proceeds independent of the habeas appeal.

[9] It's technically true that it's not appealable if a judge issues a writ but, after hearing argument, determines it's not cognizable or otherwise refuses to rule on the merits. *Ex parte Gonzales*, 12 S.W.3d 913, 914 (Tex. App.–Austin 2000, pet. ref'd). The problem, though, is that once the writ issues, there's a cause number and something that facially looks like an order from the trial court. If the defendant tries to appeal, the State is stuck litigating appealability in the court of appeals. I had this happen in a post-conviction writ, and while I eventually got the court of appeals to dismiss the case, it took two years before that appeal concluded. See *Ex parte Lewis*, No. 14-16-00629-CR, 2017 WL 6559647 (Tex. App.–Houston [14th Dist.] Dec. 21, 2017, pet. ref'd) (not designated for publication). That's a lot of appellate litigation in a non-appealable case.

[10] *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016).

[11] *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010).

[12] *McKeand*, 430 S.W.3d at 573.

[13] *Doster*, 303 S.W.3d at 724.

[14] *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005).

[15] It would also refer, in olden times, to situations where a defendant is being restrained without a criminal charge. But that doesn't happen a lot in 21st Century Texas.

[16] *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

[17] *Ex parte Couch*, 678 S.W.3d 1, 3 (Tex. Crim. App. 2023).

[18] *Ex parte Gonzalez*, 525 S.W.3d 342, 350 (Tex. App.–Houston [14th Dist.] 2017, no pet.).

[19] *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016).

[20] See *Sheffield*, 2023 WL 4092747, at *6-*7. *Sheffield* does a good job of synthesizing and applying the reasoning of *Perry*, and I recommend reading it if you need to apply some of these principles.

[21] See, e.g., *Ex parte Dickerson*, 549 S.W.2d 202 (Tex. Crim. App. 1977).

[22] *Ex parte Edwards*, 663 S.W.3d 614, 618 (Tex. Crim. App. 2022).

[23] *Ex parte Smith*, 178 S.W.3d 797, 804 (Tex. Crim. App. 2005).

[24] *Ex parte Vieira*, 676 S.W.3d 654, 658 (Tex. Crim. App. 2023).

[25] *Ex parte Robinson*, 641 S.W.2d 552, 555 (Tex. Crim. App. 1982).

[26] *Ex parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002).

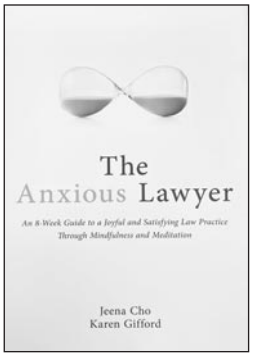
[27] Tex. Code Crim. Proc. Art. 11.24.

[28] *Ex parte Gomez*, 624 S.W.3d 573, 578 (Tex. Crim. App. 2021).

[29] *Ex parte Gomez*, No. 01-20-00004-CR, 2022 WL 2720459, at *5-6 (Tex. App.–Houston [1st Dist.] July 14, 2022, pet. ref'd) (not designated for publication).

Self-compassion for anxious lawyers

Opening to my loss,
Willing to experience aloneness,
I discover connection everywhere;
Turning to face my fear,
I meet the warrior who lives within;
I gain the embrace of the universe;
Surrendering into emptiness,
I find fullness without end.
—Jennifer Welwood, "Unconditional"[1]



By Jeena Cho & Karen Gifford

When we introduce the concept of self-compassion, frequently students will say those two words self and compassion shouldn't go together. Compassion is our innate response to suffering and our desire to help. We think about compassion as something reserved for people very close to us, such as our friends and family. When we use the term self-compassion, we are talking about the ability to extend compassion to ourselves.

Think back to a time when a friend or a colleague shared with you a difficulty in her life. Perhaps she lost a month-long trial she spent years working and preparing for. Or maybe your friend told you he was having difficulty in his marriage. When you think back to when your friend shared his or her difficulty, how did you feel? What did you do or say to comfort your friend? Did you empathize with what she or he was going through? Did you feel that sense of compassion welling inside?

Now, think back to a similar difficulty you had in your own life. Maybe when you lost a hearing, a motion, or a trial. Were you able to extend a similar feeling of kindness, empathy, and compassion toward yourself? Probably not. Chances are you were filled with self-criticism, self-doubt, or even self-hate. It's also possible you felt angry at the judge or the opposing side.

We can cultivate self-compassion, a sense of unconditional positive regard for ourselves in times of difficulty instead of being overly harsh or critical. When we practice self-compassion, we're recognizing our own difficulty, pain, anger, or other suffering in that moment. Perhaps you lost a hearing on an important issue you spent months preparing for. In that moment, you can recognize what you're going through and say, "This is a moment of difficulty." You can then acknowledge these events are a part of life. Suffering is a part of the human condition. You can begin to offer yourself self-compassion, perhaps by saying, "All lawyers lose hearings from time to time." You can then practice being kind to yourself by saying, "I know I worked really hard on this. I know that really hurts." By acknowledging your pain, accepting this pain is common to many others, and offering kindness toward yourself, you are practicing self-compassion.

Importance and benefits of having compassion for oneself

When we're working with clients [or victims] who suffer great tragedy or experience unbearable emotional pain, we may attempt to embody the idea of a tough, emotionless attorney by shutting down our feelings or try to protect ourselves by emotionally distancing ourselves. We may even say things like "What you're telling me isn't relevant to your case" and dismiss the client [or case]. This isn't because we're heartless or uncaring. Just the opposite is true. We fear that if we allow the pains of our clients [crime victims] into our heart, it will completely consume us.

Frequently, when we say "self-compassion," people think of self-esteem or selfishness. While these words all may sound similar, they're very different. In fact, one could argue that being compassionate toward self or self-compassion is the opposite of self-esteem and selfishness.

Self-esteem is related to worth and externally achieved. It comes from measuring ourselves against a particular yardstick, and we only experience self-esteem when we achieve what we strive for. We impose that yardstick on ourselves as we try to achieve the goal that will allow us to feel self-esteem; for example, being the best in our softball league or being the "best" lawyer. If we only feel good from achievements, it can also feed insecurities.

If you are motivated principally by self-esteem, you may also find that you struggle with self worth. Do you ask yourself questions such as "Am I good enough?" or "Do I deserve?"

Selfishness is being concerned with only one's own well-being. It lacks consideration for others. When we're being selfish, we are taking something from others, purely for our own benefit.

With self-compassion, we practice being kind, accepting, and loving toward ourselves. This is done without condition or question. Unlike self-esteem, there's nothing we must do in order to be deserving of our own kindness to ourselves.

When we practice self-compassion, we become more aware of our own difficulties. When we're compassionate toward ourselves, it allows us to more fully open to the experience of our own as well as others' suffering. We're better able to help those who are in pain because we have the emotional capacity, the resilience to do so. Hence, it's completely the opposite of being selfish.

However, ignoring or refusing to hear our client's pain doesn't protect us from absorbing it. Consider the fact that so many lawyers suffer from alcohol and drug abuse or suffer from mental illness such as depression, which is probably an indication that as a profession we aren't managing our difficulties very well. Instead of denying the realities of our job—that there is suffering inherent in our work—we need to find a way to process the pain in a healthy way that doesn't lead to abusive, self-destructive behaviors.

In our experience, extending compassion toward oneself is perhaps one of the most challenging practices described in this book. We've both struggled with this practice. As with any new skill, what you practice becomes easier. Practicing self-compassion is no exception. Despite the challenges, this practice has been one of the most rewarding and enriching for both of us. As we learn to approach ourselves with more kindness and gentleness, we begin to approach others with the same attitude. As mentioned in a previous chapter, we can't express any emotions toward others without first experiencing those emotions ourselves. As we engage in self-compassion practice, we may recognize we can only extend as much compassion toward others as we have toward ourselves.

Self-compassion and understanding our mind

Part of the practice of cultivating self-compassion is to understand our mind and how it works. Humans have the ability to direct the mind. As an experiment, bring your attention to your right foot. You can direct your mind to make your right foot move. Next, move your attention to your right hand. Notice how you can use your mind to direct your attention. How you direct the mind is important because your mind is an incredible instrument that finds answers. The question you pose to your mind is important because it will answer that specific question. For example, if you lose a hearing and ask your mind, "Why are you such a loser?" the mind will happily come up with a list of answers.

Imagine your mind files events of your life in filing cabinets. When you criticize yourself by saying, "You're a terrible lawyer" after losing a hearing, your mind will file away that event in the cabinet labeled "Terrible lawyer." And the next time you ask yourself, "Why are you such a terrible lawyer?" your mind will go into that filing cabinet and give you a very long list of examples or reasons. Humans have a negativity bias. Therefore, chances are you probably have a very large filing cabinet for all the things you perceive as being negative about yourself and you may lack a positive filing cabinet. We all carry around views about ourselves and others. Therefore, if you only see yourself as angry, you'll always look for behaviors or actions that validate this view. Similarly, if you see your opposing counsel as a "jerk" or difficult, you'll only look for actions that validate this perception.

As you become more familiar with your mind, you can begin to see your thoughts and challenge them. Instead of having the mind automatically find the answer to the question, "Why are you such a loser?" you can notice the flaw in the question itself. The assumption is that you are a "loser." In these moments, instead of allowing your mind to be self-critical, you can direct it toward compassion.

When you observe your inner chatter, see if you ask "why" questions—which look backwards (e.g., Why am I always so angry?)—as well as "how" questions—which direct the attention forward (e.g., How can I avoid getting angry?). Both questions can clue us in on our mind's habits. Remember the pattern, when x happens, I always think y? Maybe every time you have to give a talk,

In our experience, extending compassion toward oneself is perhaps one of the most challenging practices described in this book. We've both struggled with this practice. As with any new skill, what you practice becomes easier.

you always think, "I'm going to be terrible at this" or "I'm going to forget everything I'm supposed to say and make a fool of myself." You can examine the underlying thought patterns and ask yourself, "Why do I believe this? What evidence do I have to show that my thoughts are true? How can I show up as my best self?" or "Can I simply allow this anxiety to pass?"

Working with difficult opposing counsel

Your phone rings and the Caller ID shows the familiar name of an opposing counsel you loathe. You can feel the blood rush to your face, the muscles in your arms and legs tense. Your heart starts beating faster. Your body's fight or flight response is triggered and you cringe wondering why he's calling. All of this happens within a second or two and you may not even notice the physiological response. The only thing you know is how much you dislike this person, the list of annoying things he's done to you and your client.

Many lawyers spend a great deal of time severing their emotional selves from the office. However, by doing this, we're stopping ourselves from being fully present to our lives!

Our legal system often requires us to be adversarial, but rarely are we taught how to cope with our own discomfort and pain when navigating this system. What's worse, the lack of frank conversations about our own difficulties of being in an adversarial system only compounds our pain because it can feel as though we're the only ones who can't hack it. The mildly annoying to rude, abrasive, discourteous behaviors are rampant in our legal system, particularly in litigation settings.

Often, when we speak to attorneys about the most difficult part of their job, the list consists of opposing counsel, judges, clients, lack of time, deadlines, and financial pressure. The attorneys who register for our classes often want a solution for fixing the bad behaviors of others. Get the opposing counsel to stop being a jerk, get the judge to see things from our perspective, or get the client to follow instructions.

The other common reason attorneys join our class is because they want to be completely resistant to the bad behavior of others. Wouldn't it be much easier if all these behaviors of others didn't affect you—at all? If you could respond to your opposing counsel's denial for your request for an extension with robotic precision so you can always get the desired outcome? Wouldn't it be great if you could, in fact, leave your emotions at home so you never experienced anger, frustration, sadness, annoyance, or any other feelings at the workplace?

Many lawyers spend a great deal of time severing their emotional selves from the office. However, by doing this, we're stopping ourselves from being fully present to our lives! Most of us spend more than half of our waking hours at the office. Is it ideal or desirable to spend so much of our lives disconnected from ourselves and others? We firmly believe that while it may be possible to convince yourself you don't care or are immune from your feelings, suppression of your emotional self will manifest itself in other toxic ways—for example, using or abusing drugs or alcohol to numb the pain. What if, instead of disengaging from yourself, you can bring mindfulness into the picture? What would that practice look like?

Let's pause for a moment and consider the scenario above. You're in litigation and there's a long history of resentment, hostility, and other negative feelings toward your opposing counsel. When the phone rings, and you see his name come up on your Caller ID, what do you feel? What thoughts are going through your head? Can you identify what parts of your body are reacting to this event? Can you slow down your thoughts and the physiological response so you can take a moment to pause and notice what is happening? Can you give yourself a moment of reprieve and spend a few seconds practicing diaphragmatic breathing?

Often, when your fight or flight response is activated, all you know is you're experiencing an intense feeling and your mind says, "I don't like this feeling. I want it to stop." Then your mind begins looking for a reason for why you're feeling this way. Once it identifies it as this person you loathe who is calling you, your mind might go into judging mode by saying, "You shouldn't feel this way. Stop being so weak!" You may also go into full fight mode and your body goes into battle-ready mode. "That jerk! I'm going to show him!" All of this is happening and you may not even be fully aware of it. You may feel helpless, unable to moderate your physical or emotional response.

Through the years, you may have developed strategies for dealing with such situations. You may disassociate from what is happening, react with aggression, or avoid in-person confrontation by getting into drawn-out email wars. You may also have your favorite strategies for getting

under this person's skin, further provoking her and tearing apart your relationship.

As much as we wish there was a magic wand that could change the behaviors of those who cause us grief, what we often fail to recognize is that the only person whose behavior we have control over is ourselves. While this may feel restrictive or lacking at first glance, it's actually a liberating realization. Instead of wasting precious energy and effort trying to control or change other people's behavior, we can redirect that energy toward moderating our own behavior. We can focus on being present to each moment and doing our best instead of obsessing over the outcome (which we often do not have control over). The invitation is to show up to each situation as our best self and do our best given the tools and resources available to us—in that moment. With a combination of self-compassion and mindfulness practice, we can access our inner resilience so we can respond in a healthy and appropriate way.

Going back to our example, you see the Caller ID, your mind starts to race, and you can feel the adrenaline pumping throughout your body. Instead of using your typical habitual reaction (ignoring the call, answering in anger, suppressing your feeling), can you make room to give yourself a moment of reprieve by taking a few deep breaths? Can you give your nervous system a chance to recover?

Before going into an explanation on tools you can use to cope with difficult opposing counsel, it's important to know that while the practices are simple, they are not easy. To use them, practice and patience are required. In addition, this is an ongoing, lifelong practice. Just as in a meditation practice, your ability to use these tools will be different from day to day, from moment to moment. If there's a single message we could convey, it is this: be kind to yourself. Being a lawyer is difficult.

There are two main tools for working with difficult opposing counsel— cultivating compassion toward self and cultivating compassion for others. When we use the word compassion, we are not suggesting you condone or accept the opposing counsel's behavior. We're also not talking about sympathy or feeling sorry for yourself. In the context of mindfulness practice, compassion has a very specific definition, as described earlier.

First step is recognizing what is happening. This means noticing the anger, frustration, or annoyance you feel toward this person. This willingness to look at and acknowledge your inner state, how you are feeling, can itself feel scary and you may notice a lot of resistance around it. This makes sense given that you may have spent years ignoring or suppressing your feelings. You may fear that if you allowed yourself to feel, you may lose yourself in your emotions, like jumping into a pit of despair. With continued meditation practice, you cultivate the ability to observe all of your emotional states—positive, negative, those that feel like blazing hot steel, and those that feel a giant block of ice. As you practice noticing your emotional states as simply passing moments without reaction or judgment, your reaction to people who trigger you may lessen. Show up with curiosity. Can you be a scientist of your own mind, whose job it is to examine your thoughts and reactions?

After you allow yourself to see how and what you are feeling, the next step is to acknowledge that moment as a moment of suffering. The work you do as a lawyer is difficult work. This does not mean dwelling in your difficulty or feeling sorry for yourself. You're simply acknowledging as a fact that, in this moment, having your opposing counsel call is triggering an emotional reaction and this is a difficult moment for you.

Our mindfulness practice can help us access the compassion, for ourselves and for our opposing counsel, which we need in order to move through this situation in a skillful way. Mindfulness is all about awakening to what is and responding in a thoughtful, considered manner with compassion. This isn't possible until we fully allow ourselves to be with our own difficulty, emotions, and reaction. This doesn't need to be a labored process (although it may be). It may be as simple as acknowledging and saying, "John's calling and I'm noticing my reaction. My heart's beating faster, my mouth feels dry, and I can feel anger rising." You can then acknowledge your difficulty. For example, "John and I have a long history of having a very difficult and adversarial relationship. This is a painful moment. I feel extremely frustrated thinking about our last conversation." As you do this, notice your breath. This isn't an intellectual practice. This practice requires you to connect with your mind and body. The way to connect with both is through the breath.

After you allow yourself to see how and what you are feeling, the next step is to acknowledge that moment as a moment of suffering. The work you do as a lawyer is difficult work.

Softening self-judgments is an organic process that happens through practice. Perhaps one of the first steps in loosening the grip of always needing to be perfect or constantly using the whip is recognizing that how you are in this moment isn't permanent.

By acknowledging what is instead of resisting, denying, or ignoring, you can begin to move through and process what is happening. Suppressing your emotion is akin to pushing a beach ball under the water in a swimming pool. It takes a lot of effort and, sooner or later, it will pop back up with more force.

The mindful way of processing described here won't happen overnight. Also, if you use meditation only when you're triggered, it likely won't be very effective. Like long distance running, we can give you all the strategies and tools—proper running form, breathing techniques, clothing, shoes, diet, etc. However, you can't master all of these strategies on the morning of the marathon. You need practice. You can practice being mindful when you're walking down the street, washing your hands, talking to your spouse, or other times when you are not triggered. With continued practice, you'll get better at observing your thoughts, your default reaction, and your triggers. You can become more familiar with the patterns of your mind.

By taking a stance of compassion toward yourself, you may notice you can take more ownership and responsibility over your own reactions. Instead of saying, "John made me angry," your inner dialogue may change to, "When John refused to give me an extension, I felt angry." This can be incredibly empowering because you're no longer constantly a slave to your reactions. You may also begin to notice there are times where you can talk to John and not feel triggered. You can even see a possibility for having a completely different response to John. Instead of immediately lashing out at John, you may approach the situation with curiosity and inquire as to why he's refusing to give you an extension after you've given him three extensions previously. You may ask yourself how others might respond to John in similar circumstances. This isn't to suggest your default reaction will change overnight. It probably took many years, even decades for your brain to wire itself with this reaction and it may take many years before you can develop different neural pathways and responses. However, in the meantime, you can practice being very gentle, kind, patient, and compassionate with yourself.

In addition to acknowledging your own emotional and physiological response, you can practice noticing additional thoughts. One common thought pattern is judgment around your reaction. When you see John's name pop up on the Caller ID and you feel yourself get triggered, your inner critic may chime in. Your inner critic may say, "Stand up to him! Stop being so weak!" or berate you for the way you're feeling. Again, practice recognizing it as a pattern and make room for a different response.

Softening self-judgments is an organic process that happens through practice. Perhaps one of the first steps in loosening the grip of always needing to be perfect or constantly using the whip is recognizing that how you are in this moment isn't permanent. Each of us is constantly evolving and changing. Research shows our brain can be changed, due to changes in behavior, environment, neural processes, thinking, emotions, as well as changes in the body. This process is known as neuroplasticity. Therefore, you can influence how you think, experience, and perceive the world. You can soften your identification with your current self.

Practicing self-compassion

There are specific steps we can use to practice compassion toward ourselves.

1) Acknowledge this is a painful moment or moment of suffering. When we use the word "suffering," we don't necessarily mean huge tragedies such as a severe illness or death. We simply mean any event in our life that causes pain, discomfort, uncomfortable feelings, or anguish. It's important to acknowledge how we feel, because unless we do so we can't begin the process of understanding what's happening or thinking about a way to respond.

This simple act of acknowledging you are in a difficult, painful situation—a moment of suffering—is the first step in cultivating self-compassion. Without first acknowledging our own pain in the situation, we cannot effectively acknowledge or help those in pain. As repeated in every safety instruction on every flight, "Secure your own oxygen mask befor helping others."

2) Notice how this moment feels. The next step is to notice how this moment feels. You can notice the emotions, anger, fear, frustration, or any number of other feelings that may arise. You can also notice how it feels in your body. Do you notice yourself curling your shoulders in, as if you're trying to protect yourself from a blow? Do you feel your stomach tie into knots? Do you notice tensing in your arms or legs? Do you notice pain around your heart? All of these give you information about how you're feeling in this moment. By simply noticing and acknowledging how you feel, you can then make a decision to re-

spond. The response will, of course, depend on the specific circumstances but until you can tune into how you feel, you can't begin to formulate a response.

As you practice being with how you are in this moment, without clinging or rejecting, and without judging your emotions, you may find it helpful to name your emotions. For example, when you can feel the heat rise to your face when your client blames you for an outcome after he specifically refused to follow your advice, you can name the emotion by saying to yourself, "I feel anger."

Ever have an experience of being so completely overtaken by your emotions you can't even begin to put words around how you feel, or you simply snap? By regularly practicing and tuning into how you're feeling, especially in moments of difficulties, you'll be better able to modulate your response to a given situation.

3) Tune into your natural tendency to feel compassion. As human beings, we're hardwired to feel compassion. When we see someone in pain, we feel compassion—there's a natural desire to help, to see that the person not suffer. For most of us, it's much easier to extend compassion to others than it is to ourselves. If this is true for you and you have difficulty extending compassion to yourself, imagine seeing yourself as you would a loved one, a good friend, or a child. If this person you deeply cared about was in a situation where she was faced with working with a difficult client or case, wouldn't you feel and express compassion? Can you extend this care toward yourself? As you engage with this practice, remember to treat yourself as you would someone who is dear to you, someone who you love. Afford yourself the same compassion, kindness, empathy, and love you'd extend to a loved one.

4) You are not alone. The next step in being compassionate toward ourselves is to remind ourselves that suffering is a human condition. No human is free from pain, uncomfortable experiences, anger, frustration, disappointment, shame, and thousands of other feelings and emotions that make up the fabric of being human. This fabric can be said to bind us together. In fact, all living beings experience suffering of one form or another. It's part of life. Of course, life isn't all about suffering. The opposite is also true. We also experience joy, happiness, delight, satisfaction, and all the positive emotions that make up being human as well. The invitation of this practice is to recognize the common bond—this condition of being human and show up for each experience.

Karen's story of learning to relax between the stressful moments

When I was preparing for labor with my second child, my childbirth coach gave me advice that turned out to be key for getting through this classically challenging experience in a pretty wonderful way. The labor coach said, "Your labor is likely to last for a long time—certainly several hours. So for hours, you'll be having contractions, and then there will be time between the contractions. I'm going to give you some techniques for how to manage the contractions, but you also have to pay attention during the time between the contractions."

My coach told me it was very, very important to relax completely between each contraction. She explained it like this: if, the minute your contraction is over, you start to worry about the next one, you'll tense up and tire yourself out so you have very little energy when that next contraction actually comes. If instead you focus on what is happening—no contraction—and enjoy that break completely, you'll get a real break and be ready for the next contraction.

I was lucky with this second labor; it was a relatively easy one. On the other hand, it was long—more than 24 hours—and the advice my coach gave me turned out to be crucial for getting through it. I was amazed that simply relaxing when I had the opportunity to do so could make such a big difference, but it did. When I remembered to relax, I was fine when the next contraction started; if I forgot or was distracted during my "downtime" between contractions, the next contraction almost overwhelmed me. Needless to say, I became a very motivated relaxation expert in short order!

After I returned to work, my coach's advice stayed with me. The deadline-oriented work I did as a litigator was characterized by periods of intense activity, and stretches of time when there was little going on. It certainly wasn't as intense as labor, but I began to consciously take time to relax when I could. Rather than fill all my extra time with busy work, I might see a friend for a long lunch, go for a walk, or leave the office early to spend an extra hour with my children in the evening. The busy times always returned, and I found I was enjoying them more and had more energy for them when I'd taken a real break from the frenetic pace litigation sometimes requires.

Once I began meditating, I began to better understand why resting the mind is so important. I could also see how easy it was for me to continue to fall into the trap of needing to feel busy, even when busyness was not necessary to doing my work effectively. Once I got into busy mode, I could easily fill all my spare moments with extra phone calls, making lists, double-checking and reediting prose that didn't need changing—work that was entirely optional, left me depleted, and didn't necessarily lead to better results for my client.

To counter this tendency, I extended the idea of taking time off by making a daily practice of relaxing completely. Even on very full days I tried to take note of the little breaks when it was possible to stop and take a breath. In my case, these moments often happened on the bus going to or from work, or in my office between meetings. I might take a few minutes to follow my own breath, consciously relax my shoulders and upper back, and look at something beautiful or let a pleasant image fill my mind. Just taking those little mental vacations was surprisingly rejuvenating, even in the midst of a very challenging day. ❇

Recognizing this interconnectedness among all human beings and recognizing that we all feel negative and positive emotions can help us feel less isolated and alone when it feels like life is crashing around us.

5) This is temporary. When we're in the midst of whatever life event we're struggling with, it's hard to see the light at the end of the tunnel. It may feel like this situation, this painful moment, this suffering will last forever—that there will be no end. Of course, this isn't true. Everything is transitional and nothing is permanent.

This includes how you're feeling in this moment. Even when you're experiencing unbearable pain, if you pay attention, you'll notice the intensity of the pain shifts from moment to moment. Remembering "this too shall pass" may be one of the most difficult but perhaps one of the most powerful reminders when you're in the thick of suffering.

How often do you eat lunch at your desk, eating bite after bite while staring at your screen only to realize you've finished your meal without having enjoyed a single bite? If you regularly eat lunch at your desk, commit to breaking this habit and practice mindful eating.

Selfishness versus self-care

Often, when we teach self-compassion and self-care, students express concerns about becoming selfish or self-centered. These concepts, while sounding similar, are completely opposite from each other. As we noted earlier, selfishness means lacking consideration for others and having concern only for one's own gain. Self-care means caring for ourselves so we can maintain optimal physical, emotional, psychological, spiritual, and mental health. Self-care allows us to care better for others. There's no diminishing others or their values in self-care.

Self-care is something we can only do for ourselves. No one else can consume healthy, nutritious meals for us. No one else can spend five minutes walking around the block during lunch. No one else can meditate for us. By zealously guarding our well-being, we will better be able to prepare for any challenges that will arise in our life. By being more mindful, we can tune in to our own needs and desires. The more sensitized we become to this, the more we are able to attend to our inner world.

Lawyers are outward facing—we're constantly focused on others, our clients, our coworkers, law partners, and so forth. Lawyers like to be responsible. We like to be responsible for others. We spend a lot of time trying to deliver the right results. We're people pleasers. This is precisely the reason why being mindful is so critical. We have to carefully monitor our inner state, our emotional fuel tank. If we're constantly giving to others without ever stopping to refill out own tank, sooner or later, we'll start running on fumes. We may be able to operate from this state temporarily but, sooner or later, we'll have nothing more to give.

Give yourself a break: mindful eating

How often do you eat lunch at your desk, eating bite after bite while staring at your screen only to realize you've finished your meal without having enjoyed a single bite? If you regularly eat lunch at your desk, commit to breaking this habit and practice mindful eating. Get out of your office and go to the break room, to a nearby park, or to your favorite restaurant. Instead of eating your food on autopilot, take a moment to bring a sense of gratitude for this meal. Pay attention to each bite. Notice the sensation of having food in your mouth. Notice all the flavors. When your mind gets distracted with thoughts, worries, or goes into planning mode, simply guide your mind back to the food you're eating.

In practicing self-care, the specific act you choose isn't as important as the intention you bring to the act. For example, you can approach something as simple as hand washing as an act of self-care. As you turn on the water, consider how you're taking better care of yourself by washing your hands. Take an extra moment to adjust the water temperature to your liking. Feel the luxurious sensation of soap against your hands. Take a moment to notice your hands—see the incredible instrument they are. How much you rely on them, how dependable they are, how hard they work for you. Just as helping your child wash his hand can be an act of kindness and love, so can washing your own hands.

Being kind to ourselves

"It's your birthright to have your own mind be kind to itself." This was a statement one of our meditation teachers repeated weekly in class. Consider for a moment the truth of this statement. If you can't be kind to yourself, who will? If you can't unconditionally stand by yourself, accept yourself, with kindness and compassion, who will?

Many lawyers are driven by fear. Fear of failure. Fear of criticism. Fear of not getting the right outcome. And when things don't go as expected, we punish ourselves harshly. What is your motivation tool? Is it the carrot or the stick? Your internal source for motivating yourself, is it kind or

cruel? When you mess up, do you berate yourself? How loud is your inner critic? Do you hold yourself to an impossible standard? Is anything less than perfection unacceptable? What if you can be just a bit gentler with yourself? When you consider that possibility, how does it feel? Do you feel excited by that idea or do you feel fear? Perhaps you fear that if you were kinder to yourself, you'd lose your edge, that you'd become a failure. It may seem counterintuitive, but being more compassionate with ourselves, letting go of constantly pushing yourself using the "negativity stick," can help us be better lawyers. As we let go of the harsh narrative and holding ourselves to an impossible standard, we may be more inclined to take risks. When we aren't so fear-driven and engaged in avoiding failure, we can access creative thinking. When we let go of the idea of perfection, we are better able to rebound from mistakes.

As we explore this concept of self-compassion, ask yourself what yardsticks you use to measure yourself. We have the tendency to hold ourselves to an impossible standard or to someone else's standard. It can feel scary to even consider this line of inquiry. We've had students ask, "What will stop me from eating gallons of ice cream if I let myself do what I want?" This is certainly a valid concern. However, doing what you want is probably very different from merely giving in to passion if you think of your task as taking very good care of yourself. Would eating a gallon of ice cream be practicing self-compassion? Would you feed a gallon of ice cream to someone you deeply cared about? Probably not.

The importance of rest

Lawyers struggle, perhaps even more than other professionals, with constant demands on time. The billable hours system with which most of us work means we are under continuous pressure to be productive, literally in every minute. Consciously taking time to allow ourselves to rest is a simple act of self-compassion we can give ourselves. When we practice meditation, we are allowing our mind to rest. We learn to use our mind not just for thinking but to simply observe and notice our mind. In a world where we're constantly bombarded by external distractions, it's becoming more crucial to give ourselves the gift of rest. Frequently, we think about rest and relaxation as something that happens only on vacations. Perhaps you've had the experience of going on vacation only to have your mind still at the office, unable to unwind, unable to let go.

New research is showing what all of us intuitively know. More work does not result in increased output. The human body is simply not designed to sit at a desk for eight hours straight. The most productive people tend to balance focused time where all attention is put on a task followed by a period of rest.

Giving yourself permission to have downtime and unplug can feel scary. You may notice internal resistance to the idea of taking a break during lunch and going for a leisurely walk instead of mindlessly scarfing down your lunch in front of the computer. If you notice resistance to the idea of rest, see what internal dialogue is playing in your mind. Perhaps you believe you can't take time for yourself because you have too much to do, or you're being selfish. Perhaps you fear you'll fall behind. These thoughts are perfectly understandable. In this ever increasingly connected world where technology is speeding up at an astonishing rate, you may feel as though you must work harder and faster to keep up. Consider for a moment that the computing power in the technology we use doubles every one month to two years. Is it possible for you to double your work output every couple of years? How much faster can you work while producing quality work? What is the cost of continually demanding more?

There is no easy solution to finding a work-life balance. There is no convenient time to rest, to unplug. We must value our downtime as much as we value our work time. We intuitively know there is a point at which working more results in diminishing returns but we continue to work. Even when we are not at the office, we constantly check our work email on our smartphone. Many students in our class describe a sensation of feeling addicted to their email. In fact, each time we check our e-mail, Twitter, Facebook, or other social media, we are triggering our dopamine system. The dopamine system is responsible for pleasure-seeking behaviors. We check email because we're seeking pleasure. When we get an email, it triggers the opioid or "liking" system, which makes us feel satisfied.

There is no shortage of tips for unplugging and taking time to rest. However, no amount of tips is going to work unless there is a fundamental shift in thinking. We must examine our underlying beliefs and thoughts around rest and taking time for ourselves.

It may seem counterintuitive, but being more compassionate with ourselves, letting go of constantly pushing yourself using the "negativity stick," can help us be better lawyers.

Jeena's experience: making change with gentleness

That part of you—that part that experiences fear—deserves your gentle attention. It's easy to want to shun that weak or even embarrassing part of yourself, deny its existence or push it away. However, if you pay attention to it with gentleness instead of rejecting it, you may find the tender part of yourself actually serves a purpose. Perhaps it's there to protect and guide you through difficult situations.

During the time I was working to overcome a debilitating case of social anxiety, part of me was deeply committed to seeing my own success. That part of me also knew I had to succeed in my own unique way. Once I felt the power of this part of myself, the sensation shifted from fear and anxiety to power and skillfulness. When we're struggling with difficulties, we can feel a deep sense of despair, as though the pain, discomfort, the challenge will never end. Mindfulness practice is helpful during these challenging times because mindfulness practice simply asks us is to be fully committed to being with the challenge in this moment.

You don't have to sit with the challenge forever, for the next year, for the next month, or even for the next hour. You just have to recommit to noticing the experience of the challenge—here and now. There's a sense of trusting in the process of the struggle. Once you commit to simply being in the challenge, moment by moment, you may notice each moment is slightly different. That the challenge has an organic shape, which is fluid and transforms as you observe it. This is the beauty of mindfulness practice. The tool is the same, but how you use the tool in your own life will be different from others. Once you master how to do this, you have a gift you can bring to the world. This space of your own mastery contains tremendous amounts of power and taps into the core of who you are. It is your birthright to tap into this source of strength and power. The more you can access this part of yourself, the more resilient you'll become.

Living through your own suffering, without avoiding it or denying it allows you to create space for examining it and then learning something from it. These sufferings, once you've experienced them, survived them, learned from them, become an area of service. What better way is there to support someone who is suffering than to have gone through that exact same suffering yourself? This is why support groups for those suffering from illness such as cancer or alcoholism are so powerful.

It's best to find ways to unplug that work for you and your schedule. Here are some suggestions to get you starte:

Schedule breaks into your day. If your calendar tends to get jam-packed with meetings and other commitments, schedule regular breaks and put them on your calendar. This doesn't need to be a long break. It's not about quantity, but quality. Aim for short five-minute breaks to stretch and move your body. If you can't manage that, pause and take three conscious breaths.

Reduce distractions. Turn off auto-notifications on your smartphone device and your computer. The constant alerts for emails, Facebook "likes," and Twitter notifications are distractions and they keep you from fully focusing.

No screen time. Have a regularly scheduled "no screen" time. For example, no screens after 10:00 p.m., at the dinner table, during meals, or first thing in the morning.

No email mornings. Use your morning hours for the most important work of the day. Do not give your best hours to your inbox. Don't let other people set your daily agenda by checking your email.

Get an alarm clock. Do you check email first thing when you get up in the morning? Get the smartphone out of the bedroom! If you use your smartphone as an alarm clock, invest in a standalone alarm clock. Similarly, if you use your smartphone to check the time (only to get distracted in Twitter vortex), invest in a wrist watch. Leave [the phone] at home. Do you notice your anxiety level rising when you accidently leave your smartphone at home? Start to break the cycle of addiction by intentionally leaving it behind. Alter- natively, leave it behind in your car.

Digital Sabbath. Choose one day out of the week where you completely unplug for a 24-hour period. Before you go to bed, intentionally power down all of your digital devices and commit to staying unplugged until the next night. If this isn't possible, start with a shorter block of time.

Understand your intention. When you are reaching for your smartphone while waiting at the checkout line at the grocery store, ask yourself, "What is my intention or reason for checking my phone?" Is it because you're bored? Fear of missing out? Is it habitual? Are you overcommitted to work? Understanding your intention for why you are checking your email again may help you see your patterns with the digital device more clearly.

Being kind to ourselves isn't an intellectual exercise. It's not about making a list of good things you should do for yourself. It's not about spoiling yourself. The benefits of being kind to ourselves come from "living the question." Pose questions such as:

- How can I be kind to myself?
- How do I care for myself?
- How can I nurture myself?
- How can I nourish myself?
- What do I truly desire?

As you do, the brain develops a different way of

thinking. Instead of forcing yourself to be chained to the desk until a task is completed, perhaps you'll get up to stretch your legs and get a glass of water.

Working with your inner critic

Many of us walk around life with the constant chatter of the inner critic. The inner critic is that voice, the broken record in your mind that says you're not good enough, smart enough, and asks questions such as, "Who do you think you are?" The inner critic never misses an opportunity to point out your imperfections, your shortcomings, and all the things you dislike about yourself. This week as part of our practice of self-compassion, we'll tune in to this inner dialogue and begin to work with it.

Note that you have this inner critic because it serves some function (either currently or has in the past). We cannot get rid of the inner critic but, rather, we can redirect it so it's useful. You may pose a question to your inner critic such as, "What is your purpose for showing up" or "What are you afraid of?" By looking at the inner critic head-on, you are able to look at the underlying beliefs or concerns and rationally choose your response.

To begin, let's start by acknowledging we are imperfect beings. Yet, there is perfection in our imperfection. We can't have the parts of ourselves we like without the parts of ourselves we dislike. You come as a whole package. As you practice, notice when the inner critic comes up. Instead of becoming critical of the inner critic, bring a sense of gentleness to yourself.

In the box below, write five positive traits about yourself that are easy to accept. If your friend said, "You're smart," for example, is that easy or difficult to accept about yourself? How about "You're attractive"? Next, write five negative traits about yourself that are also easy to accept. For example, you might be bad at math or lousy at golf.

Now, consider five positive traits that are difficult to accept. For example, if someone said, "You're very generous," is that easy or difficult to accept? Try to allow yourself to be honest without judgment about these traits.

Finally, write five negative traits that are difficult to accept. Could it be that you're short tempered and can't admit it? That you're disorganized? Include whatever negative qualities you want to deny about yourself in this last column.

Pay attention to your inner dialogues that use the words such as should or never. For example, "A good lawyer should always ..." or "A good lawyer would never ..."

Now, imagine all the lines in the chart have been erased and you didn't label anything positive or negative. See if you can bring your mindfulness practice into play here and simply look at the list as being representative of who you are as a whole human being, with flaws, imperfections, struggling to do your best—just like everyone else. Remember, the practice of mindfulness is to accept what is (including yourself) without preference or judgment. This doesn't close the door to change, improvements, or internal shifts. The invitation is to see yourself and the limiting beliefs you have about yourself—in this moment.

After you've completed this exercise, ask yourself: How does that make me feel? Does that change how I view myself?

It's important to remember that this list of positive and negative traits is dynamic. It can expand or shrink; however, you can't do this selectively. The entire list must expand or contract. You can't only choose to accept the positive traits, while rejecting the negative. Be open to all life experience and bring a sense of non-judgmental awareness to it.

Continued in the orange box on page 24

	Easy to accept	Difficult to accept
Negative		
Positive		

Recent gifts to the Foundation*

Ryan Calvert
Jon English
Tony Fidelie
Mike Fouts
Wally Hatch
David Holmes Jr.
Jana Jones
Raquel Jones
Rob Kepple
Rob Kepple *in memory of Skip Cornelius*
Bud Kirkendall *in memory of Jim Vollers*
Julie Renken
Randall Sims
Alden & Barbara Smith *in memory of Jim Vollers*
Beth Toben *in honor of Roy DeFriend, Jeff James, & Rob Kepple*
Brad Toben

* gifts received between October 7 and December 8, 2023

Award winners at the KP–VAC Conference

TOP PHOTO: Sara Bill, Victim Assistance Coordinator in Aransas County, was honored with the Oscar Sherell Award, which is given to someone for exceptional service to TDCAA. Sara is pictured (on the left) with Jalayne Robinson, TDCAA's Victim Services Director (right). BOTTOM PHOTO: Amber Dunn, Victim Assistance Coordinator in Denton County, was named the Suzanne McDaniel Award winner, which goes to the VAC who exemplifies the qualities of its namesake: advocacy, empathy, and the constant recognition of the rights of crime victims. Amber is pictured on the right with Jalayne on the left.

'How can I be kind to myself?'

For this week, ask yourself the question, "How can I be kind to myself?" You don't need to find any answers to the question. The assignment is to simply pose the question and let it go. As the question percolates through your mind, you may notice you naturally come up with a list of answers. This exercise isn't about doing any of the things to be kinder to yourself. It's simply to open the possibility of being kind in order to cultivate self-compassion.

Put a reminder on your calendar to do this practice. You can also use other cues to practice. For example, you might do this exercise each time you wash your hands, brush your teeth, or stop at a red light.

It's important to remember that the purpose of this exercise isn't to come up with the "right answer" or any answers at all. The reason for not answering the question is twofold. First, it's too easy to fall into the trap of "I should be kinder to myself and I'm failing at that because I'm not doing x, y, and z." The practice of self-compassion isn't doing anything to be kinder to ourselves. It's not about taking ourselves shopping or getting an extra large scoop of ice cream. (Although all of these actions may be part of your self-compassion practice.) It's about cultivating an attitude of kindness and compassion. Second, the practice is to build up the muscle of self-compassion. We want to dial down the inner critic that's constantly at work. By asking the question without any pressure to come up with the answer, we're trying to reduce the tendency of the inner critic to take charge by coming up with "the right answers." Pay careful attention to any answers that have the word should; for example, "I should be exercising everyday and I should be eating more vegetables." ❇

Endnote

Justice delayed by a vociferous defendant

On March 21, 2020, 21-year-old Emilia Gunnels left her parents' house in Sherman to spend an evening with two coworkers.

By J. Brett Smith
Criminal District Attorney in Grayson County

Earlier in the week Emilia had agreed to hang out with Joe Toscano and Ebby Wade at Wade's apartment to play video games. The three worked together at a FedEx distribution center. At some point in the evening, unknown to Emilia, Joe texted Wade to say he had messed up his schedule and could not make it to their get-together.

Emilia never came home that night.

By the early morning hours of the following day, Emilia's mother was frantically texting and calling both her daughter and Ebby Wade. Emilia never responded to the calls or texts, and her phone went straight to voicemail. Wade told Emilia's mother that she left his apartment around 9:00 p.m. to return home.

Emilia's family contacted the Grayson County Sheriff's Office to report her missing, and family members began immediately searching for Emilia's car. A 911 dispatcher contacted Emilia's cell phone carrier and discovered that Emilia's phone last pinged at 8:55 p.m. the night she went missing. The ping came from a tower near Ebby Wade's apartment. Within an hour of the initial call to the sheriff's office, Emilia's car was found in a nearby apartment complex, just down the road from Wade's apartment. When deputies arrived, they immediately began canvassing the complex and located a doorbell camera that captured Emilia's black Nissan backing into a parking space. The person parking the car appeared to be a man, who exited the car and locked the door. This man had a subtle but distinctive limp.

Within hours, sheriff's investigator called a K-9 officer to the scene. A bloodhound scent tracker named Red was given a hairbrush from Emilia's car to establish a known scent. The K-9 immediately tracked Emilia's scent and quickly located the fob for Emilia's car keys on a nearby highway. The keys were in a direct route to Wade's apartment, just a third of a mile down the road.

By that evening, investigators contacted Wade and conducted a non-custodial interview. He claimed Emilia has been at his apartment to play video games and that their coworker Joe was supposed to be with them, but he never arrived. Investigators asked about the nature of the relationship between Wade and Emilia. Wade said they were just friends but admitted he was sexually attracted to her. Wade claimed she was not interested in anything more than friendship, and he denied they had ever had sexual relations.

The next morning, investigators continued their work: interviewing Emilia's family, sending preservation orders to Facebook for Emilia's and Wade's Facebook records, obtaining search warrants for cell phone records, and obtaining surveillance videos from dozens of nearby businesses. Meanwhile, a street crew working for the city was out checking bridges to clear debris due to recent rain when a worker discovered the partially nude body of a young woman. The body was positively identified as Emilia.

Investigators invited Wade to the sheriff's office for a second non-custodial interview. He again claimed he and Emilia had never had sexual relations and denied having anything to do with her disappearance or death. The investigator's body camera did, however, capture Wade walking into the interview room with a slight limp.

A subsequent autopsy revealed Emilia had died from strangulation. At the request of investigators and per standard practice of the Dallas County Medical Examiner's Office in a strangulation case, swabs were taken from her vaginal and anal body cavities. Emilia's Nissan was taken to the DPS Crime Laboratory in Garland, and a latent print was discovered near the trunk release; it was subsequently confirmed to be from Wade's left index finger.

In January 2021, the DPS Laboratory confirmed that Wade's DNA was found on both swabs taken from Emilia's body. Wade was arrested for murder and placed into custody at the Grayson County Jail. His bond was initially set at a million dollars, but later reduced to $750,000. Wade was unable to post bond and was detained pending disposition of the charge.

The long journey

Shortly after his arrest Wade hired an attorney (Attorney No. 1). We presented the case to a grand jury, and an indictment was returned for murder. Almost immediately after the indictment, Wade's retained counsel filed a motion to withdraw, which the court granted. The Court appointed another attorney (No. 2) for the defendant. Within months, the defendant began filing *pro se* motions and complaining about his court appointed counsel. After about a year and following a hearing about the *pro se* motions and complaints, the court allowed Attorney No. 2 to withdraw and appointed a new attorney (No. 3) for the defendant.

One of his new attorneys filed a Motion to Suppress Evidence and a Motion to Recuse the District Attorney's Office from the case. The defense was seeking to suppress evidence that the State had already told them would not be presented to a jury.

A few months into the new representation—because trial was nearing and discovery was voluminous—the trial court appointed a second-chair attorney (No. 4) to represent Wade. The case proceeded and discovery was, once again, delivered to the new attorneys. (The defendant continued to request by handwritten motion to represent himself.) Following a hearing and the proper admonishment under *Faretta v. California*,[1] the defendant's request was granted. The defendant represented himself for six weeks, during which time the State provided all his discovery on an external hard drive, along with a computer in the jail. In addition, the State arranged on several occasions to permit the defendant to inspect the autopsy and crime scene photographs at our office. Eventually, the defendant requested his attorneys be put back on the case.

Despite the new counsel, the defendant continued to file *pro se* motions. The handwritten motions were often mailed to the court and not served on the State or even filed with the district clerk's office. Wade filed motions challenging the legality of many issues, including his arrest, the issuance of search warrants, the subsequent Facebook search warrants, etc. He also filed a multimillion-dollar lawsuit in federal court (also *pro se*) claiming his arrest was unlawful and unjustified and that his civil rights were violated by the sheriff's office, the Texas Rangers, several judges who signed numerous search warrants and his arrest warrant, and the prosecutors handling his case. However, because the defendant failed to serve any of the defendants, the civil suit did not proceed. (The suit had no impact on the prosecution of his case.)

One of his new attorneys filed a Motion to Suppress Evidence and a Motion to Recuse the District Attorney's Office from the case. The defense was seeking to suppress evidence that the State had already told them would not be presented to a jury. The court set the matter for a hearing, which became very heated, particularly when defense counsel accused both the prosecutor and lead investigator of violating the defendant's rights as it related to a defense request to inspect the defendant's cell phones. Almost immediately after the court's ruling, which denied both the suppression and recusal motions, one of his court-appointed attorneys filed a Motion to Withdraw. The State had prepared the case for trial in January 2023. The trial was continued and Attorney No. 4 was allowed to withdraw from representation. Appointed counsel (No. 3) was still hanging on and another attorney (No. 5) was appointed to assist No. 3.

The State announced ready in May 2023; however, the defense was granted a continuance. By June, Wade once again requested to represent himself and, following a subsequent *Farretta* hearing, the request was granted. Our office continued to provide discovery, filings, and motions to both the defendant and his attorneys. Arrangements were also made for the defendant and his counsel to inspect evidence in our office if requested. We provided defense counsel with all communications from the defendant, including those to our office, the court, and anything filed with the district clerk. These communications were handwritten letters, often in the form of motions and requests for and complaints about discovery. Our goal was to ensure defense counsel was kept abreast of all the defendant's filings and any responses from our office.

The defendant filed additional *pro se* motions, including a Motion to Continue the third pending trial setting, complaining that because he now elected to represent himself, he should be granted a continuance to review discovery and develop trial strategy. But on September 6, 2023, the Court of Criminal Appeals handed down a decision in *Huggins v. State*.[2] The Court noted that appellant Noel Huggins did not have the right to

repeatedly alternate his position on the right to counsel and to delay the trial; Huggins did not meet his burden of showing that the withdrawal would not interfere with the orderly administration of court business, result in unnecessary delay or inconvenience, or prejudice the State.

The timing of the *Huggins* decision was perfect. During our final pretrial hearing, we cited *Huggins* and reminded the court that "an accused's right to represent himself or select his own counsel cannot be manipulated so as to obstruct the orderly procedures in the courts or to interfere with the fair administration of justice."[3] The Court agreed with the State's position and denied the defendant's last-minute request for a continuance.

The State announced ready on October 16, and the case proceeding to a jury trial. The court had Attorneys Nos. 3 and 5 attend as standby counsel. We conducted voir dire and spent a significant amount of time on the issue of self-representation. It is common practice for our office to spend a few minutes of every voir dire discussing the various rights of the defendant (right to remain silent, right to confrontation, right to a trial, etc.), which allows the State to control some of the narrative regarding the defendant's constitutional rights. In this case we discussed the defendant's constitutional rights to self-representation in detail. We did so in the context of explaining that I, lead counsel, have more than 20 years' experience as a prosecutor and my second chair, Kerye Ashmore, has been a prosecutor for over 40 years. We asked the jury if they would expect us to conduct the trial of this case any differently simply because the defendant chose to represent himself. We also explained that despite the fact the defendant made a decision to represent himself, the State still had the burden of proof and still had would still be calling nearly 40 witnesses and presenting nearly 300 trial exhibits. Jurors overwhelmingly agreed that the defendant was making a poor decision to represent himself and that the State should prosecute the case just like any other trial.

Following jury selection, we began presenting our evidence. By the end of third day, the defendant told the judge he no longer wanted to represent himself, and his standby counsel took over. We believe the defendant finally realized exactly what we had promised all along: a very strong circumstantial evidence case that was starting to stick like Super Glue. Standby counsel took over and the case proceeded for another day and a half. The State appreciated the court's position of having standby counsel attend the entire trial and ordering them to assume the job of lead counsel once the defendant threw in the towel on representing himself.

The trial lasted just over four days. After closing arguments, the jury deliberated for about six hours before returning a verdict of guilty on the murder charge. The defendant immediately requested, once again, to represent himself during the punishment phase of the trial, and the judge granted his request. The State had very little evidence in punishment, other than reminding the jury of the horrific nature of this crime. Just like we told Emilia's family from day one, this case was always about a guilty verdict. We had no doubt what a Grayson County jury would do if we got to punishment. The defendant, however, got up during his opening argument and told the jurors they "got it wrong"—an assertion that allowed the State to follow up: We pointed to all 13 jurors (included an alternate) and reminded each person, "You got it right, and you got it right, and you got it right ..." until we had confirmed that every juror reached the correct verdict of guilty. Following a much shorter deliberation, the jury sentenced him to life in prison.

In a subsequent hearing, the defendant advised the court he desired to represent himself on appeal. That appeal is pending.

Jurors overwhelmingly agreed that the defendant was making a poor decision to represent himself and that the State should prosecute the case just like any other trial.

Conclusion

Emilia Gunnels came from a very large and close-knit family. Her mother and father raised six other siblings, and all eight members, plus a few friends and in-laws, attended each and every day of trial. Upon the guilty verdict and subsequent life sentence, we could sense a tremendous burden has been lifted from the family—at long last, their 3½-year wait for justice had arrived. During the course of more than three years, we had meetings with the family to discuss the defendant's arrest, his indictment, pretrial hearings and procedures, and just general meetings to discuss trial strategy. We also spent a significant amount of time preparing this family for each and every trial setting, as we called at least four family members as witnesses during the trial. The testimony of Emilia's mother, father, sister, and brother were extremely emotional parts of the trial. There was even one point where the judge had to dismiss the jurors while the Emilia's

Continued in the orange box on page 28

Photos from our PMI: Elected Edition course

mother started crying during my direct examination about the night her daughter didn't come home. She had to take a minute to compose herself.

A very wise prosecutor once told me to "think with my head and not my heart." It is good advice to avoid both emotional decision-making and empathy fatigue, but that advice was hard to follow in this case. Despite what I knew was best for me as a prosecutor, my heart simply could not help but hurt for this family and what they had been through. Our whole trial team developed a relationship with the Gunnels family, which we anticipate will continue forever.

The ruling in *Huggins* had a direct impact on our ability to finally move this case to trial. The decision is important for courts, prosecutors, and defense counsel. No longer will vociferous defendants be allowed to delay justice, so long as their rights are properly safeguarded. ❇

Endnotes

[1] 422 U.S. 806, 835 (1975).

[2] *Huggins v. State*, No. PD-0590-21 (Tex. Crim. App. Sep. 6, 2023).

[3] *Huggins* citing *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976).

NDAA's response to the American Bar Association's 2023 Plea Bargain Task Force

Earlier this year, the American Bar Association (ABA) Criminal Justice Section Plea Bargain Task Force issued a report[1] critical of the practice of plea negotiation in American courtrooms as "impermissibly" coercive, insufficiently transparent, and subject to manipulation by allegedly unethical prosecutors practicing in front of complacent judges, all to the detriment of public faith in the legal system.

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Because we believe that the report does not accurately portray what is happening in America's halls of justice, the National District Attorneys Association (NDAA), as the voice of America's prosecutors, provides this response.

We value collaboration and communication and stand ready to work with the ABA on improving the quality of justice. Unfortunately, this report, as well-intentioned as it may be, does not serve the interests of criminal defendants, crime victims, or community safety.

While the task force's criticisms are broken down into 14 "principles," it is fair to categorize them as resting on one of two alleged flaws with the plea negotiation process:

1) in the process of plea negotiation, the State has impermissible leverage; and

2) there is a lack of oversight and transparency that permits abuses of that leverage.

As to the first alleged flaw, the presumption that the prosecutor holds all the cards in a plea negotiation is not accurate. A prosecutor is not the final determinator of a plea result. It is critically important to acknowledge the role of the defendant's attorney in the evaluation and negotiation process. Equally important are the prosecutor's dual burdens of both proof and persuasion and the duty to disclose in advance all witnesses and evidence in a case whether or not that evidence is admissible at trial. The evidence can point both to guilt or to innocence, and it frequently contains elements of both. The plea is a result of a negotiation between both parties, with each side taking into account the potential risk of a poor result. In sum, there is nothing impermissible about plea negotiations.

Nevertheless, the report concludes that a substantial difference between a plea offer and a post-trial sentence must "reflect a penalty for exercising one's right to trial." The notion of a trial penalty is based on a false assumption. It assumes that the accused's constitutional rights to silence, assistance of counsel, due process, cross-examination, an impartial jury, and other elements of a fair trial have not been honored—but only if the result is a conviction. In this false scenario, all convictions become a penalty while all acquittals are justice for the accused. The assumption that a trial penalty exists also fails where the jury returns a mix of convictions and acquittals, which frequently happens in tried cases.

The false "trial penalty" argument ignores the fact that the greatest discrepancies between the offered plea and the post-trial sentence frequently manifest where the defendant had the greatest power and control: those cases where a key witness is "in the wind"; where a victim is reluctant to endure the horror of reliving her trauma by testifying in front of 12 strangers; or where there were real grounds for both sides to anticipate an unfavorable jury verdict. In a rational world where the decision is to go to trial,

there is no penalty for an acquittal. It logically follows that there is no penalty for conviction. The only remorse comes when the outcome at trial produces a result that the accused considers worse than the lost opportunity to negotiate a better offer.

In addition, the report also ignores the fact that the prosecutor has no more than persuasive influence on a post-trial sentence. The defendant's counsel has equal influence. Judges alone decide the appropriate sentence.

As to the second alleged flaw, the idea that a plea agreement is not transparent is false. While a guilty plea is negotiated outside the public view, it is put forward as an agreement of both parties, and it is reviewed and accepted or rejected by a judge. By law or by practice, it is communicated to victims, who have the opportunity to express their opinions to the prosecutor and the judge. It is subject to scrutiny by the public, the press, and the voters. It is recited in open court and supported by a factual basis. It has consequences for the State and the defendant and sets informal precedence within the prosecutor's office and the jurisdiction's state bar.

Having already referenced the oversight of courts, victims, and the public, it is important to note that there are robust practical and ethical requirements for a prosecutor who contemplates extending a plea offer, which are set forth in NDAA's National Prosecution Standards §5-3.1. Those standards are ignored by the task force.

The task force's report also omits any discussion of the real values of the plea process. By failing to call for the abolition of plea agreements, it implicitly recognizes the practical necessity of resolving some cases by means other than a trial. But there are other values to the plea system, notably:

1) A plea is often an instrument of leniency. There is perhaps no more striking answer to the "trial tax" accusation than prosecutor-led diversion. All across the nation, prosecutors have taken the lead in offering criminal defendants a way out of the criminal justice system.

2) A plea provides certainty for a defendant. The report nowhere mentions the legions of defense attorneys who daily seek and receive plea offers for their clients for a wide variety of reasons, not least of which is a more certain outcome.

3) A plea provides finality to the legal process. For the community as a whole, not to mention victims in particular, there is a value to the legal process coming to an end. A fair and just disposition is also a vibrant and transparent part to justice.

4) A system in which any sizable percentage of cases is tried would be massively more expensive and would overwhelm the criminal justice system. Taken seriously, the task force's recommendations would require spending on the criminal justice system never seen in the history of the nation and not likely to be politically feasible in the future.

Any human system is subject to criticism. Prosecutors who misuse the plea process and act with malice make up only isolated incidents across a very broad spectrum of successful negotiations. There is no mass abuse of a voluntary negotiation process. In fact, NDAA has provided the standards by which to judge them, not to mention the disciplinary processes available through state bar associations. The report pays little attention to those processes, to the judges who oversee them, to Bar associations that may impose disciplinary action, and to the zeal and expertise of the defense attorneys who participate in this process every day.

Prosecutors are committed to serving their communities by providing fair and equal justice for all and allowing defendants the opportunity to accept responsibility, with the advice of their counsel and the oversight of a neutral judge who is integral to an effective and just system. The task force, lacking local prosecutor representation, missed the opportunity to engage with the broader prosecution community and, as a result, failed to perceive the realities on the ground that certainly do not call for sweeping change to the nation's system of plea negotiation. ❇

Endnote

[1] Access a copy of the report at www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

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