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"The primary duty of an attorney representing the state ... is not to convict but to see that justice is done."
Art. 2A.101, Texas Code of Criminal Procedure

Tips for managing your time well

Without exception, when we at TDCAA ask people who attend our conferences what kind of training they'd like in the future,

Compiled by Sarah Halverson
TDCAA Communications Director in Austin

the answers are about handling heavy caseloads and managing their time. While we can't magically make all crime disappear, we *can* publicize how several prosecutors across the state keep track of deadlines, complete tasks, and stay on top of their workloads. Read on for their best tips for doing a hard job well.

Tara Avants
Assistant Criminal District Attorney in McLennan County

One of the great things about being a prosecutor is that our days are unpredictable. As we all know, one plea agreement or reset case can shift the entire day's focus. I realized within a few weeks that my to-do list would rarely be completed by the end of the day. I now have a "running to-do list" specific to each case that I'm actively preparing for trial, along with a to-do list for projects that do not have an urgent deadline. These lists keep me organized and help me to manage which tasks are currently the priority.

Erik Nielsen
Assistant District Attorney in Travis County

It's nothing earth-shattering, but my shortcut to time management is that my email inbox doubles as my to-do list. First off, it's usually how people request actions from me, so I don't need to retype it out. Also, it comes automatically dated so I know when the task was assigned. Plus, in our database (TechShare) there is a hyperlink to my email address with the cause name/number/etc. auto-filled in the body of the email, so it's easy to initiate the email without having to type all of that necessary information myself.

If something important gets too far down the list, I can always resend it to myself so it pops back up in the more recent items. And the satisfaction of moving an email out of my inbox into the general folder seems to be the digital equivalent of crossing something big off a written to-do list—in some cases, it's absolute bliss.

Calli Bailey
Assistant Criminal District Attorney in Collin County

I should start by acknowledging that I am very much a Type A (bordering on OCD) person. I've made lists for years. I am organized. I am not a procrastinator (at least 90 percent of the time). I am not going to "put off tomorrow what I can do today" because it just adds to the to-do list. I've also always said that there are two types of people in the world when it comes to time management and organization: those who can't stand the red badges on the Messages, Phone, and Mail

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Strange days indeed

Nobody told me there'd be days like these / Strange days indeed / Most peculiar, mama
—Lyrics from "Nobody Told Me," John Lennon (1977)

By Shannon Edmonds
TDCAA Executive Director in Austin

'The Rupture'

"The Rupture." That's my nickname for that roughly six-month span from March to September 2020 when the world turned upside down. (And yes, it's a word play on "The Rapture.") Even now, five years later, when I get asked when something happened that I cannot specifically recall, I may use "pre-Rupture" or "post-Rupture" as a shorthand reference, especially in regard to a time when things seemed "normal."

Before the global pandemic.

Before the stock market crashed and the economy went into recession.

Before George Floyd's killing and the resulting protests and riots.

Before school doors stayed locked.

Before paralysis hit courthouses throughout the state.

Strange days indeed.

Today, even though many of us have tried our best to return to something that feels normal, we still suffer from the fallout of The Rupture, especially when it comes to the recruitment and retention of high-caliber public servants to serve our local communities. In the following columns, I'd like to focus on how we all might work together to recover from it.

The damage

At the macro level, The Rupture resulted in—or at a minimum, greatly contributed to—an erosion of cultural and political norms and an increase in the distrust of core institutions in our country. For example, there has been a dramatic decrease in the public's favorable opinion of the courts after The Rupture. Between 2020 and 2024, national confidence in our judicial system dropped 24 percentage points, from 59 percent to 35 percent.[1] And among Texans, the favorability rating for the courts and the criminal justice system went from roughly even (36 favorable / 39 unfavorable) to a net –22 percent (26 favorable / 48 unfavorable).[2]

Within our profession, we also heard frustration and dissatisfaction with changing work conditions at the micro level, first from a loss of office camaraderie and connection when people had to socially distance themselves in the office or work from home (WFH), and again when some who came to enjoy the WFH lifestyle were asked to return to the office on a regular basis. But hey, I'm not telling most of you anything you don't already know, right? *We all lived through it.* The question is: Where do we go now?

The repair

At its core, your local criminal justice system is a three-legged stool that remains in balance only when all three legs are strong. Those legs are you (prosecutors), the defense bar, and judges. And of those three legs, prosecution is by far the most communal, especially in suburban and urban jurisdictions operated by more than just one elected prosecutor and a small staff. That larger model was the type of office in which I cut my prosecutor teeth, and I still have fond memories (and lifelong friends) from my first job out of law school. Serving my larger (geographic) community as part of a team that was its own smaller (professional) community within the courthouse

[1] Gallup, December 2024; https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx.

[2] Texas Politics Project, June 2022; https://texaspolitics.utexas.edu/set/courtscriminal-justice-system-favorability-june-2022.

was not just rewarding, it was *sustaining*—it helped me cope with bad outcomes and overcome challenges both inside and outside the office.

Experts who have analyzed the current post-Rupture malaise often cite personal loneliness and lack of community as two of primary drivers behind people's current unhappiness. To restore the attractiveness of our profession—both for those considering joining it and for those already in it who are deciding if they want to stay—we need to restore the positive sense of community and *esprit de corps* within our offices that used to exist before The Rupture. Having a shared sense of mission—and working within an office culture in which the employees are aligned from top to bottom in a way that accomplishes that mission—is something unique to prosecution in our courthouses, and it can be attractive to those who lack that in their private or professional lives. Great friendships are also formed in the crucible of the courtroom because shared burdens bind people together in positive ways that can last a lifetime.[3] And one silver lining to The Rupture's unanticipated disruption is that it gave offices that previously had a negative or non-affirming culture an opportunity to start anew and create something that makes people want to work there.

To restore the attractiveness of our profession–both for those considering joining it and for those already in it who are deciding if they want to stay–we need to restore the positive sense of community and esprit de corps within our offices that used to exist before The Rupture.

But how?

But how does a prosecutor's office make that obvious to potential employees in a manner that draws them in? Re-establishing the good aspects of prosecutor office life that were lost in The Rupture sounds easy in theory but may prove harder in practice. Many of us entered the profession with that kind of culture and community already in place, so we were not privy to how it was originally formed. This is where I'd like to ask for your help to crowdsource successful ideas to share with others.

What has your office done to improve morale and *esprit de corps* internally? What have you done to shape your community's external view of your office in a positive way? If you'd like to share things that have worked—or missteps to be avoided—please send them my way so I can spread that good advice among your peer offices and strengthen our profession as a whole.

Recognition

One way to support our profession is to recognize those who go above and beyond the public's expectations for prosecutors, and TDCAA can help with that. At its most recent meeting in June, TDCAA's Board of Directors confirmed the following award recipients for 2025:

Prosecutor of the Year: **Tonya Ahlschwede**, 452nd Judicial District Attorney, Mason

Lone Star Award: **Jacquelyn Johnson**, Asst. County & District Attorney, Rockport

Kepple Award: **Mike West**, Asst. Criminal District Attorney, Tyler

C. Chris Marshall Training Award: **Glen Fitzmartin**, Asst. Criminal District Attorney, Dallas

These awards will be presented at the opening reception of our Annual Conference in September. I hope you can join us to celebrate these prosecutors and their well-deserved recognitions!

Looking ahead

I hope to have some good tips to share with everyone on that front in our next issue. Meanwhile, we here at TDCAA continue in our mission to equip you to better serve your communities, both geographic and professional, by sharing the experiences of others in our profession. As the Good Book says, "Iron is sharpened by iron; one person sharpens another" (Proverbs 27:17).

In that spirit, we are pleased to offer you a plethora of iron-sharpening articles in this issue, ranging from an overview of a prosecutor's successful domestic violence diversion court (page 12), to tips on topics ranging from oral arguments (page 39) to checking jurors' criminal history backgrounds (page 45), to some humorous-yet-thought-provoking rules for practicing law as a government attorney. And we kick off all of that (and more) with a cover story on a topic that is always at the top of the "I need help with" list from our conference attendees: time management. So please, set aside some of your precious time to review this issue, and hopefully you will discover things that will improve your ability to serve your community. ❇

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[3] For an interesting post-Rupture reflection on this phenomenon in general, see "The magic of your first work friends," *The New York Times*; www.nytimes.com/2022/07/14/business/work-friends.html.

Correcting false testimony and doing our primary duty

The movie version of Robert Bolt's play *A Man for All Seasons* swept the Oscars in 1966.

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

It seems to be largely forgotten now, except for a few law nerds who love it for one particular scene that contains a beautifully rendered illustration of the rule of law. Near the end of the first act, the Lord Chancellor of England, Sir Thomas More, is on stage with his wife Alice, his daughter Margaret, and his future son-in-law, William Roper. Richard Rich, whose dangerous ambitions have alarmed them all, has just departed, and Alice, Margaret, and William urge More to arrest him because he is a bad, dangerous man. More refuses, saying that Rich has broken no law. Exasperated, More's wife bursts out:

> *Alice More:* While you talk, he's gone!
> *Sir Thomas More:* And go he should, if he were the Devil himself, until he broke the law!
> *William Roper:* So, now you give the Devil the benefit of law!
> *Sir Thomas More:* Yes! What would you do? Cut a great road through the law to get after the Devil?
> *William Roper:* Yes, I'd cut down every law in England to do that!
> *Sir Thomas More:* Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat?

Fidelity to the rule of law means that the right process is more important than any outcome, and for that reason prosecution can be hard on your heart. Despite our best efforts, despite doing everything right, sometimes what we (or the public) think of as the "right thing" just doesn't happen. Sometimes a ruling isn't what we think it should have been or a jury doesn't follow what we laid out for them, and you lose a case you should have won. In those moments of heartache or disappointment, it's hard not to think that "the system" didn't reach the right outcome and let us down.

But did it really? Having an independent judiciary, a jury of the defendant's peers, and a defense bar committed to the protection of the accuseds' rights means to some extent that disappointment for the prosecutor is inevitable—it's baked into the system. We're never going to get every outcome we want or ask for, and we shouldn't. The alternative is a society where the government's power to do as it sees fit goes unchecked by the courts or the citizenry. I am not saying we should be happy when we lose a case that we feel we should have won, only that we can't be so focused on getting the "right" outcome that we lose sight of the system and the law that restrains us.

Bearing that in mind, we must be experts on not only what the law requires us to prove, but also on how it requires us to ethically do so. This column involves a recent opinion of the U.S. Supreme Court, *Glossip v. Oklahoma*,[1] which deals with the prosecutor's constitutional duty to correct testimony he or she knows to be false under *Napue v. Illinois*.[2]

Background

Richard Glossip was the live-in manager of an Oklahoma City motel owned by Barry Van Treese. Glossip hired 19-year-old Justin Sneed as the motel's handyman, allowing him to live in the

[1] 145 S. Ct. 612 (2025).

[2] 360 U.S. 264 (1959).

motel as payment. Sneed had a history of violence, angry outbursts, and abuse of marijuana, methamphetamine, cocaine, and LSD.

In late 1996, owner Van Treese began to suspect, after checking Glossip's accounting, that the manager was allowing guests to stay at the motel off the books and pocketing the money. On January 6, 1997, Van Treese visited the motel and confronted Glossip about the discrepancies, and after discovering unregistered guests, he threatened to report Glossip to the police. Hours later, after Van Treese had gone to bed at the motel, handyman Sneed entered the room and beat Van Treese over the head with a baseball bat, killing him.

Sneed evaded arrest for several days, but Glossip, the manager, was interviewed by police shortly after the murder. Glossip stated that Sneed knocked on his door that night and had a bump on his head that looked "like somebody punched him," which he said Sneed attributed to a fall in the shower. Glossip denied knowledge of the murder but admitted that he helped Sneed replace a broken window in the room where the body was later found, telling police that he hadn't seen the body because he was replacing the window from the outside. Police arrested Glossip the next day in front of an attorney's office with $1,700 in cash, and in his subsequent interview, he admitted Sneed had told him that "he killed Barry." Glossip said that he was scared to tell the truth in the first interview because he was afraid that his failure to notify police immediately would make him look like he was involved.

Police eventually located Sneed and arrested him with $1,680 in blood-covered cash on his person. When he was interviewed, police told Sneed that they did not think he had acted alone and that he should not "take the whole thing" on himself.

Police eventually located Sneed and arrested him with $1,680 in blood-covered cash on his person. When he was interviewed, police told Sneed they did not think he had acted alone and that he should not "take the whole thing" on himself. They told Sneed that "everybody" was making him "the scapegoat in this," especially Glossip, who was "putting it on [him] the worst." Sneed first told police that his brother was responsible, but he eventually said that Glossip wanted to steal Van Treese's money and the death was a robbery gone wrong. He stated that he stole Van Treese's car and found an envelope there containing $4,000, which he split with Glossip. When pressed by police, Sneed added that "actually," Glossip had asked him to kill Van Treese so he "could run the motel without him being the boss."

The trials

Glossip and Sneed were both charged with capital murder, and Glossip was offered a deal to plead guilty and avoid the death penalty in return for testifying against Sneed. Glossip maintained his innocence and refused the same deal that was offered to Sneed, who accepted. Glossip was sentenced to the death penalty, but the Oklahoma Court of Criminal Appeals (OCCA) unanimously reversed on grounds of ineffective assistance of counsel. The OCCA noted that Sneed's testimony was the only direct evidence connecting Glossip to the murder, and that "the evidence at trial tending to corroborate Sneed's testimony was extremely weak."[3] Accordingly, Glossip's defense counsel's failure to cross-examine Sneed on his many inconsistent statements was "so ineffective" as to undermine any "confidence that a reliable adversarial proceeding took place." Glossip again rejected a plea offer and was tried again.

In the second trial it was established through the medical examiner that the victim had been attacked with a knife as well as a baseball bat, and although Sneed had denied stabbing Van Treese to police at the first trial, he now said that he had done so repeatedly. The prosecution also asked Sneed whether anyone had prescribed him any medication, and he testified that he had been prescribed lithium by mistake:

> Q. After you were arrested, were you placed on any type of prescription medication?
> A. When I was arrested, I asked for some Sudafed because I had a cold, but then shortly after that somehow they ended up giving me lithium for some reason, I don't know why. I never seen no psychiatrist or anything.
> Q. So you don't know why they gave you that?
> A. No.

Sneed testified that he used marijuana and "crank" (methamphetamine) "twice a week" prior to his arrest, and he testified that Glossip's motive for the murder was robbing Van Treese of his money and getting him out of the way so Glossip could take over the motels that Van Treese owned;

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[3] *Glossip v. State (Glossip I)*, 29 P.3d 597, 599 (Okla. Crim. App. 2001).

Glossip had also threatened to fire Sneed if he did not kill the owner because of room remodels that had not been completed. The State, in its closing argument, weaved these motives together with the original theory that Glossip was caught embezzling, further arguing that Sneed was "satisfied and contented with [his] humble life" and that he had no propensity for violence, had Glossip not pushed him to commit the murder. Glossip was sentenced to death a second time, and a divided OCCA affirmed. [4]

Post-conviction

Glossip's subsequent state and federal habeas petitions did not result in relief, but they did attract the attention of a bipartisan group of 62 Oklahoma legislators who retained the law firm of Reed Smith LLP to conduct an independent investigation. Reed Smith's full report in June 2022 expressed "grave doubt" as to the integrity of the conviction and sentence.[5] The report found that the prosecution had deliberately destroyed "key physical evidence" before Glossip's retrial, including items from the crime scene and the motel's receipts and deposit books, which could have helped Glossip address the accusations of embezzlement. The report also said the State had falsely portrayed Sneed as Glossip's "meek and non-violent puppet," using the testimony of a now-former police officer who was later jailed for making false statements.

Two months after the report was issued, the State disclosed seven boxes of documents that had been withheld from Glossip's trials. The boxes included notes from the lead prosecutor to Sneed's attorney expressing reservations about the medical examiner's report and Sneed's statements about the knife. This revelation led to allegations that the State had violated the Oklahoma Court's Rule of Sequestration (similar to our Tex. R. Evid. 614, "the Rule") during Glossip's retrial by providing Sneed, through his attorney, information regarding testimony given by other witnesses. The boxes also contained letters from Sneed to his attorney expressing a desire to recant his testimony prior to Glossip's second trial. Another post-conviction writ was filed, and the OCCA held that Glossip's claims were both procedurally barred and without merit.

Shortly after, the State found *another* box of trial documents, which included a page of handwritten notes from the lead trial prosecutor during a pretrial interview with Sneed indicating that he was on lithium not by mistake, but through a "Dr. Trumpet," who was determined to be psychiatrist Dr. Larry Trompka. Dr. Trompka had been working at the county jail at the time of the trial. Sneed's medical records, withheld from the defense, indicated that he had been treated with lithium for his undisclosed bipolar disorder. Glossip filed another petition for post-conviction relief arguing actual innocence, *Brady* violations, and cumulative error; he also argued that the State's failure to correct Sneed's false testimony about being mistakenly prescribed lithium violated *Napue v. Illinois*.[6] The State agreed and confessed that *Napue* error had been committed, which, taken with the destroyed and withheld evidence, warranted a new trial. Because Glossip and the State were in agreement, no evidentiary hearing was held.

The OCCA disagreed that there had been a *Napue* violation and held that Glossip's post-conviction claim was both procedurally barred and without merit, even though the State had confessed error.[7]

Glossip petitioned the Supreme Court of the United States (SCOTUS), and the Court granted certiorari and stayed the execution pending its decision.[8] The Court also directed the parties to brief and argue an additional question: whether the Oklahoma Court of Criminal Appeals's holding—that the Oklahoma Post-Conviction Proce-

The report found that the prosecution had deliberately destroyed "key physical evidence" before Glossip's retrial, including items from the crime scene and the motel's receipts and deposit books, which could have helped Glossip address the accusations of embezzlement.

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[4] *Glossip v. State (Glossip II)*, 157 P.3d 143 (Okla. Crim. App. 2007).

[5] Independent Investigation of *State v. Richard E. Glossip*, Final Report, Reed Smith LLP (June 7, 2022) (retrieved May 25, 2025 at www.reedsmith.com/en/news/2023/03/reed-smith-glossip-investigation-releases-new-findings-evidence-withheld).

[6] 360 U.S. 264 (1959). *Napue* held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," including when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*. at 269. The falsehood in *Napue* occurred when an accomplice testified that the Assistant State's Attorney had made no promise of consideration in return for his testimony, when in fact he had promised to recommend a reduced sentence.

[7] *Glossip v. State*, 529 P.3d 218 (Okla. Crim. App. 2023).

[8] *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024).

ure Act (PCPA) precluded post-conviction relief—is an adequate and independent state law ground for the judgment.[9] Because the State agreed with Glossip, the Court appointed Christopher G. Michel as amicus curiae to argue in support of the OCCA's judgment.[10]

As the judges saw it

The U.S. Supreme Court reversed in a 5–3 ruling.[11] Writing for the majority, Justice Sotomayor first addressed the additional question it directed the parties to address: whether the Court had jurisdiction to review the OCCA's judgment under the independent and adequate state ground doctrine. The Court found that the doctrine was not a bar here, because the OCCA's procedural ruling rested on a misapplication of federal law (as discussed below, Justice Barrett concurred with the Court as to this holding). The OCCA explained in both this case and others like it that it will normally reject the State's confession of error only "after finding that it lacks a basis in the law and in the record." Accordingly, the procedural question rests on an underlying question of law, which in this case involved *Napue* and was thus federal. Because the OCCA's resolution of the procedural issue depended on its determination that no *Napue* violation had occurred, a mistaken ruling on that federal question was not a jurisdictional bar to SCOTUS review.

Justice Sotomayor then addressed the heart of the matter: the *Napue* violation. Sneed had also testified in a pretrial hearing and told a competency evaluator that he was given lithium for dental pain after having a tooth pulled, but the jail psychiatrist, Dr. Trompka, attested by affidavit that 1) lithium is only used as a psychiatric medication and 2) he was the only medical professional at the jail who would have issued that prescription. Sneed's testimony that he received lithium after asking for Sudafed and that he had never seen a psychiatrist was accordingly false, and the record supported the State's confession of error. The OCCA had held that no violation had occurred because the defense "was aware or should have been aware" Sneed had been prescribed lithium and the prosecution could not have knowingly concealed something the defense already knew, but the Court stated that was a mistaken application of *Napue*. For one, the false testimony concerned *why* he was prescribed lithium, not merely that he was taking it. Secondly, the OCCA's finding that Sneed's testimony was not "clearly false" because Sneed was likely in denial of his mental disorder was unconvincing and irrelevant: "What matters is that his testimony was false and a prosecutor knowingly let it stand nonetheless."[12]

The Oklahoma Court of Criminal Appeals's finding that Sneed's testimony was not "clearly false" because Sneed was likely in denial of his mental disorder was unconvincing and irrelevant: "What matters is that his testimony was false and a prosecutor knowingly let it stand nonetheless."

Justice Sotomayor further found the State was aware that Sneed's testimony was false based on the State's access to his medical file regarding the competency evaluation and the pretrial notes showing that the State was aware that he was prescribed lithium from Dr. Trompka. When considered in conjunction with the additional misconduct of violating the rule of sequestration, destroying evidence, and withholding witness statements, the *Napue* violation was material.[13] Credibility was paramount; Sneed's testimony was the only direct evidence of Glossip's involvement in the murder. The Court did not accept the amicus's argument that the impeachment evidence was already overwhelming and that the *Napue* violation could not have added to it. Correcting Sneed would have shown the jury that Sneed was willing to lie on the stand under oath; even if his bipolar disorder itself were irrelevant,

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[9] *Id*.

[10] *Glossip v. Oklahoma*, 144 S. Ct. 715 (2024). Michel, now a partner at Quinn Emanuel, is a former attorney in the U.S. Solicitor General's Office and former law clerk to Chief Justice Roberts. Despite the Court's rigorous treatment of the amicus's arguments, the opinion approvingly noted that Michel "ably discharged his responsibilities." *Glossip*, 145 S. Ct. at 624.

[11] Justice Gorsuch recused himself and did not participate; no reason was given but presumably it was because he had participated in Glossip's previous post-conviction litigation while a judge of the U.S. Tenth Circuit Court of Appeals.

[12] *Glossip*, 145 S. Ct. at 630.

[13] Materiality under *Napue* requires "the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Bagley*, 473 U. S. 667, 680, n. 9, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (quoting *Chapman v. California*, 386 U. S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); *Glossip*, 145 S. Ct. at 627. Stated another way, a new trial is warranted if there is "any reasonable likelihood" the false testimony could "have affected the judgment of the jury." *Napue*, 360 U.S. at 271.

his lie was not. The Court concluded that the prosecution's failure to correct Sneed's trial testimony violated the Due Process Clause and that Glossip was entitled to a new trial.

Concurrence and dissent

Justice Barrett concurred in part and dissented in part. She agreed with the Court's opinion as to the adequate and independent grounds doctrine, although she stated it was "a closer question for me than it is for the Court."[14] Citing *Michigan v. Long*,[15] she noted that the OCCA did not "make clear by a plain statement" that the lower court was relying on state law independent of Glossip's federal claims, and she further noted that the OCCA's opinion can be read to say that the court's procedural holding was based on the merits of Glossip's federal claim, which it denied based on a mistaken reading of *Napue*. Justice Barrett agreed with the majority that the question was not whether the witness subjectively believed he was lying, but whether the prosecution knowingly presented false testimony. Because Sneed's testimony was the primary evidence offered by the State to show Glossip's involvement, being corrected by the prosecutor could have made the critical difference in whether a juror found guilt proven beyond a reasonable doubt. If Sneed gave false testimony and if the prosecutor knew it was false, then there was a *Napue* violation and the OCCA was wrong as a matter of federal law.

Those "ifs," however, are where Justice Barrett parts ways with the majority. The Court opined that the State's confession of error was enough to warrant reversal for a new trial, and that the written documentation clearly demonstrated that Sneed lied and the prosecutor knew it. But this was not at all clear to Justice Barrett, who observed that the prosecutor's notes were difficult to parse and that the prosecutor may well have been confused by the reference to "Dr. Trumpet." Justice Barrett would have held that the lower court is better equipped to make these factual findings, and she believed the Court was exceeding its appellate role in making those findings in its place. She would correct only the OCCA's misstatement of federal law and vacate the judgment, leaving the OCCA to order an evidentiary hearing and make findings of its own.

Justice Thomas sharply dissented, joined by Justice Alito and in part by Justice Barrett (as it concerns the need for an evidentiary hearing). Justice Thomas criticizes the majority for its reading of the independent state grounds doctrine, the *Napue* decision, the facts of the case, and the need for an evidentiary hearing to present the evidence and arguments raised by the family of Barry Van Treese.

Justice Thomas accused the majority of "stretching the law at every turn" to rule in Glossip's favor, beginning with the jurisdictional question, in which he stated the Court "concocts federal jurisdiction by misreading the decision below."[16] Thomas observed that Oklahoma's Post Conviction Procedure Act governing post-conviction law closely mirrors the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[17] as to when it allows subsequent applications. That is, the applicant must show that "the factual basis for the claim" was not previously "ascertainable through the exercise of reasonable diligence"; and the applicant must demonstrate that "the facts underlying the claim" would, if proved, "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death."[18] Thomas wrote that the OCCA's opinion that the "State's concession was not based in law or fact" was not merely based on the Napue violation, but also on the lack of actual innocence evidence and the diligence requirement, which he says are strictly a matter of Oklahoma law. Thomas points out that a forensic psychologist's report prior to Glossip's first trial strongly suggested that Sneed was taking lithium to treat bipolar disorder or a similar condition, and that the defense was well aware of this prior to the second trial. Glossip's appellate counsel in his direct appeal from the first trial had faulted his trial counsel for not using the report to show the jury that Sneed was taking lithium to control his anger, but defense counsel chose not to raise it in the second trial.

Justice Thomas accused the majority of "stretching the law at every turn" to rule in Glossip's favor, beginning with the jurisdictional question, in which he stated the Court "concocts federal jurisdiction by misreading the decision below."

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[14] *Glossip*, 145 S. Ct. at 634 (Barrett, J., concurring in part and dissenting in part).

[15] 463 U.S. 1032, 1041 (1983).

[16] *Glossip v. Oklahoma*, 145 S. Ct. at 636 (Thomas, J., dissenting).

[17] 28 U.S.C. §2244(b)(2)(B).

[18] Okla. Stat. Tit. 22, §1089(D)(8)(b)(1), (2). This is similar to the subsequent-writ bar found in Tex. Code Crim. Proc. Art. 11.07 §4 and 11.071 §5.

Turning to the merits, Justice Thomas finds that even if the Court had jurisdiction, Glossip does not show he is entitled to a hearing on his Napue *claim.*

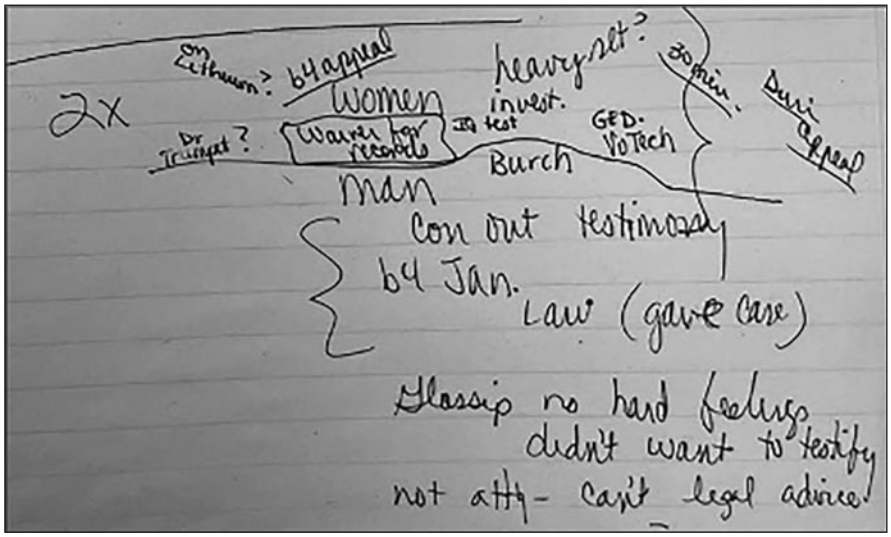
Because the OCCA expressly stated that the diligence and actual innocence requirements were not met even considering the State's confession, in Justice Thomas's view the decision rested on independent and adequate state grounds that the Court had no jurisdiction to review.

Turning to the merits, Justice Thomas finds that even if the Court had jurisdiction, Glossip does not show he is entitled to a hearing on his *Napue* claim. He asserts that the Oklahoma high court correctly held that Sneed's false statements were not material because the defense already knew about Sneed's condition but strategically decided not to use it, perhaps believing that highlighting his poor mental health would show his vulnerability to Glossip's manipulation. He criticizes the majority's recitation of *Napue*'s admonition ("[a] lie is a lie, no matter what its subject") because the Court omits what immediately follows: "*and, if it is in any way relevant to the case*, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."[19] Thomas reasons that treating any false statement regardless of content as material because it undermines a witness's credibility renders the materiality requirement meaningless.

Justice Thomas further criticized the majority's finding that a *Napue* violation had been definitively shown in the first place. In the lead prosecutor's notes from a 2003 meeting between her, her co-counsel, Sneed, and his attorney, she had written "on Lithium?" and "Dr Trumpet?" A copy of those handwritten notes in the body of the dissent is below.

Glossip's current counsel stated that these phrases meant that Sneed had admitted during the meeting he had been prescribed lithium by the psychiatrist at the county jail. Referring to the amicus brief filed by the victim's family, Thomas pointed out that the two prosecutors disagreed with this interpretation, saying that the notes simply record that Sneed told her that Glossip's defense team had asked him about his use of lithium and about "Dr Trumpet," and that Sneed recounted that he had responded to questions about lithium and Dr. Trompka with his earlier story that he was prescribed lithium in error after having his tooth pulled. Thomas argued that this interpretation was explained at great length by the Van Treese family's brief, but "as of yet, no one—including the parties and the majority—has attempted to refute it on the merits."[20] He further faulted the independent counsel for failing to give the trial prosecutor a meaningful opportunity to explain what her notes may have meant or what she knew about Sneed's medical history—despite requests from the Van Treese family to speak with her.

For these reasons and others, Thomas states that even if the majority were correct in the jurisdictional and merits analyses, the appropriate remedy is to vacate the OCCA's opinion and allow the lower court to conduct an evidentiary hearing, saying, "This Court has no authority to order a new trial."[21] Thomas castigates the majority for rejecting the family's arguments because it relies on "extra-record materials not properly before the Court," yet denying them the opportunity to present it in an evidentiary hearing. He ended with, "Make no mistake: The majority is *choosing* to cast aside the family's interests. I would not."



The takeaway

Glossip is notable for how it will impact post-conviction litigation, particularly what constitutes adequate and independent state grounds that limit federal review. At the trial level, it makes clear that a *Napue* violation is not dependent on whether the witness thinks he is lying, but on

[19] *Napue*, 360 U.S. at 269–70 (emphasis added in *Glossip*).

[20] *Glossip*, 145 S. Ct. at 642 (Thomas, J. dissenting).

[21] *Id.* at 658.

whether the prosecution knowingly allowed a witness to testify falsely—regardless of the witness's subjective belief—without having corrected him. *Napue* applies equally to falsehoods that the prosecution did not elicit, and it's accordingly just as important for a prosecutor to scrutinize the testimony of the witnesses presented by the State for falsehoods and errors as it is defense witnesses. It's easy to be taken by surprise when this happens, so mental preparation on the steps to be taken when it does are important. Falsehoods, even mistaken ones, must be corrected without any regard to how doing so hurts the State's case.

But there's another broader takeaway from *Glossip*, and it's a good reason to delve into opinions dealing with prosecutorial ethics when they issue: refocusing on exactly what our job is and our role in the criminal justice system. Getting the "right" outcome isn't our paramount duty. Echoing *Berger v. United States*,[22] the Code of Criminal Procedure lays out our highest duty: "The primary duty of an attorney representing the State, including a special prosecutor, is not to convict but to see that justice is done." [23] Not to seek justice but to *see that justice is done*. Seeing that justice is done means enforcing criminal law and discharging our obligations to the public and to victims of crime, but that's not all it means. Seeing that justice is done means upholding the law that protects the accused and ensuring they receive the due process to which the law entitles them. It rests on the shoulders of defense counsel and the courts as well, but it must start with prosecutors. ❇

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[22] 295 U.S. 78, 88, 55 (1935) "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

[23] Tex. Code Crim. Proc. Art. 2A.101 (formerly Tex. Code Crim. Proc. Art. 2.01).

Call for nominations for the Suzanne McDaniel Award

The Suzanne McDaniel Award is given each year to a person employed by a county attorney, district attorney, or criminal district attorney's office, whose job duties involve working directly with victims, and who has demonstrated impeccable service to TDCAA, victim services, and prosecution.

The person selected for this award should exemplify the qualities that were so evident in Suzanne herself: advocacy, empathy, and the constant recognition of rights of victims. The criteria necessary for an individual to be nominated are as follows:

- The person must be employed by a county attorney, district attorney, or criminal district attorney's office;
- At least a portion of the individual's job duties must involve working directly with victims; and
- The person must have demonstrated impeccable service to TDCAA, victim services and prosecution.

Should you choose to nominate someone, please keep in mind that the person does not have to work in your office or even in your TDCAA Region, as long as he or she meets the criteria above. Anyone in a prosecutor's office may make a nomination. To nominate someone, please provide the nominee's name, office of employment, phone number, and a description no longer than 100 words of why you believe the person deserves this award. This information should be emailed directly to Jalayne.Robinson@tdcaa.com.

Nominations are due by 5:00 p.m. on Friday July 25, 2025. ❇

A success story about a Domestic Violence Court

Prosecutors' dockets are overrun with domestic violence cases. It's hard to balance the sheer volume of cases sitting on your desk with notions of justice.

By Kristin Burns
TDCAA Domestic Violence Resource Prosecutor in Austin

Statistics from the Texas Office of Court Administration (OCA) back up how you're feeling, proud Texas prosecutor. The OCA reports there were more than 39,000 new misdemeanor family violence cases added to the existing 37,000 cases from 2023. And these misdemeanor offenses are usually handled by the newest prosecutors in the office.

The OCA also tells us there were about 13,800 new felony DV cases in 2023—this, on top of the already-pending 14,000 such felonies. Which tells us that plenty of offenders are graduating from misdemeanors to felonies. And if they didn't "graduate" from misdemeanor to felony by way of prior convictions, the facts of the offenses are severe (hello, strangulation cases).

But one Texas prosecutor office has been handling certain DV offenders differently. These prosecutors have been identifying abusers who deserve the State's intervention, oversight, and ultimately a dismissal of their DV cases. And what if I told you that so far, the recidivism rate for those who have graduated from this program is *zero*? Sound too good to be true? I thought so as well. But that was until I learned about an insightful program from our friends in South Texas.

Let me introduce you to the Domestic Violence Court (DVC) in Hidalgo County.

I sat down with Alex Benavides, First Assistant Criminal District Attorney, and Amy Bayona, Chief of the Domestic Violence Unit in Hidalgo County, several weeks ago so that they could explain their program and how it could be implemented across the State of Texas. It is a specialty court only for domestic violence offenders, and it identifies defendants who are at risk of entering the felony family violence world and thus need substantial intervention. Its goal is to minimize any future criminal behavior, but specifically domestic violence.

Once accepted into the program, these defendants are required to work hard. They are held accountable. And in the end, if they are successful in the eyes of the State of Texas, their cases are dismissed. Hidalgo County has astonishing success rates—no new family violence arrests from program graduates—and Alex and Amy want to teach us more about what they're doing.

Defendant criteria

The program is for misdemeanor offenses, primarily second-time domestic violence offenders or those whose first offenses are severe enough to warrant substantial early intervention. These are cases where the harm, while not legally classified as a felony, is serious enough to demand early and focused attention from the State; sometimes the injuries are significant, or other times the defendant's behavior (when taken in full context) signals a risk that we cannot ignore.

Defendants can apply for the program either in a pre-trial diversion case or a post-conviction condition of community supervision, the distinction being that dismissal is the result for the pre-trial diversion cases. Defendants must be referred by the DA's Office or the Domestic Violence Court Judge Rodolfo "Rudy" Gonzalez.

Upon referral the defendant completes an application, a Texas Risk Assessment Source (TRAS) assessment, and if relevant, an Addiction Severity Index (ASI) assessment. Additional requirements include the payment of restitution to include property damage and medical expenses,

full compliance with all bond conditions originally imposed by the magistrate court, and no harmful contact with the victim. Defendants must not have any open warrants in any jurisdiction, and they cannot have any pending felony cases or prior felony convictions. Both the defendant and the victim must be adults. Defendants are also required to pay a $250 application fee, supervision fees, and the cost of classes and drug tests throughout the program. About 30 defendants are referred each month, and around 10 of those are accepted into the program.

The application process

The application includes the defendant's personal information, employment, criminal history, prior contact with law enforcement, and substance abuse history. The document, a copy of which is available on TDCAA's website (look for it with this article in the Journal section), clearly defines the program, the principals of operation, eligibility, and terms and conditions for participation. Defendants waive their right to a speedy trial, to discovery under Code of Criminal Procedure Art. 39.14, and their right to an expunction of records within the Hidalgo County Criminal District Attorney's Office. The waiver of the expunction is important should the defendant reoffend down the road. Alex and Amy want future Hidalgo County prosecutors to see the prior case and opportunity the defendant was given.

My personal favorite part of the application is the "Statement of Accused: Voluntary Acceptance of Responsibility for Facts of Offense." This page-long section cuts out more offenders than the prosecutors' already critical eye. If there is a single "but she" excuse or justification for the defendant's violent behavior, then the defendant has not demonstrated that he is in the right mindset for acceptance into the program—off to the traditional court you go, sir. Defendants must accept full responsibility for their assaultive, violent, and controlling behavior toward a member of their family to be accepted in the DVC program. If you, as the defendant, are not willing to accept full and complete responsibility for your conduct without placing any blame on the victim, then you are in no way worthy of the grace this program offers. This single page of the application probably predicts more success and failure than any other part. It could also potentially be used as a great tool in therapy, both for the defendant's accountability and for the victim to see the abuse is not her fault—despite what her abuser may be saying behind closed doors.

The final stage of the application process is that two members of the DA's office review all applications for the program and ultimately, acceptance is up to the State.

The team

The team who holds these defendants accountable consists of a prosecutor, a member of the public defender's office, a probation officer, a counselor, a clinical supervisor, a program coordinator, and the judge. Each member of the team is present during court settings to provide both encouragement and accountability to defendants. They also give feedback in the event of violations.

Defendants are given an individualized treatment plan after an evaluation by a counselor. This plan is not a cookie-cutter, one-size-fits-all approach!

The program

Defendants are given an individualized treatment plan after an evaluation by a counselor. This plan is not a cookie-cutter, one-size-fits-all approach! Treatment plans are implemented over the course of four phases and last between one and two years. Each phase is rigorous with both individual and group therapy, anger management, Batterers Intervention and Prevention Programs (BIPPs), meetings with probation officers, meetings with the DVC team, and court settings.

Phase One includes weekly appearances in court and with probation.

Phase Two changes to bi-weekly court contact and probation meetings. This is also when cognitive behavioral treatment (group counseling) begins. Unique to this phase is the addition of one-on-one meetings with Judge Gonzalez.

Phase Three transitions to monthly court contact with probation. Phase Three is when individual therapy is added to the plan and sub-

DV Court prosecutors Amy Bayona (left) and Christina Saldivar-Garcia (right) in the Criminal DA's Office in Hidalgo County.

stance abuse treatment, if necessary (based on an ASI evaluation).

Phase Four requires monthly contact with both the court and probation. In Phase Four the focus shifts to transitioning into the community and the defendant's use of coping skills that they (should have) learned in the first three phases.

There is a focus on mental health treatment through both individual and group therapy throughout the process. Other terms and conditions are like those of a standard probation: no new offenses, no drugs or alcohol use, restitution for property damage, and payment of court costs and court appointed attorney's fees. Clearly, defendants are not allowed contact with victims that is threatening, harassing, or violent in nature. Some defendants are required to comply with protective orders if requested by the victim or warranted by the facts.

But it's not all rules and punishments. There are rewards for progress and positive results too! Incentives can include gift cards, fewer required court appearances, phase advancement and recognition amongst your peers. If there is no pressure like peer pressure, there has to be no reward like being propped up in front of your peers—except for the big incentive, a dismissal.

Since the program's inception in 2017, 190 participants have been selected. Of those, 96 have graduated, and there have been zero repeat family violence offenders for those graduates!

Funding

This program was started in Hidalgo County in March 2017 by a grant initially funded through Governor Greg Abbott's office. When the grant wasn't renewed for a few years during the Covid-19 pandemic, they turned to county commissioners for assistance. Presently, the program is sustained by a $129,020 allocation from the commissioner's court as well as grant funding, which was recently renewed. It pays annual stipends for each member of the team (prosecutors, defense attorney, probation officer, counselor, support staff, and the judge), provides incentives to the participants, and compensates court and probation staff for their additional time and work.

Participants themselves also partially offset some of the costs. They pay a $250 application fee, monthly supervision fees, and the costs of any classes or treatment required under their individual plans. The financial contribution is practical and reinforces accountability – a theme of the program and the participants' success.

Violations

Should a defendant violate the terms and conditions of the program, the team evaluates those violations for possible sanctions. Sanctions can include verbal admonishment from the judge, modification of the treatment plan by adding classes or conditions to the treatment plan, time in jail, or removal from the program. If a defendant is removed from the program, he agrees upfront that he will be sentenced for the underlying offense. Sanctions are discussed with the team comprised of the prosecutor, a defense attorney, a probation officer, a counselor, and the judge, but the judge decides the sanction. While the judge can be a bit forgiving with sanctions, the decision to remove a defendant from the program or to dismiss a case lies solely in the discretion of the State.

Since the program's inception, only 25 participants have been sanctioned, while four have been removed.

Results

Since the program's inception in 2017, 190 participants have been selected. Of those, 96 have graduated, and there have been *zero* repeat family violence offenders among those graduates! That's right: Not a single graduate of the DVC program has reoffended with a new domestic violence charge, according to records kept by the team and Judge Gonzalez.

But the program's impact goes beyond numbers. Prosecutors in Hidalgo County report that participants leave the program with more insight into their behavior, stronger coping skills, and often, healthier relationships. Graduating defendants deliver an acceptance speech as they receive their certificates of completion. Many point to a common skill they've learned to use in place of violence: communication. "I never knew how to communicate with my spouse, or communicate what I was thinking or going through," says one graduate who wished to remain anonymous. The real measure of the DVC program lies in the change it fosters—in defendants, in their relationships, and in the system's approach to domestic violence. Prosecutors, counselors, and defense attorneys alike describe participants who begin to take real ownership for their actions, develop healthier ways to cope with stress, and build lives less shaped by control and violence. That kind of transformation is difficult to quantify, but its impact is undeniable.

A DV court for your jurisdiction

Not all counties will be on board with the cost associated with a specialty court. Some are hesitant

to apply for grants, and for others, commissioner's courts simply don't have the budgets. However, these results are outstanding. The selective criteria for identifying those repeat offenders most in need of dramatic and invasive intervention has proven worth the time and expense in Hidalgo County. There is certainly an argument that implementing a similar program is far more helpful to the long-term safety of victims than the practice of "anger management class and dismissal" or just "dismiss because ..." approaches.

If you can't get the funding for a specialty court by way of grants or through your commissioners, might I suggest adding conditions such as these to an existing plea? While it won't have the result of a dismissal, it could have the long-term effect of change. For one thing, switch out anger management courses in favor of Batters Intervention and Prevention Programs (BIPP). Here's why: We have learned over time that defendants do not have an issue with controlling their anger—domestic violence is more about power and control—so anger management courses aren't as helpful in DV situations. The BIPP curriculum must meet the requirements of the TDCJ-CJAD Guidelines to qualify and is targeted to the needs of domestic violence defendants. The chances of a defendant learning the lessons (to not hit again, to not control their partner, and that power does not exist as a weapon in a healthy relationship) are much higher from BIPP than anger management.

Add individual or group therapy (or both!) to your plea paperwork. Maybe include the "phase" approach to probation reporting requirements with an officer who has specialized training in domestic violence dynamics. Take the post-conviction aspect of the Hidalgo County model and use that to your advantage. If we can help reduce the number of new cases coming into your office because we are changing the mindset of defendants, that's a win! And that, my friends, is what they are doing in Hidalgo County with this program.

But maybe you really like this program's pretrial aspect, but you still don't have the money for a specialty court. That's OK. Try these requirements as bond conditions with a pre-trial diversion probation officer. You may not have the team oversight of a DVC, but go back to the olden days when the prosecutor, the probation officer, and your office's investigator checked in on people. Under this method, defendants must provide proof that they have completed the work (therapy certification, BIPP classes, the "phase" approach to probation officer meetings, no new offenses, etc.), and their reward can be a dismissal. It puts the onus on the defendant to be proactive in completing the work and turning in proof of completion to either you or a pre-trial diversion probation officer. Or, if you don't want to keep track of 15 defendants, spell the requirements out in painstaking detail, including what type of classes and where they can be found, then make the defendant turn in the proof—to his attorney. If they want the dismissal, they can organize compliance. But keep in mind that the reason the Hidalgo County method works is that we are not simply checking boxes. Defendants are digging deep and working hard to discover the root of problems. Please shy away from simple box-checking and make the defendant earn the reward, or you will likely see him again.

I would also submit that this is not a practice for every DV case on your desk. The goal is to provide treatment for those who engage in domestic violence and to do it in a way that is more intrusive and that requires more commitment from the defendant. These prosecutors are attacking the problem by treating defendants on the verge of entering felony court. By offering them a big reward for completing the program, they incentivize defendants to dig deep and reflect on why they commit these crimes in the first place. Prosecutors are picky about whom they accept in the program, and once they accept applicants, they hold them accountable. The lack of family violence recidivism speaks for itself.

There's certainly more than one way to skin a cat. Maybe attacking domestic violence with a specialty court program will cut into your caseload, reduce recidivism, and keep victims in your county safe—as it's done in Hidalgo County. ❇

If you can't get the funding for a specialty court by way of grants or through your commissioners, might I suggest adding conditions such as these to an existing plea? While it won't have the result of a dismissal, it could have the long-term effect of change.

Texas Prosecutor Society scholarship reminder

In March, the Foundation Board announced a scholarship program for Texas Prosecutors Society (TPS) members who are former prosecutors who would still like to enjoy the camaraderie (and excellent MCLE!) at TDCAA conferences but may be short on the registration fee.

By Rob Kepple
TDCAF Executive Director in Austin

It is a great idea to ensure that those who have contributed so mightily to the profession still get to be a part of it. This year the Annual Criminal and Civil Law Conference is at the Kalahari Resort in Round Rock September 23–25 (Tuesday through Thursday this year). If you are a former prosecutor and a TPS member who wants to attend and needs the scholarship, please contact me at Rob.Kepple@tdcaf.org.

TPS member in the spotlight: General Kyson Johnson

Many of you have had the good fortune to work with **Kyson Johnson**, a prosecutor with the Texas Department of Insurance (TDI) for the last 20 years. Kyson got the prosecution bug after a short stint in personal injury law, and he joined the County and District Attorney's Office in Grayson County. He made a life-altering decision soon after to join the Judge Advocate General Corps in the Army. I doubt Kyson could have expected the whirlwind of a career to follow, including being a prosecutor in Iraq in 2004 for the Abu Ghraib prisoner abuse trials, or ending up as the director of the TDI prosecution program. To top it all off, Kyson was promoted to Brigadier General in November 2024.

It is with gratitude that we congratulate Kyson on his retirement in May from the Texas Department of Insurance. We will sure miss his work in state court, but I am personally thrilled that he will still be seeking justice within the ranks of the U.S. Army! ❇

Recent gifts to the Foundation*

Kerye Ashmore
Kimberly Blackett
Shawn Connally
Amy Derrick
Rob Kepple *in Honor of Dean Robert Fertitta*
Rob Kepple *in Honor of Dean Brad Toben*
Rob Kepple *in Honor of General Kyson Johnson*
Lance Long
Karen McAshen
Natalie McKinnon
Tiffany McWilliams
Karen Morris *In Memory of Tom B. & Evalyn Morris*
Rebecca Morton *in Honor of Jessica Ramos Dunbar*
Kurt Sistrunk
Wayln Thompson
Beth Toben
John Wakefield III
Melinda Westmoreland

* gifts received between April 5 and June 6, 2025

Photos from our Civil Law Conference

Gerald Summerford Award winner

Carlos Madrid (on the right), Assistant County Attorney in El Paso County, was honored with the Gerald Summerford Award (Civil Practitioner of the Year). Brian Klas, TDCAA Training Director (on the left), presented it to him. Congrats!

Photos from our Advanced Writing & Appellate Advocacy Course

A photo from our Fundamentals of Management Course in Austin

Tips for managing your time well (cont'd from the front cover)

icons on our phones and must clear and sort them, and those whose personal email accounts have 5,000-plus unread messages. I can't even fathom the latter.

But as I entered the professional world—and frankly, as I inherited more supervisor-type responsibilities and also became a mom—the regular to-do lists just weren't working for me anymore. I used to pride myself on "making a mental note" to do that later and actually doing it, but I don't have the brain capacity for that anymore. (That was hard to admit in writing.) I also used to keep handwritten to-do lists or stickie notes all around my office, but who wants to admit that the longer the sticky note and the list sit there, the more we look past it?

So today I live and die by the calendar and reminders apps on my smartphone, which is basically attached to me every hour of the waking day as an extension of my arm. Calendar events must include alerts that annoy me as they fan across my screen or stay stuck on my locked screen until I clear them. Same thing with the reminders app. These alerts force me to consciously address them at the time and date I had previously set, or I can consciously choose to reset them for another time and date. Examples of things that go on the calendar include filing deadlines for cases set for trial or indictment deadlines for inmates in custody awaiting grand jury. A reminder alert on my separate app may include that I need to call this person back, discuss a certain situation with my supervisor, or prepare my summary and indictment for grand jury next week.

If I take the time to actively look at my calendar and place my to-do list and reminders at dates and times where it is feasible or realistic for me to accomplish them, then it helps me manage my time better. Much of this is probably something you already do here and there, but consider whether you were like me and you had to come to the harsh realization one day that the sticky notes or mental notes just weren't cutting it anymore. Make your smartphone good for something other than just doom-scrolling or texting. Make it your virtual assistant that will alert you repeatedly until you actually accomplish your task.

Will Hix
Assistant Criminal District Attorney in McLennan County

The first time that I shifted into an assignment where management of the docket for a court rested with me, it felt overwhelming. Over and over people (bosses, court staff, and judges) would tell me how many "cases" there were on the docket. What I quickly realized is that how many "cases" there are is not a useful metric to track in terms of the overall workload. I transitioned to tracking how many "unique defendants" had charges pending in the court I oversaw. By altering my focus to a better data point, focusing aggressively on the unique defendants with the most charges pending first, we were able to reduce the overall "cases" pending in the district court by over 50 percent in under two years.

Andrea Westerfeld
Assistant County & District Attorney in Ellis County

For me, everything goes into my Outlook calendar, whether personal or work-related, so I can see at a glance what's going on and where any conflicts might pop up. Everything is color-coded so I can easily tell what is a deadline, court appearance, meeting, etc. Everything also gets a reminder set to make sure I don't forget about it. Some things I might want a reminder just the day of, while others I set a reminder days or a week out to make sure I am reminded in time to work on it. I use the Outlook calendar for all of this because I can access it on my phone as well, whether in court trying to set a new hearing date or at home trying to schedule a trip.

But in addition to all of my digital reminders, I also heavily use Post-It notes to write down specific tasks that crop up so I can have them laid out on the desk in front of my computer monitor. That keeps a visual reminder, and balling up the note and throwing it away is much more satisfying than a check on a to-do list.

Joshua Sandoval
Assistant Criminal District Attorney in Bexar County

Whenever I am working with new prosecutors or with members of my team, I encourage them to set measurable goals. Take your to do list and

convert it into a collection of manageable goals. Instead of telling yourself, "I really need to work on my aggravated robbery case," consider saying, "I am going to print out defense motions on my aggravated robbery case and respond to them Tuesday afternoon.'

The benefit of adopting a goal-centered mindset is that work is clearly identified and the success (or lack thereof) can be quantified. Specificity helps keep us focused on a task at hand, and creating measurable goals helps us to chart our progress. Used in tandem, these two tools can help us to work more efficiently and maximize our time.

Kristin Burns
TDCAA Domestic Violence Resource Prosecutor

I'm currently listening to an audio book called *Four Thousand Weeks: Time Management for Mortals*. The idea is that humans have only 4,000 weeks to live, and the author's pitch is that, with this terrifyingly, insultingly short amount of time, the real measure of any time management technique is whether or not it helps you neglect the right things.

For me, even before this startling realization that I only have 4,000 weeks to live on this lovely planet, I had to accept the absolute set-in-stone fact that the to-do list will *never be done*. It's hard for perfectionists like me, and so many prosecutors, to accept—we love to check things off the list—but it's the truth. The list will never be finished. There is always more to complete tomorrow and the day after and the day after. And that is OK. It doesn't make you a failure!

That said, for the things that need to be done, I love a good old-fashioned Post-It note. There is nothing fancy about it. When I was a prosecutor, I carried a notebook or yellow pad with me in docket and made notes to myself with things that needed to be done on cases in court. Then when I got back to the office, I finished as many of those things as could be done right then and there (making notes in Odyssey, our case management software, of course).

For the things that couldn't be done immediately, I wrote myself a reminder on a Post-It with the defendant's name and the task, which was my daily reminder that the task was still pending. Once it was done, I could throw that note away. Nothing fancy here—just a Post-It note. The goal was to remove all the Post-Its by the end of the week. (Sometimes they were gone, but most weeks they were not.) I also used this method for returning phone calls or contacting victims. Really, any "to-do" note or list will work. I've come to find out there are digital versions of my old friend the Post-It note—check out an app called Todoist if you're into the digital version.

Ryan Calvert
First Assistant Criminal District Attorney in McLennan County

You cannot die on every hill. Only two types of cases exist in the world: 1) those cases you really *need* to try and 2) every other case that you need to find a way to resolve. If you are trying a case over very minor conduct or over a marginal disagreement about punishment, you may be wasting time and effort that could be better spent elsewhere.

That said: You have as much right to a jury trial as the defendant does. If there is a case you *want* to try and the defendant previously rejected a reasonable plea offer, you are under no obligation to re-extend that offer or to make a new one. Get in there and be a trial prosecutor.

Editor's note: We'd like to hear other people's tips for good time management! Please email yours to the editor at Sarah.Halverson@tdcaa.com so we can publish another article on the topic in a future issue. Everyone who submits a tip will receive some TDCAA swag as a thank-you. ❇

I had to accept the absolute set-in-stone fact that the to-do list will never be done. It's hard for perfectionists like me, and so many prosecutors, to accept–we love to check things off the list–but it's the truth.

Provisions to consider with insurance and contracts

One aspect of drafting or reviewing contracts includes adding or revising insurance provisions.

By Andrew Wipke & Jennifer Fox
Assistant County Attorneys in Fort Bend County

In larger, more urban counties, the decision whether to incorporate or modify insurance provisions in a contract may rest with a risk management department or similar internal entity. These larger counties often previously developed insurance provisions tailored for certain agreements, such as those for construction or vendor services on county property.

However, in other jurisdictions, this process may not be as streamlined. Having worked across five separate counties, the authors have experienced that in smaller jurisdictions, risk management departments are often nonexistent, and little guidance is established to ascertain what insurance provisions should ultimately be incorporated into a given agreement. Rather, this decision may be left to the sole discretion of the attorney reviewing the contract.

This article is not a primer on contract drafting.[1] Instead, it provides a general overview of common insurance provisions and potential provisions to consider incorporating into an agreement regarding insurance. As such, the authors acknowledge this article is generally directed to practitioners in smaller jurisdictions and includes information we wished we learned when previously employed in more rural counties.

Threshold inquiry

There are many types of insurance and insurance coverage. Broadly construed, insurance "is a contract by which one party for consideration assumes particular risks on behalf of another party and promises to pay him a certain or ascertainable sum of money on the occurrence of a specified contingency."[2] A requisite component of an insurance contract is the shifting or distribution of risk.[3]

Not every governmental contract will require insurance coverage. Rather, insurance provisions in certain agreements are unwarranted. For example, if a vendor is shipping television mounting brackets to your jurisdiction, insurance provisions are probably not needed. However, if the same vendor is shipping and then installing these brackets on your property, insurance provisions may be necessary to ensure that any personal injuries or property damage resulting from their work is covered.

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[1] Other TDCAA articles examine those topics. See generally Bushra F. Khan, "Government contracts–let's negotiate," *The Texas Prosecutor* (May–June 2024) at 16; Amy Davidson, "The civil approach to confronting a government contract," *The Texas Prosecutor* (January–February 2023) at 23.

[2] See *Stewart Title Guar. Co. v. Cheatham*, 764 S.W.2d 315, 318-19 (Tex. App.–Texarkana 1988, writ denied). Specifically, insurance is an "undertaking by one, party, usually called the 'insurer,' to protect the other party, generally designated as the 'insured' or 'assured,' from loss arising from named risk, for the consideration and on the terms and under the conditions recited." *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32, 36 (Tex. Civ. App.–Dallas 1974, writ ref'd n.r.e.).

[3] See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); *Steere Tank Lines, Inc. v. United States*, 577 F.2d 279, 280 (5th Cir. 1978).

Among other factors, when determining whether any insurance provisions should be included in an agreement, consider what liability the agreement will impose on your county. Specifically, consider the following:

1) Does the other party carry adequate insurance to cover their risks while performing under the contract? and

2) Does your jurisdiction carry any applicable insurance coverage, or is it sufficiently self-insured concerning the services to be performed under the contract?

If your answers indicate insurance is needed to better protect your jurisdiction from any risks associated with an agreement, then consider evaluating the following items before finalizing your agreement.

Self-insurance

In the context of insurance, you often hear a county or another governmental entity is self-insured. An entity that elects to self-insure "must pay all judgments or settlements arising out of any and all claims asserted against it as well as all related loss adjustment expenses."[4] Governmental entities are often self-insured. As such, an entity will typically set aside funds from which claims will be paid to protect the entity against loss,[5] as opposed to paying premiums[6] to transfer those risks to a third-party insurance company.

Occasionally, a vendor may stipulate that a county must maintain certain insurance coverage. Your county may indeed carry insurance coverage.[7] The purchasing or risk management department should be able to provide additional information concerning any existing policies and coverage. However, as appropriate, consider informing the vendor that the county is self-insured; thus, any requirements to maintain insurance coverage should be waived in the agreement. Further, the Texas Tort Claims Act governs relief for property damage, personal injury, and death proximately caused by the wrongful act or omission of county employees acting within the scope of employment.[8]

Conversely, after presenting a vendor with your required insurance provisions, the vendor may seek to waive these provisions on the grounds that it is self-insured. *Proceed with caution.* Some vendors do not possess the requisite financial assets to cover any liability imposed by the underlying contract. If your jurisdiction will permit a contractor to rely upon his self-insured status, consider requiring the vendor to formally attest (or prove) that he possesses sufficient financial assets to cover any exposure under the contract. This measure serves as a safeguard to ensure that a claim of "self-insured" status is substantiated and mitigates the risk of a county incurring unforeseen liabilities.

Provisions in insurance policies are not read in isolation; rather, you should examine the entire policy and seek to harmonize and give effect to all provisions.

Language of insurance policies

Insurance policies are construed pursuant to the same rules that are applicable to contracts in general,[9] including enforcing the expressed intent of the parties.[10] Insurance terms are construed according to their ordinary meanings unless the insurance policy indicates that the words were utilized in a different or a more technical sense.[11] Provisions in insurance policies are not read in isolation; rather, you should examine the entire

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[4] Mark W. Flory, et al., Know Thy Self-Insurance (and Thy Primary and Excess Insurance), 36 Tort & Ins. L.J. 1005, 1006 (2001).

[5] See generally *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 414-15 (D.C. Cir. 1994). See also Tex. Att'y Gen. Op. GA-0327 (2005). The term self-insurance is actually a misnomer, because "a self insurer does not provide insurance at all." *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 336 (Tex. App.–Austin 1999, no pet.).

[6] See Black's Law Dictionary (12th ed. 2024) (Defining premiums as the "amount paid at designated intervals for insurance; esp., the periodic payment required to keep an insurance policy in effect.").

[7] See generally Tex. Loc. Gov't Code §§157.002, .041–.043, .101; 172.005 (2025).

[8] Tex. Civ. Prac. & Rem. Code §101.021 (2025).

[9] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995).

[10] See generally *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994).

[11] See generally *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 736 (Tex. 1990); *Sec. Mut. Cas. Co. v. Johnson*, 584 S.W.2d 703, 704 (Tex. 1979).

policy and seek to harmonize and give effect to all provisions.[12] As such, the most important aspect about an insurance policy[13] is that one must review the *entire policy*. Each one is unique. Common provisions in insurance policies are included below.

Declarations. A declaration is a statement or document that outlines specific details about an insurance policy. It often includes essential information such as the type of coverage and coverage amount, the policyholder's name, the policy period, and any endorsements or exclusions concerning the policy.[14]

Endorsements. An insurance endorsement is "an amendment or addendum to an insurance policy."[15] An endorsement often modifies or clarifies coverage in the underlying insurance policy.

Additional named insured. An additional named insured is someone who is not initially named as an insured in the existing insurance policy but was added to the policy by an endorsement or other agreement.[16]

Subrogation. Subrogation occurs when "'one person is allowed to stand in the shoes of another and assert that person's rights against' a third party."[17] Essentially, when an insurer pays a loss under the insurance policy to its policyholder, the insurer can assert any legal rights and remedies that belonged to the policyholder against a responsible third party concerning any loss encompassed by the insurance policy.[18]

Indemnity. Indemnity concerns a shift in responsibility regarding the payment of damages[19] and safeguards against existing or future liability for loss or injury.[20] An indemnity clause "allocates the risk of loss or injury resulting from a particular venture between the parties to the agreement."[21] Essentially, indemnity is the right of an injured party to seek reimbursement "for its loss, damage, or liability from a person who has such a duty" concerning reimbursement.[22] Indemnity obligations may be created via agreements but for such provisions to be effective, they must satisfy the fair notice requirement to ensure clear intent and conspicuousness.[23]

Claims made or occurrence basis. When reviewing insurance documents, you may see insurance that is provided on a "claims made" basis or on an "occurrence basis." Both claims made and occurrence policies generally require that prompt notice of a claim must be given to the insurer as soon as possible under the circumstances.[24] A claims made policy "is triggered by the presentation of the claim" to the insurer and provides coverage for claims that are asserted

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[12] See generally *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). See also, "No one phrase, sentence, or section [of the policy] should be isolated from its setting and considered apart from the other provisions." *Forbau*, 876 S.W.2d at 134.

[13] An insurance policy is an agreement "between the insurer and the insured, by which each party becomes bound to perform the obligations assumed in the policy of insurance." *Id*.

[14] See generally *Safeway Managing General Agency for State and County Mut. Fire Ins. Co. v. Cooper*, 952 S.W.2d 861, 867 (Tex. App.–Amarillo 1997, no writ).

[15] Black's Law Dictionary (12th ed. 2024).

[16] *W. Indem. Ins. Co. v. Am. Physicians Ins. Exch.*, 950 S.W.2d 185, 188-89 (Tex. App.–Austin 1997, no writ). In contrast, an "additional insured is a party protected under an insurance policy, but who is not named within the policy," such as employees or household members. *Id*. at 188-89.

[17] *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 97 n. 5 (2013) (internal citation omitted).

[18] Black's Law Dictionary (12th ed. 2024).

[19] *Lee Lewis Constr., Inc. v. Harrison*, 64 S.W.3d 1, 20 (Tex. App.–Amarillo 1999), *aff'd* 70 S.W.3d 778 (Tex. 2001).

[20] *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W. 2d 505, 508 (Tex. 1993).

[21] *Whitson v. Goodbodys, Inc.*, 773 S.W.2d 381, 382–83 (Tex. App.–Dallas 1989, writ denied).

[22] Black's Law Dictionary (12th ed. 2024).

[23] The Texas Supreme Court has clarified that "fair notice requirements include the express negligence doctrine and the conspicuousness requirement, which provide that a party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract and it must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." See *Dresser Indus.*, 853 S.W.2d 508.

[24] See generally *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 379 (Tex. 2009).

against the insured.[25] However, a claims made policy often requires the claim to be presented within the policy period.[26] Consequently, if a claim is made after the date of termination of the policy, then the claim likely will not be covered.[27]

In contrast, an occurrence basis policy "covers all claims based on an event occurring during the policy period, regardless of whether the claim or occurrence itself is brought to the attention of the insured or made known to the insurer during the policy period."[28]

Claims made policies are generally cheaper than occurrence policies, because the insurer is better able to calculate risks, as exposure to claims terminates at a specified point, usually the date when the policy ends.[29] If the underlying contract entails risks that may evolve into claims in the future, then an occurrence policy may be the better alternative to consider. As there are differences between these types of coverage, consider specifying whether insurance policies provided under the agreement will be written on an occurrence or claims made basis. If your contract will permit insurance on a claims made basis, consider requiring the vendor to maintain coverage for an additional period of time, such as extending coverage for a time after expiration of the agreement. This will help ensure that applicable risks are better mitigated.

Provisions to incorporate

Limit insurance from certain companies. When requiring companies to maintain insurance coverage, it is advisable to limit the companies from which they may procure their insurance coverage. Insurance should be procured only from reliable and financially stable firms, which helps ensure that applicable claims are paid.

A.M. Best is a credit rating agency;[30] it grades an insurer's ability to pay out claims and other financial obligations. A.M. Best grades insurance corporations on a ratings scale from A++ through D.[31] In your agreement, specify a minimum insurance rating for an insurance provider, as the reliability of an insurance provider is paramount. An insurer's most fundamental obligation is to either reimburse the insured for direct losses or to cover sums the insured is legally obligated to pay to others.[32] A more financially stable and reputable insurer is better positioned to fulfill its duty to indemnify if a claim arises. Further, specifically require the insurance provider to be licensed or approved to transact business in the State of Texas.[33]

Control additional costs. In other agreements, a county will seek to limit additional costs. The same principles apply with insurance-related provisions. Inform the vendor that all costs of any insurance premiums or deductibles remain the sole responsibility of the vendor, and there are no county funds available for the procurement of insurance. The contract should include all applicable costs for the vendor to perform the requisite services.

Waive subrogation. Consider incorporating a waiver of subrogation. These clauses are designed to streamline risk allocation and minimize litigation by preventing an insurer, having paid a claim to its insured, from then seeking recovery

An insurer's most fundamental obligation is to either reimburse the insured for direct losses or to cover sums the insured is legally obligated to pay to others. A more financially stable and reputable insurer is better positioned to fulfill its duty to indemnify if a claim arises.

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[25] *Columbia Cas. Co. v. CP Nat., Inc.*, 175 S.W.3d 339, 344-45 (Tex. App.–Houston [1st Dist.] 2004, no pet.) (internal citation omitted).

[26] *Prodigy Commc'ns Corp.*, 288 S.W.3d 374 at 379.

[27] See generally *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 918, 920-21, 925 (Tex. App.–Fort Worth 1988, writ denied).

[28] *Id.* at 918 (internal citations omitted).

[29] *Id.* at 923.

[30] Information About Best's Credit Ratings, https://web.ambest.com/ratings-services/information-about-bests-credit-ratings.

[31] See generally Guide to Best's Credit Ratings, https://web.ambest.com/ratings-services/information-about-bests-credit-ratings.

[32] *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 270 n.3 (Tex. 2021) (orig. proceeding).

[33] Texas Department of Insurance, /www.tdi.texas.gov/pubs/consumer/cb022.html (Texas law generally requires most insurance companies and insurance-related businesses to have a license to sell their products or services).

from the other party to the contract.[34] Essentially, such waivers permit the contracting parties to mutually relieve each other from liability for property loss or damage to the work, to the extent that each party is covered by insurance.[35] This shifts the risk of loss to an insurer, as opposed to extended litigation between the parties, which might otherwise delay a project.[36]

Coverage provisions. At contract execution or shortly thereafter, ask for applicable executed certificates of insurance. These will demonstrate all required insurance coverage. Further, you should require the contractor to maintain insurance coverage throughout the term of the agreement, and, depending on the type of the agreement (e.g., a construction agreement), certain provisions such as insurance and indemnification may need to survive the expiration or termination of a contract. So, additional language should be incorporated accordingly.

To help prevent any lapse with insurance coverage, require the contractor to provide replacement certificates, policies, and/or endorsements for any such insurance expiring prior to completion of the services.

To help prevent any lapse with insurance coverage, require the contractor to provide replacement certificates, policies, and/or endorsements for any such insurance expiring prior to completion of the services. Further, consider requiring the contractor to provide notice of any insurance modifications (e.g., 30 days, etc.) and specify where the new insurance information should be submitted (e.g., the purchasing department, etc.). As applicable, contemplate adding a provision advising that the failure to maintain insurance coverage will be grounds for immediate contract termination.

If the agreement includes subcontractors, consider requiring them to maintain insurance of the same type and coverage as the vendor. Proof of insurance should be sent to the vendor and to the county. Proof of any renewed or replacement insurance coverage should also be produced upon the expiration, termination, or cancellation of any such policy. Further, the vendor should not allow any subcontractor to initiate work on any subcontract until the requisite insurance coverage for the subcontractor is obtained and approved.

Additional insured. Consider requiring the contractor to name your county as an additional insured on his insurance policies. This requirement is a fundamental risk management tool designed to protect and preserve a county's interests. By securing additional insured status, a county can ensure that a contractor's insurance will serve as the primary layer of defense and indemnity for claims arising from his operations or negligence. This safeguards any insurance policies a county may maintain and mitigates the financial burden of potential litigation. Counties generally do not seek additional insured status for workers' compensation or professional liability coverage, as this type of coverage typically applies to the contractor's employees or specialized professional services, respectively.

Certificate of insurance. "A certificate of insurance is a document issued by or on behalf of an insurance company to a third party who has not contracted with the insurer to purchase an insurance policy."[37] This certificate will provide evidence of the insurance policy and its general terms, including coverage types, the policy period, and any monetary limits.[38] It serves as tangible proof that the contractor has secured the required insurance coverage, assuring the county that appropriate protections are in place before work begins and throughout the contract term. It also helps verify compliance with contractual insurance provisions and mitigates the county's exposure to uninsured risks.

Types of insurance to include

Common insurance types to consider requiring in your contract include:

Commercial general liability. Commercial general liability insurance policies are broad general policies[39] designed to cover the insured for

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[34] See *Trinity Universal Ins. Co. v. Bill Cox Const., Inc.*, 75 S.W.3d 6, 13 (Tex. App.–San Antonio 2001, no pet.) (explaining the purpose of waiver of subrogation provisions in construction contracts to eliminate lawsuits by protecting parties with insurance); *TX. C.C., Inc. v. Wilson/Barnes Gen. Contractors, Inc.*, 233 S.W.3d 562, 571 (Tex. App.–Dallas 2007, pet. denied) (same).

[35] *Id*.

[36] See generally *Tokio Marine & Fire Ins. v. Emp'rs Ins. of Wausau*, 786 F.2d 101, 104 (2d Cir. 1986); *Behr v. Hook*, 787 A.2d 499, 503 (Vt. 2001).

[37] *Republic Vanguard Ins. Co. v. Mendez*, No. L-05-174, 2008 WL 11502055, at *9 (S.D. Tex. Mar. 31, 2008).

[38] See generally Black's Law Dictionary (12th ed. 2024).

[39] *Seger v. Yorkshire Ins.*, 503 S.W.3d 388, 402 (Tex. 2016).

damages caused by covered injuries to third parties, including the general public, as a result of the insured's business operations."[40]

Errors and omissions professional liability. An errors-and-omissions policy is a type of professional-liability insurance "designed to insure members of a particular professional group from the liability arising out of a special risk such as negligence, omissions, mistakes, and errors inherent in the practice of the professions,"[41] such as architects, engineers, and certified public accountants.

Umbrella or excess insurance. Umbrella or excess insurance provides protection beyond the limits of primary insurance policies. It covers catastrophic losses that exceed the coverage limits of underlying policies, including automobile liability, homeowners, or commercial general liability (CGL) policies.[42]

Cyber insurance. Cyber insurance protects businesses and organizations from losses and liabilities occurring from cyber attacks, data breaches, or related incidents. It may cover costs such as data recovery, breach response, ransomware response, and cyber extortion.[43]

Business automobile liability coverage. Business automobile liability insurance seeks to protect against losses stemming from the operation or ownership of a motorized vehicle.[44]

Workers' compensation insurance coverage. Workers' compensation insurance pays for medical bills and some lost wages for employees who are injured on the job or have a work-related illness.[45]

Performance bonds. While not insurance, a bond is a type of financial instrument involving a promise to pay money at a future date (often with interest) if certain circumstances occur.[46] Note that if your contract concerns the construction of public works and exceeds $50,000, then the contractor will be required to execute a payment bond.[47] A payment bond protects those "who supply labor and material"[48] concerning the construction of the public works contract, because public property is protected from forced sale and is not subject to a mechanic's lien.[49]

Final thoughts

Perhaps the most inopportune time to ascertain what insurance coverage was negotiated (or should have been negotiated) in an agreement is after an insurance-related event is triggered. Insurance-related provisions regularly arise in agreements, so the incorporation of applicable insurance provisions into contracts is important. These provisions may better protect your jurisdiction from associated risks and liabilities. By understanding the various types of insurance and associated terminology, county practitioners may transform this aspect of contract review into a less dauting process. ❇

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[40] *Id*. (internal citations omitted).

[41] *Venture Encoding Service, Inc. v. Atlantic Mut. Ins. Co.*, 107 S.W.3d 729, 736 (Tex. App.–Fort Worth 2003, pet. denied) (internal citation omitted).

[42] See generally *Sidelnik v. American States Ins. Co.*, 914 S.W.2d 689, 693-94 (Tex. App.–Austin 1996, writ denied).

[43] See generally Tex. Transp. Code §201.712 (2025).

[44] See generally O'Connor's Texas Causes of Action Ch. 13-A §2 (2025 ed.).

[45] See Texas Department of Insurance. What is workers' compensation? https://www.tdi.texas.gov/wc/dwc/about.html.

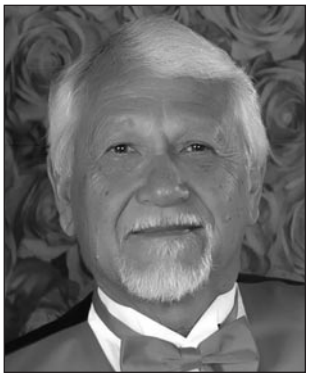
[46] See generally *Univ. of Houston Sys. v. Ground Tex. Constr., Inc.*, 650 S.W.3d 832 (Tex. App.–Houston [14th Dist.] 2002, pet. filed).

[47] Tex. Gov't Code §2253.021(a)(2), (c) (2025).

[48] *Chilton Ins.v. Pate & Pate Enterprises*, 930 S.W.2d 877, 887 (Tex. App.–San Antonio 1996, writ denied).

[49] *Capitol Indem. Corp. v. Kirby Rest. Equip. & Chem. Supply Co.*, 170 S.W.3d 144, 147 (Tex. App.–San Antonio 2005, pet. filed). Depending on the dollar amount of the project, the contractor may be required to execute a performance bond. Tex. Loc. Gov't Code §262.032(a) (2025); Tex. Gov't Code §2253.021(a)(1), (b) (2025). A performance bond protects the government regarding performance of the contract. See generally *Parliament Ins. Co. v. L.B. Foster Co.*, 533 S.W.2d 43, 47-48 (Tex. Civ. App. 1975).

"Trial by Jury": a poem



By Steven Reis
District Attorney in Matagorda County

One hundred faces
    Stare blankly at the clerk.
She speaks instruction
    And begins her work.

First and last names,
    One-by-one, read aloud.
Occasional hands raised
    And "Present," from the crowd.

Filing in, they pass the clerk,
    Sitting stiffly on her stool.
They've not stood like this in line
    Since past days in pre-school.

Finally, seated on benches,
    Crowded shoulder to shoulder;
Volume slowly increases
    As the jurors become bolder.

Then, shushed by the clerk,
    They're told, "Rise to your feet!"
A black-robed man enters,
    Climbing a high-perched seat.

Others, lawyers perhaps,
    Quietly file to their places.
It's their turn now
    To stare at gathered faces.

*****

The lawyers walked in with their
    heads a-swivel;
Permitted by the judge they
    spouted drivel;
Thinking opponents would begin
    to snivel;
But none was quite so frail.

The jury of 12 sat in seats confused
By legal jargon which the
    lawyers suffused.
The judge rolled his eyes as he was
    bemused.
He knew what the case would
    entail.

Standing in a row, each one to be
    sworn,
A group, heads bowed down,
    looking quite forlorn.
"Obey the court rules," the surly
    judge warned,
"Or I'll send you all to jail."

They all took the stand and began
    to speak.
For days they talked—then
    talked for a week.
Anxious jurors caused their seats
    to creak;
Their minds were soon
    derailed.

Like ballet dancers, lawyers
    pranced the room.
Cold, clammy air gave the feel of a
    tomb.
Nothing said or done could dispel
    the gloom.
Each side sought to prevail.

Hours stretched to days and weeks
    and months and years
Or so it felt to the jury of peers.
Finally they finished—full up to
    their ears.
Shell-shocked, they all felt frail.

*****

"It's done," said the judge,
    "Your job now completed."
But then he looked down,
    Looked up, said, "Be seated."

"What's this mean?" he asked,
    Rubbing hands to his face.
"You can't write this down—
    You need to erase."

He motioned the bailiff
    To come to his side.
Then the lawyers he called;
    Letting each one confide.

He showed them the note,
    Sent out by the jury.
His face got redder
    As he stifled his fury.

He looked at the 12
    Sitting primly and still.
Knowing now he could not
    Bend them sharp to his will.

He stood, stared, and left;
    His robes flapping a breeze.
Out a side door he strode
    Abandoning ease.

The paper, abandoned,
    Lay where it was dropped.
Lawyers left in a huff—
    Not a pause, not a stop.

The jury left also—
    No reason to stay.
They smiled, walking out,
    Having had their say.

*****

There once was a jury quite
    puzzled
Weeks later, they were quite
    bumfuzzled
They wrote on their paper,
    "The public is safer
If lawyers and judges are muzzled." ❇

The power of the gang letter

"My defendant is a gang member. What do we do now?"

By Sergeant Investigator Anthony J. Rodriguez
Criminal Investigator, Bexar County Criminal District Attorney's Office

I've heard this question many times throughout my career as a professional criminal investigator and recognized gang expert—not just from prosecutors, but also from other investigators. To address this question, we will explore a world that many may not typically consider: corrections (that is, jail or prison).

I began my law enforcement career as a jailer assigned to the Classification Section. My primary responsibility was housing inmates. To do this, I needed to know detailed information about each arrestee to ensure they were housed appropriately. This required understanding various factors, including (but not limited to) mental health, medical issues, risk potential, and most importantly for purposes of this article, gang affiliation.

The process of housing a gang member shares striking similarities with proving an individual is a gang member in court. The required evidence typically consists of an admission of gang affiliation. Fortunately, Corrections has been documenting gang affiliation for decades. The document that establishes gang affiliation goes by many names. I've heard it referred to as a gang letter, gang confirmation form, gang card, (insert color) form, and gang sheet. Officially Bexar County uses a Gang Identification Card, but we usually call them gang letters. One is printed on the opposite page; you can also find one as a PDF on the TDCAA website with this article. Regardless of the name, these forms are designed to capture an inmate's admission of gang membership. These forms were originally created by Corrections to house arrestees and retain information about their gang affiliations for future incarcerations. Eventually, legislators caught up with Corrections and recognized the negative impact of gang membership on communities and enacted laws to legally document gang affiliation.

Initially, the gang letter was designed to document an individual's identifying information and gang affiliation. The basic information included was simple and expected: name, date of birth, Social Security number, and other common identifiers. Over time, the gang letter evolved to include more detailed information about the gang, such as the date of joining, location of entry, reasons for joining, gang tattoos, aliases, and the individual's status within the gang.

An important aspect of gang letters, particularly those obtained from Corrections, is that many are signed by the defendant!

Article 67.054(b) of the Code of Criminal Procedure standardizes the gang letter by properly defining the criteria for legally identifying an individual as a gang member. As a result, a standardized gang letter features boxes to be checked at the bottom of the form. Have you seen this standardized form? Have you ever paid attention to those boxes or read them?

The standardized gang letter is divided into two portions. The first is the "Stand-Alone Criteria" (in the pink box, opposite). This portion is rarely used by law enforcement officers because it was created for use in judicial settings. Many prosecutors miss the opportunity to document a known gang member using this section. There are two items to select within the "Stand-Alone Criteria." The first box states, "A judgment under any law that includes, as a finding or as an element of a criminal offense, participation in a criminal street gang." This box requires a judgment from a case in which gang affiliation was acknowledged on the record during the trial or hearing and the participation in the gang was an element of the criminal offense.

The second box states, "A self-admission by the individual of a criminal street gang membership made during a judicial proceeding." This box should be checked when gang affiliation is acknowledged by the defendant during an official

Bexar County
District Attorneys Office

GANG IDENTIFICATION CARD

Date: _____

☐ New ☐ Update

☐ **Street Gang:** ☐ Member ☐ Associate ☐ Suspected
☐ **Prison Gang:** ☐ Member ☐ Associate ☐ Suspected
☐ **Motorcycle Gang:** ☐ Member ☐ Associate ☐ Suspected
☐ **Other:**

Photo: ☐ Yes ☐ No Intelligence Report: ☐ Yes ☐ No Report #: _____

Gang Name: _____ If Tango, list street gang affiliation: _____

☐ Admitted ☐ Identified ☐ Investigation ☐ Informant ☐ Other: _____ Submitted to TXGANG ☐ Yes ☐ No

Name:	**Vehicle Information**
Alias:	Make: Year: Model:
Race: Sex: Male DOB: Hgt: Wgt:	Style: Lic: State:
Hair: Eyes: Build:	Color: ☐ Driver ☐ Passenger
DL#: State: SS#	**Scars, Marks & Tattoos**
FBI# SID# TDCJ#	
Address:	
City: State: Zip:	
Work/School:	**Military Service / Branch**
H Phone: W Phone: Pager:	Military ID#:
Associates:	Branch of Service:
Hangouts:	Unit:

State Gang Criteria

The information contained on this Gang Identification Card must be relevant to the identification of a member or associate of an organization that is reasonably suspected of criminal activity. This identification should consist of any of the following:

Stand-alone criteria

☐ A judgment under any law that includes, as a finding or as an element of a criminal offense, participation in a criminal street gang.
☐ A self-admission by the individual of criminal street gang membership that is made during a judicial proceeding.

Two criteria from the lists below required for confirmation

☐ Non-judicial self-admission (Includes use of Internet or other electronic medium to post photos or other documentation identifying individual as gang member). Admission made to _____
☐ Identification of the individual as a criminal street gang member by a reliable informant or individual.
☐ A corroborated identification of the individual as a criminal street gang member by an informant or other individual of unknown reliability.
☐ Evidence of the individual's use of technology, including the Internet, to recruit new criminal street gang members.
☐ Evidence that the individual uses, in more than an incidental manner, criminal street gang dress, hand signals, tattoos, or symbols, including expressions of letters, numbers, words, or marks "regardless of how or the means by which" the symbols are displayed, that are associated with a criminal street gang that operates in an area frequented by the individual.
☐ Evidence that the individual has been arrested or taken into custody with known criminal street gang members for an offense or conduct consistent with criminal street gang activity.
☐ **Evidence that the individual visited a gang member (other than certain family members) while the gang member was in penal institution.***
☐ **Frequents a documented gang area & associates with known gang members ***

If used together, requires at least one more selection from list

Date:	Time:	Location:	Nature of Contact:
Notes:			
Submitted by:		Badge#:	Unit#:
Phone:	Pager:	Cell:	Email:

judicial proceeding. Pre-sentencing investigations or sentencing hearings are common opportunities to check this box especially when the defendant testifies.

Below the Stand-Alone Criteria, there is a separate set of criteria. This second portion requires a minimum of two boxes to be selected. This section should be the focus for law enforcement when obtaining acknowledgment of gang affiliation. It was designed to be used by law enforcement outside a judicial setting because it indicates a self-admission, which is the most acceptable form of acknowledgment, especially in Corrections. Remember, Corrections documents gang affiliation for housing purposes. It is in the best interest of many gang members to acknowledge their affiliation so they can be housed with fellow gang members or, more importantly, avoid being housed with rival members.

Now that we know how to document an individual as a gang member, how does a prosecutor or DA investigator obtain these gang letters? As mentioned earlier, gang letters are most often obtained by correctional staff.

Eight criteria

There are a total of eight criteria of which a minimum of two must be selected. The first criterion is the most common and should be essential for any law enforcement officer seeking self-admission. It states, in part, "Non-judicial self-admission." This item is for when a member verbally admits gang membership to an officer. This box is the most useful because it represents a direct self-admission.

Second, "An identification of the individual as a member of a criminal street gang [or foreign terrorist organization (FTO)] by a reliable informant or other individual." This is an often-missed opportunity. Many jail staff—including classification officers and lead detectives—can serve as reliable informants to identify the individual as a gang member. Jail staff are often aware of gang membership through jail intelligence (e.g., jail mail, phone calls, visual sightings of gang hand signs, and incident reports). Lead detectives who are familiar with the case's facts, as well as their training and experience, can also confidently identify a gang member.

Third, "A corroborated identification of the individual as a member of a criminal street gang [or FTO] by an informant or other individual of unknown reliability." This criterion is less frequently used because it depends on the testimony of a witness or known associate, and the reliability of that information must be corroborated.

Fourth, "Evidence of the individual's use of technology, including the internet, to recruit new members of a criminal street gang [or FTO]." This criterion is useful for law enforcement and criminal analysts monitoring social media for gang activity.

Fifth, "Evidence that the individual uses, in more than an incidental manner, criminal street gang [or FTO] dress, hand signals, tattoos, or symbols, including expressions of letters, numbers, words, or marks that are associated with a criminal street gang [or FTO]." This criterion should be used as often as the first because it captures another common form of gang admission: non-verbal self-admission. Non-verbal self-admission is commonly seen in gang-related tattoos, hand signs, clothing, and graffiti. See the graphic on the opposite page for some common examples.

Sixth, "Evidence that the individual has been arrested or taken into custody with known members of a criminal street gang [or FTO] for an offense or conduct consistent with gang activity." This should be used with the testimony of the arresting officer or lead detective.

Seventh, "Evidence that the individual has visited a known member of a criminal street gang [or FTO], other than a family member, while the member is confined in or committed to a penal institution." This requires testimony from someone aware of the visit and able to articulate that the incarcerated individual is a documented gang member.

Lastly, "Evidence that the individual frequents a documented area of a criminal street gang or FTO and associates with known members of a criminal street gang or FTO." This relies on the testimony of law enforcement officers or residents who can identify a neighborhood as being occupied by criminal street gangs. Many officers can make this identification based on their experience, training, and knowledge of the area.

Obtaining a gang letter

Now that we know how to document an individual as a gang member, how does a prosecutor or DA investigator obtain these gang letters? As mentioned earlier, gang letters are most often obtained by correctional staff. Look at the Code of Criminal Procedure, specifically Article 67.051. It states, "(a) Subject to Subsection (b), a criminal justice agency or juvenile justice agency shall compile criminal information into an intelligence database for the purpose of investigating or prosecuting the criminal activities of combinations, criminal street gangs, or foreign terrorist

organizations." This law requires that a central database be maintained for all law enforcement agencies to submit their gang data, and that database is TxGang.

What is TxGang, the central gang database?

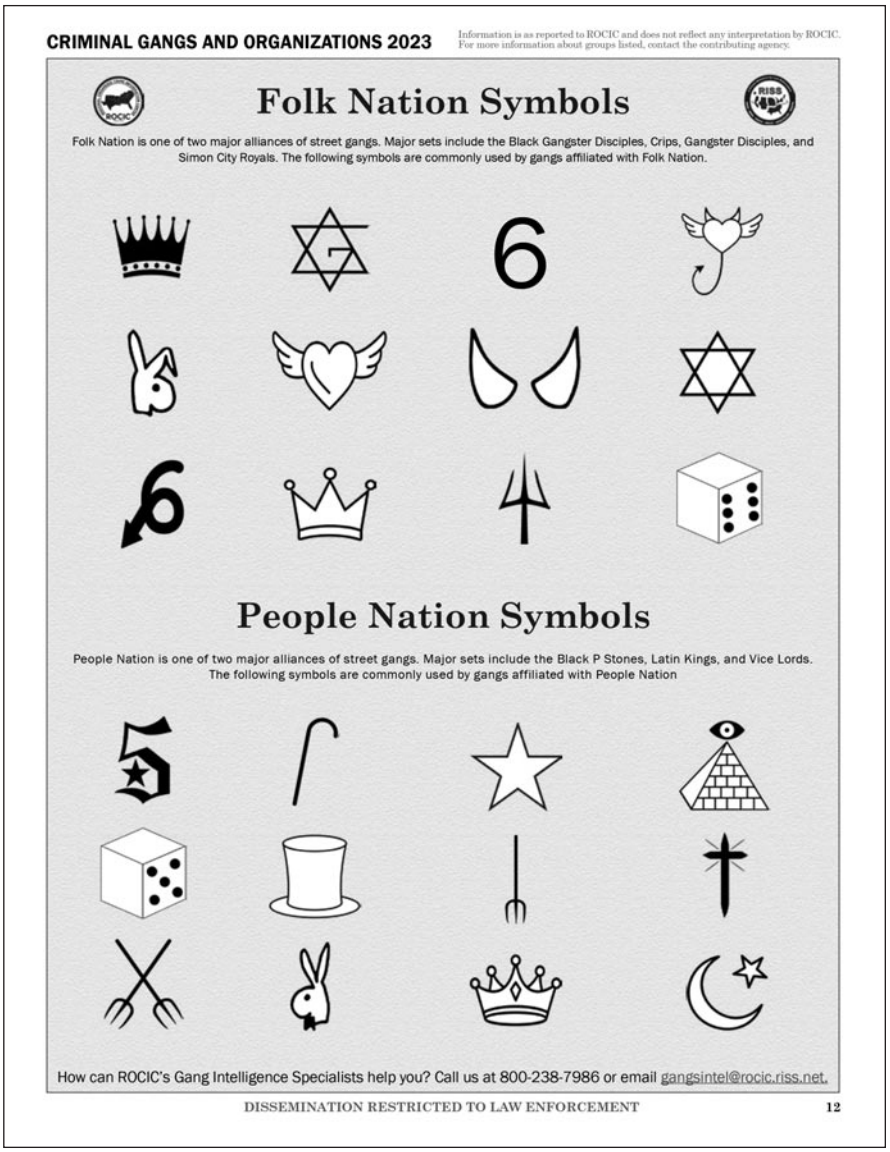
TxGang is maintained by the Texas Department of Public Safety. Law enforcement agencies are required to submit gang letters if their jurisdiction meets the population threshold (a city with a population of 50,000 or more or a county with a population of 100,000 or more). At the time this article was written, TxGang reported that there are currently 559 participating agencies in Texas, with 291 contributing gang data. There are 56,360 documented gang members across 11,305 gangs entered in TxGang (https://securesite.dps.texas.gov/DpsWebsite/Login.aspx).

The Bexar County Criminal District Attorney's Office currently has 60 DA investigators with access to TxGang. As the agency administrator, I ensure that all investigators are trained to use the system, enabling them to determine whether a defendant is a documented gang member and retrieve the relevant gang letter. I highly recommend that other DA offices adopt similar practices. It ensures that prosecutors are better informed when making decisions as they navigate cases through the legal system.

Why is the gang card important?

I'll pose a different question: Why do DA investigators provide prosecutors with criminal histories? It allows prosecutors to make more informed decisions and ensure that cases are indicted correctly. I would argue that gang information serves the same purpose. Consider this: What if the prosecutor is considering probation for a defendant? There are specific stipulations for documented gang members. What about crimes directly related to gang membership? For example, unlawful possession of a firearm (Penal Code §46.04) and engaging in organized criminal activity (Penal Code §71.02).

Ultimately, this information is critical for prosecutors, and the gang letter is a powerful tool they should utilize. Legislators have created databases including TxGang to make this information available to law enforcement. It is essential that prosecutors and investigators not only understand but fully embrace this valuable resource to strengthen their cases. ❇



CRIMINAL GANGS AND ORGANIZATIONS 2023

Information is as reported to ROCIC and does not reflect any interpretation by ROCIC. For more information about groups listed, contact the contributing agency.

Folk Nation Symbols

Folk Nation is one of two major alliances of street gangs. Major sets include the Black Gangster Disciples, Crips, Gangster Disciples, and Simon City Royals. The following symbols are commonly used by gangs affiliated with Folk Nation.

People Nation Symbols

People Nation is one of two major alliances of street gangs. Major sets include the Black P Stones, Latin Kings, and Vice Lords. The following symbols are commonly used by gangs affiliated with People Nation

How can ROCIC's Gang Intelligence Specialists help you? Call us at 800-238-7986 or email gangsintel@rocic.riss.net.

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An unforgivable betrayal

There are some cases so horrific that you remember where you were when you first reviewed them.

By (left to right) Emily Dixon
Assistant Criminal District Attorney,
Danny Nutt
CDA Investigator, &
Lisa A. Callaghan
Assistant Criminal District Attorney,
all in Tarrant County

You remember everything about them. They are impossible to forget, even when you want to.

Such is the case of Craig Alan Vandewege, who on a crisp December day in 2016 executed his wife and 3-month-old son by cutting their throats. He then reported for work as a set-up for his alibi. He was prepared to get away with murder.

But as is often the case in criminal investigations, there was much more to this crime than just the events of December 15, 2016. Mr. Vandewege's scheming and planning started much earlier. His financial planning and motivation to commit this crime started years prior and escalated in the year before he killed his wife and son. After a lengthy investigation by Detectives Matt Barron and John Galloway of the Fort Worth Police Department, plus five years of work by the prosecutors and investigators at the Tarrant County Criminal District Attorney's Office, a jury gave the final word and decided the fate of Craig Vandewege. As appeals are final and mandate has issued, the story can finally be told.

Background of the crime

Craig Vandewege and Shanna Riddle met on Christian Mingle. They both lived in Colorado at the time. To Craig's parents, it seemed that they were very much in love. Her parents thought the same, although there was always something about Craig that bothered them.

Shanna was a nurse and Craig worked for Costco as an optician. A promotion within Costco brought them to Fort Worth.

On the evening of December 15, 2016, Vandewege called 911 after arriving home from work to report finding his wife's and child's bodies in the bedroom. He told the 911 dispatcher that they were deceased and that the "house was messed up," suggesting that an intruder, perhaps a burglar, had been inside. Two things caught the dispatcher's attention: that the caller's reporting of events seemed to focus more on making his report than on asking for help, and that his emotional demeanor was not consistent with someone who had just found his family dead. In fact, she described him as calm, and he did not ask for help, which was very unusual in her experience of receiving calls from people in similar situations. A witness with Medstar, who testified concerning its portion of the 911 call, described Vanderwege's demeanor on the phone as "nonchalant," and also said it was unusual because of a "lack of wanting to help."

Police arrived about four minutes after the 911 call and discovered Vanderwege in front of the house waiting for them. He was calm in his demeanor when speaking to the first officer and had no tears in his eyes, nor did he appear to be in shock.

Going upstairs in the darkened house, officers encountered a scene of incredible horror. Shanna was in her bed, in a position suggesting she was asleep at the time of her death, with her throat cut. She was wearing night clothes and a mouth guard, which also suggested she'd been sleeping when she was killed. The baby, Diederik, was in his bassinet next to her, also with his throat cut. All blood was confined to the bed and bassinet; there was no indication of a fight taking place in the bedroom. There was also no obvious weapon in the room. However, it did appear that there was blood under the lip of the sink and in the sink itself in the adjacent bathroom, as though someone might have tried to clean up there.

Vanderwege, meanwhile, was informed he was not under arrest, and he was given the opportunity to speak with homicide detectives. He

agreed to go downtown to the Fort Worth Police Department for an interview. He showed no significant emotion during this interview, and in fact actually slept a little while waiting for detectives to come speak to him. In his statement, he attempted to pawn the situation off as a burglary. He said he left around 10:30 the morning of the murders. Shanna and the baby were sleeping, he said. He started texting his wife around 2 o'clock that afternoon, and he texted her for an hour, but she did not respond. When he got home and found them, he took no life-saving measures, as they were obviously deceased.

At the crime scene

While detectives worked on Vanderwege in the interview room, crime scene officers began the painstaking process of going over the house in detail. The first officer to enter noted that cabinets in the kitchen were opened, but nothing appeared to have been rummaged through or ransacked. As more officers arrived, more things were noticed. There were pry marks on the back door, but no windows or glass in the door was broken. It did not look as though it had been kicked open either. There were expensive items, including televisions and firearms, in obvious places that were not taken. Shanna's purse, containing credit cards, money, and medication, was untouched in the kitchen. There were dogs in the house at the time of the victims' deaths, and a shotgun under the bed, but it did not appear that Shanna responded to the dogs barking, nor did she make any attempt to pull the shotgun out from under the bed. There were two safes on the floor, one with a key in it and whose contents were dumped on the floor. The other safe had to be opened with a code.

Crime scene officers made a thorough search of the house and of Vanderwege's vehicle in the driveway, which he told detectives he had driven to and from work that day. Of interest in the front console was a white rubber examination-type glove that had multiple reddish- brown stains on it. This glove would prove very significant once DNA testing was done.

What Vanderwege did next

Vanderwege left the police department after the first interview and went to work "because he had nowhere else to go," he said. He told a supervisor at Costco that "someone had broken into the house" and his wife and son were killed. The supervisor asked another employee to drive him to a hotel, as his home was still being processed by a crime scene team. His demeanor, once again, was described as "stone-faced."

The other Costco employee described his conversation with Vanderwege about what happened. Vanderwege said he arrived home from work that evening and found the front door unlocked, which he thought was odd. He noticed dog urine on the floor and disarray in the kitchen, and eventually he went up upstairs to the bedroom. He said the bedroom door was closed, which was also odd to him. He looked in the room and discovered the bodies of his wife and child, but he did not approach them. He told this coworker that nothing was missing from the house, and he insinuated he was in the house while the crime scene unit was doing its job, and that they were examining the pry marks on the back door. This, of course, was false. Vanderwege also said that whoever committed the crime must have made Shanna open the safes before they killed her. But this was inconsistent with the crime scene because there was no sign of a struggle—there would have surely been one if she had been awake when killed, but it appeared she was asleep when she died. This coworker also noted the Vanderwege didn't call either victim by name while he was speaking of them.

Vanderwege left Fort Worth around December 20 and drove to Colorado. While there, he posted on Facebook, which came to the attention of the police department. It was something along the lines of a farewell note:

> "So, after taking a little drive and stopping at the local Chevy dealership, I told the salesman my life story. He agreed to let me borrow a newer Corvette. He has all my guns and has Shanna Riddle Vandewege's Elantra. I want to meet you all in Las Vegas at Trump Tower and ask Trump for a pardon in case lying [expletive] face investigator convicts me. I feel the deck is stacked against me. I am going to get 2K out of the bank and do some hookers and cocaine while one gives me a [vulgar] job. Maybe he will let me grab someone by the [vulgar]. I love you all and God bless and God speed and [vulgar] deep. Yee, yee."

He stopped at a convenience store in Glenwood Springs, Colorado, and made some odd statements to the clerk about people being taken into

Of interest in the front console of Vanderwege's vehicle was a white rubber examination-type glove that had multiple reddish-brown stains on it. This glove would prove very significant once DNA testing was done.

custody for a murder, and the clerk subsequently called police. Glenwood Springs officers initiated a traffic stop and detained Vanderwege, and he continued making odd statements. He told them his wife and son had been murdered and pointed out he had multiple firearms in his car. He also told them he was being blamed for the murders, but that his dad told him the "good news" that someone else was arrested, and he was going to Las Vegas.

Initially, this stop became tense because Vanderwege refused to get out of the car, but he was ultimately arrested and taken to jail. Soon after, Detective Barron in Fort Worth obtained an arrest warrant for capital murder after being notified of his suspect's arrest in Colorado.

Capital murder charges were filed in Tarrant County. Although this case was subject to the death penalty, a decision was made by then-District Attorney Sharen Wilson not to pursue it. Therefore, if Vanderwege were convicted, the only punishment available was life without parole.

Many of the defendant's former coworkers recalled him saying things about both Shanna and the baby that were concerning and derogatory. He criticized everything about Shanna: her looks, weight, money management skills, intelligence, and more.

Investigating

Prosecutors Lisa Callaghan and Robert Huseman, with CDA Investigator Danny Nutt, made a fact-finding trip to Colorado in January 2017. It was clear there were a lot of witnesses there who needed to be interviewed in detail and sorted through, plus new witnesses to discover. After a week we had talked to Costco employees, family friends, and others, giving us a richer understanding of the situation.

Many of the defendant's former coworkers recalled him saying things about both Shanna and the baby that were concerning and derogatory. He criticized everything about Shanna: her looks, weight, money management skills, intelligence, and more. He complained about their sex life and how she dressed, that it was not "sexy" enough. He also said that after having the baby, Shanna had gained weight and "looked like a bodybuilder," and it disgusted him. He said he made her cry every day because he was "an asshole." Vanderwege's colleagues at Costco, both in Colorado and in Fort Worth, said he made these comments to them almost daily. There was also information from multiple sources (cell phones and online posts) that Vanderwege was interested in sex outside the marriage.

In Tarrant County at that time, it was common for a case of this magnitude to take two or three years to work its way up to the top of the trial docket and actually go to trial. During those years, much work was done. It became clear, for example, that a financial motive might explain the defendant's crimes, and that possibility had to be researched and records ordered. Forensic testing had to be done. All of this was normal, but then something unexpected happened—the pandemic hit. For almost two years the courts were shut down, so this case pended for almost five years before it got to trial. In that time, Robert Huseman left the DA's office, and Emily Dixon signed on to be second chair. Finally, after so many years of waiting, the day came—October 20, 2021, the day we picked the jury in this case.

The trial

At trial, about 30 witnesses testified. The jury was very business-like and remarkably attentive. This was particularly beneficial to the State, as one of the jurors became ill with Covid-19 and the trial had to be continued for about a week mid-trial. It was gut-wrenching, but ultimately it was only a brief delay. Another juror was declared disabled, and she was replaced with an alternate, and the trial started again. This time, however, jurors were not in the jury box together; they were spread out in the spectator gallery, as far apart from each other as possible. The proceedings were streamed to an adjoining courtroom so that family and spectators could watch, as was proper under existing law.

One of the witnesses who testified, Amanda Rickerd, did serology testing on the glove from the console of the defendant's car. He had driven it to work, after leaving his wife and child in the morning, and then returned that evening to find them murdered. Therefore, if he was telling the truth (that he had not been in the house when they were killed), you would not expect to find blood evidence in his car. According to Ms. Rickerd, the glove had human blood on it. She took swabs and submitted them for DNA testing. Lo and behold, the defendant could not be excluded from a stain on the wrist of that glove; the chance that an unrelated person chosen at random from the general population would be included as a contributor to this major DNA profile was approximately one in every 320 sextillion individuals. However, the most important result was that another stain was consistent with baby Diederik's DNA. The chance that an unrelated person chosen at random from the general population would be included as a contributor to this DNA profile was approximately one in every 1.3

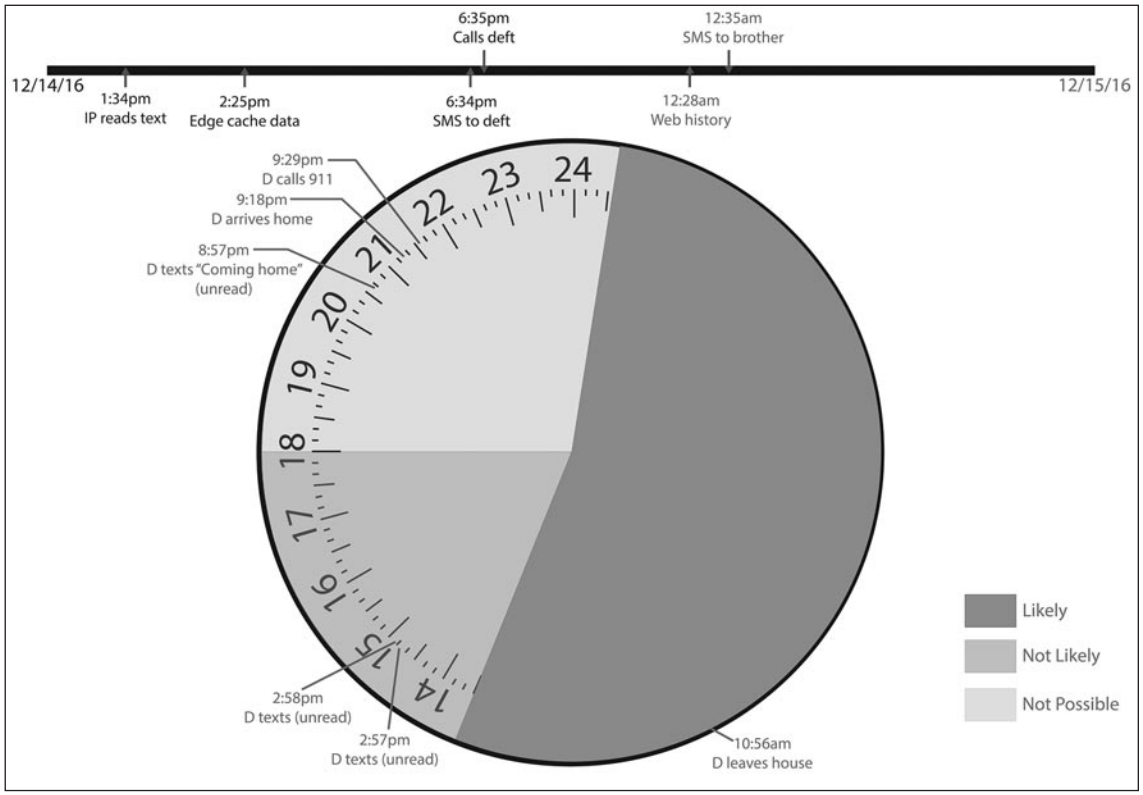
quintillion individuals. There was no innocent explanation for a glove of this type to be found in the cab of his car with his DNA and his child's blood on it. It was, in fact, a smoking gun.

In addition, the blood in the sink where the killer appeared to have cleaned up was a combination of the defendant's, Shanna's, and the baby's blood; the blood under the lip of the sink was Shanna's. The other DNA in the house was notable for one additional thing: Of all the items tested for DNA (from the kitchen drawers, the bathroom sink, and other locations), no sign of foreign DNA was present in that house. The only profiles came from the defendant, Shanna, and the baby, meaning there were no foreign profiles present (where lab techs were able to obtain a profile). This absence, in its own way, was also a smoking gun. It suggests, of course, that no one broke in or touched anything—the only surviving person in that house was Craig Vandewege. He was the only person who could have committed these crimes.

The medical examiner also testified for the State. In addition to describing the injuries to the throats of both victims, she discussed their likely times of death. For this purpose, our office's Forensic Litigation Support Specialist Rhona Wedderein created what we liked to call a "time wheel." (It is reprinted below.) It showed relevant times, including the last known communications from Shanna; when the defendant left for work; when the 911 call was made; and other events to show that during the times she and the baby were likely alive, Vanderwege was the only person around. Shanna last communicated using her cell phone at 12:35 a.m. The defendant called 911 at 9:29 p.m. that night. Dr. Tasha Greenberg, the medical examiner, testified that based on rigor and fixed lividity, it was most likely that Shanna had been killed between 12:35 a.m. and approximately 1:30 p.m. that afternoon. There was no one in contact with either victim from 12:35 a.m. to 10:56 a.m. (when the defendant left for work) other than him. There was no one else present who could have killed Shanna and Diederik.

A blood spatter expert from the Montgomery County Sheriff's Office also testified that the blood evidence from the photos was consistent with Shanna being in her bed in the position she was found in immediately prior to her death. There was a blood marking on her chin and face indicating that someone whose hand was already bloodied had touched her there. From all evidence it was consistent with her being asleep when the bloodletting began. It is not clear, however, which of the two victims died first.

The State also called Jeanette Hanna, a foren-



sic financial analyst who is employed with the DA's office, to testify. It became clear to our team during the preparation of the case that the defendant had taken out an unusual amount of insurance on Shanna and the baby. Fortunately, Jeanette was able to do some digging, and in combination with subpoenaed information from Costco and other insurance providers, a financial motive quickly became clear. Although Shanna already had some life insurance on her a month after she and Craig Vandewege were married, he took out additional insurance on her in the amount of $220,736, for a total of $265,000, before they moved to Texas. Once they got here in 2016, the defendant took out even more insurance, including accidental death and dismemberment insurance. There was a total of $661,505 in life insurance on Shanna prior to her death.

On Diederik, the defendant took out $56,500 in life insurance, much of which was accidental death and dismemberment insurance–very unusual for an infant.

On Diederik, the defendant took out $56,500 in life insurance, much of which was accidental death and dismemberment insurance—very unusual for an infant. The defendant obtained the insurance on the baby two days after he was born. The total amount of insurance on both victims was $718,005, and the beneficiary of all the policies was Craig Vandewege.

In addition, once the family home in Aspen was sold (when they moved to Texas), that money was put into a living trust accessible only by the defendant. Four days after the murders, he disbursed $25,000 to his mother; a little over a month after the murders, he gave an additional $199,000 to his father. Vanderwege benefitted to the tune of $973,842.21 from the deaths of Shanna and the baby.

The verdict

The jury went out to deliberate at 12:40 p.m. on November 4, 2021, and they reached their verdict at 3:55 p.m., just a little over three hours later. From the State's perspective, it was the longest three hours in history.

At one point after we closed our case, we went to an adjoining room where Shanna's family and friends had observed final argument. Many had come from out of state to watch, and they were all crying. Not just crying, but gut-wrenching sobs, letting out years of pain. It was very difficult to see, but somehow it pointed out the ability of trials to exorcise pain and help people heal. Somewhere in all that pain was a small seed of hope.

When the verdict came back, the jury foreman announced with great conviction that they had reached a verdict, and Judge Robert Brotherton read it: "We, the jury, find the defendant, Craig Alan Vandewege, guilty of the offense of capital murder, as charged in the indictment."

After five years, justice was finally done.

After the appellate process concluded, mandate was issued on June 6, 2024. Vanderwege was taken to the Institutional Division of the Texas Department of Criminal Justice, where he remains at the Clemens Unit on a sentence of life without parole to this day. While Shanna and Diederik were not there to see that verdict, their loved ones were.

Conclusion

Shanna and Diederik Vandewege deserved to live their lives to the fullest. Shanna deserved to pursue her career as a nurse, to become a grandmother, and to have a dignified old age. Diederik deserved to go to school, grow up, become a man, and get married one day. They both deserved love and loyalty. They were denied all these things by the one man who should have done everything he could to see that their lives were full and happy. Instead, he betrayed them—and for what? For a worthless "freedom" to follow his vices: sex and greed.

The only silver lining in this tragedy is that the person who authored it will pay for it—in the Texas Department of Criminal Justice—for the rest of his life. ❇

Oral argument

Editor's note: This article is excerpted from Chapter 10: Oral Argument in the 2025 edition of the *State's Appellate Manual*, which was sent for free to every Texas prosecutor's office in spring 2025. Copies of the 14-chapter book are also available for sale on the TDCAA website at www.tdcaa.com/books.

By Emily Johnson-Liu
Assistant State Prosecuting Attorney in Austin

Oral argument is often a nerve-racking experience that, when properly prepared, takes a lot of time away from the rest of your docket and seldom changes the outcome of a case. But it offers attorneys something irreplaceable: the opportunity to hear and address the concerns of the court deciding their case. To take advantage of that opportunity, attorneys must understand the purpose of argument, prepare and anticipate questions at the core of their case, and engage extemporaneously with the court in a way that is both responsive to their concerns and conveys the party's core message. If this sounds daunting, don't worry. Be patient with yourself, and know that, as with most things, it gets better with practice.

Understanding the purpose of argument

The biggest mistake an attorney can make about oral argument is to view it as a speech to the court interrupted by questions. Attorneys subconsciously telegraph this misguided mindset when, in answer to a question, they say, "I'll get to that in a minute" or with every hypothetical, they respond, "That's not our case." These attorneys have entirely missed the point. You are at argument to get a glimpse into the judges' view of the case. Their questions will dictate the order in which you will address the issues because it is their interest and how they are approaching the issues that matters, not yours. Human communication is imperfect, and even though we strive to make our point as clear as possible in our briefs, sometimes the message doesn't get through. But, if you are listening and open to it, the back-and-forth exchange between you and the judges can bring those misunderstandings to light. A point made in natural human speech can strike a judge differently than it would in a brief. Also, you may have mentioned a fact or cited a case in one part of your brief that the justice did not focus on, but when you remind the justice of it in answer to her question on another point, your position may become more appealing. In this way, as Rule of Appellate Procedure 39.2 explains: "Oral argument should emphasize and clarify the written arguments in the briefs."

Another important perspective an attorney should have about argument is that your involvement is midstream in the court's or panel's ongoing discussion of this case or the law more broadly. Some courts of appeals prepare a draft opinion or have conferenced about the case before argument. Even when they have not, the judges or justices always talk with each other, sometimes about related cases of which you are unaware. Your case arises amid that larger stream of conversations. They are privy to what their colleagues think on other matters; you are not. And they will return to their conversations with their colleagues specifically to decide your case. This can affect how you prepare and respond to questions during argument.

These two perspectives (that soliciting and responding to the judges' concerns should be paramount and realizing there is a conversation going on beyond you) affect everything else.

Preparing for argument

Texas Court of Criminal Appeals Judge David Newell said that one of his biggest frustrations about oral argument is attorneys' failure to anticipate the most basic questions that a court would

have about the case. In my own experience, I have seen attorneys repeatedly answer, "I don't know" to judges' questions about the facts or be dumbfounded by what seems to be the operative question in the case—such as how to interpret a particular phrase of the statute in a statutory interpretation case. This can be avoided by careful preparation, including re-doing some of your work from the briefing stage, getting yourself in the right mindset where you can anticipate concerns, and mastering your case through the process of preparing notes or an outline.

Re-familiarize yourself with the facts and law. Most of the time, there is a delay between when you have briefed the case and when you argue. This delay can work to your advantage by allowing you to look at the case with fresh eyes. Although you often won't have time to redo all the work, you should re-familiarize yourself with the facts and law. This time, instead of constructing an argument, consider how a fair-minded, neutral judge would view everything. Be curious. Then, as you go through the various stages of preparation, think about what that fair-minded judge would want to know. Keep your legal pad or notes section of your phone handy to add to your running list of possible questions.

Although you often won't have time to redo all the work, you should re-familiarize yourself with the facts and law. This time, instead of constructing an argument, consider how a fair-minded, neutral judge would view everything. Be curious.

Re-read all the briefing. Most attorneys begin their preparation by doing this. It's an excellent way to quickly get back up to speed.

Refresh your knowledge of the record. If you don't have time to re-read all the hearings or testimony implicated by the issues, at least go back and look at the key moments. To do this, ask yourself what is crucial about your facts. So, for example, if the case is whether *Miranda* warnings were required, you'll likely need to know all the facts relevant to whether the defendant was in custody.

Don't rely on your memory from your original preparation of the case. Telling a judge who asks about the facts that you "don't remember" doesn't explain why you didn't refresh yourself on the aspects of the record implicated by the issues in the case. No one expects you to have memorized the entire record, and there will be times you may not know the answer to a factual question, but identifying the crucial facts, spending time finding them in the record, and learning them (or noting them in your oral argument outline) will enable you to answer most questions you are likely to get.

Re-learn the law. Update your research to see if anything new has come out. As with the facts, identify which aspects of the law control the resolution of the issue. If a statute is key, reference the same version of the statute throughout your preparation to help with memory. Re-read the most important cases and prepare notes on their basic facts and holdings, but also really interrogate them.

Prepare an outline or notes. While some attorneys draft an entire prepared speech that they would give if not asked any questions, most prefer to prepare an outline or notes of some kind. Many continue to hone the outline as they go—shortening it as they internalize greater amounts of information and distilling it as they find better ways to express key points.

One helpful way to begin an outline is to sketch the basic framework of your argument on each issue from your brief. Don't try to include every argument. Some arguments are too far in the weeds and are best suited for the person sitting down to write the opinion. But other arguments have intuitive appeal and can be easily and succinctly explained aloud. Those are keepers.

Your outline should probably include a canned opening (that you'll memorize or near-memorize) and perhaps the briefest closing (which you may not have time to say). I also use it to make notes to myself—like remembering how I'll begin (even writing "May It Please the Court," "*Slow down*," "*Breathe*," or "*Speak up*"). When I was arguing before different panels in the courts of appeals, I put photos of the justices on the panel at the very top of the outline to help me visualize giving the argument to them.

Try to identify a principle or overarching theme that answers several points about why the court should rule in your favor. Here's a few common examples:

- The touchstone of the Fourth Amendment is reasonableness.
- It's a totality-of-the-circumstances test.
- The trial judge's ruling fell within the zone of reasonable disagreement.

Sometimes you can work one of these mantras into your opening or have it to fall back on as an immediate response to a judge's question, giving you time to think of a less generic and more persuasive answer.

Drafting your prepared opening. How you start will depend on whether you are the first attorney to argue (the appellant in the court of appeals) or the second (the appellee in the court of appeals). Whoever argues first needs to orient the court to the issues and the very briefest, opera-

tive facts. Most courts of appeals justices I have argued in front of were well prepared and had obviously read the briefs. A good opening would (in less than 90 seconds) present the disputed issue and your position on it so that a quick-witted judge who had not read the briefs would immediately catch on. In no case should you start reciting a bunch of facts and dates. Instead, set the stage by sketching the issues and positions so everyone can get to what you're there for—figuring out what might be concerning the court. Here are a few examples of how to start an opening argument:

> Appellant was a lone shoplifter who was convicted of organized retail theft. As it turns out, organized retail theft requires multiple people committing large-scale theft in an organized fashion. So, this Court said she couldn't be guilty of that and sent it back to the court of appeals to decide if "big theft" includes "little theft" as a lesser-included offense. The court of appeals decided as a matter of common sense that the statutory elements of organized retail theft included the statutory elements of theft under §31.03(a). However, the court of appeals declined to hold that theft was a lesser included in this case because the State never alleged the identity of the property owner in this case, which was HEB. So, the micro-issue in this case is whether the identity of the owner is an essential element for the first step of *Hall*.[1]

> Permitting the outcry witness to testify over Zoom was proper here. The trial court heard evidence of the witness's intimidation in the form of death threats against her, her family medical need to care for her injured husband, and a conflicting court appearance. After that, the trial court stated it would "find a necessity shown." Contrary to the court of appeals's holding, this finding was sufficiently specific and it was defensible.[2]

> The federal constitution has two provisions that guarantee defendants some sort of right to be present in a courtroom. Both of these use—in court descriptions of them—the word "confront." However, they are very distinct rights: the Due Process right to confront witnesses and be present and the Sixth Amendment Confrontation Clause right to be present and confront witnesses. What happened in this case was the court of appeals confused those two. They used the test for when the Due Process right applied and then they applied the Confrontation Clause. I'm going to ask this Court to hold first that the Confrontation Clause does not apply at probation revocation hearings, consistent with all federal precedent on the subject. I'm also going to ask this Court to hold that the Due Process right to be present requires at least a showing of harm but also an objection to be able to be preserved for appeal, or else there's nothing for an appellate court to review.[3]

If you argue after your opposing counsel, the court has figured out—either through your opponent's opening or through questions from the court—what the case is about. As a result, it is usually best to pick up right where the conversation ended with opposing counsel, so the opening to your response argument becomes entirely extemporaneous. But sometimes you need to recenter the discussion if you feel some perspective has been lost or the argument has gotten entirely off-track. In those cases, it can be useful to have prepared a very brief canned opening that reminds the court of your position on the issues being argued. Here's an example:

> This is a case of too little, too late—both as to the legal matters and to the factual ones. Legally, Appellant waited too late to raise the issue of equitable estoppel (which was not preserved), and he cannot meet the elements. Factually, Appellant was only going through the motions

If you argue after your opposing counsel, the court has figured out–either through your opponent's opening or through questions from the court–what the case is about.

[1] John Messinger, *Lang v. State*, PD-1124-19.

[2] Emily Johnson-Liu, *McCumber v. State*, PD-0467-23.

[3] Clint Morgan, *Hughes v. State*, PD-0164-22.

of the service plan and by then it was too late, and the risk to his children, too great.[4]

Anticipating questions. Approaching the issues as a fair-minded, neutral judge will help you identify many of the questions your actual judges will have about the case. If you are curious and ask yourself why the rule you are asking for, the case you rely on, or the result you seek makes sense, you'll likely be able to satisfy many of the judges' concerns, too. If you can, seek out the views of someone likely to be sympathetic to your opponent's side of the argument, or imagine that you were having to advocate for that position. Identify the strongest arguments for that side and figure out how to rebut them or at least how to make them less damaging.

A former appellate prosecutor and court of appeals justice used to say that if you can't sit down and write out the whole of your argument in big, thick crayon on half a sheet of paper, you don't know your case well enough.

Another good source of potential questions is the court's other recent decisions on similar issues. This can give you a peek into some of the possible internal discussions the court has had. If those cases were argued, you'll want to listen to the recording if one is available. Judges have been known to ask the same questions they asked during earlier iterations of the same issue. Research a better answer than the previous advocate gave.

Preparing for organized chaos. Oral argument is necessarily a jumble that you cannot control. One of the best ways to prepare yourself for the disorganization to come is by identifying what you *have* to say. A former appellate prosecutor and court of appeals justice used to say that if you can't sit down and write out the whole of your argument in big, thick crayon on half a sheet of paper, you don't know your case well enough. Updated a bit: See if you can put it in a text message to a friend. Such an argument obviously needs to be pared down. At the same time, you also need to be prepared for a cold panel, where you get very few questions but still need to advance your argument for long enough to draw out a concern from the judges as it occurs to them.

To prepare for jumping around in the argument, some attorneys find it helpful to write their anticipated questions on notecards (perhaps keeping them segregated by issue if there are multiple issues). You can practice answering a question, getting back to your argument, and then answering another question.

Know the local rules. If you are not already well-versed in your court's local rules and advice concerning oral argument, refresh your memory. They are usually found on the court's website, either under "Practice Before the Court," "Local Rules," or "Internal Operating Procedures." The topics covered vary from court to court, but what you find may surprise you. For instance, the Second Court of Appeals posts a one-page dress code for courtroom proceedings, and the Tenth Court of Appeals prohibits bringing up a new issue in the appellant's rebuttal. Several courts have rules about electronic devices.

Time limits. The time limits for your court are the most important rules to know. Particularly if you are the appellant (or it's your PDR in the Court of Criminal Appeals [CCA]), know ahead of time whether you must reserve time for rebuttal from the total time you're allotted. This is the minority practice among the courts of appeals, but it's the rule in the CCA. It's also good to know in advance whether you'll be expected to alert the presiding judge to the amount of time you've reserved, in addition to telling a clerk or briefing attorney before argument. Some courts have a maximum number of minutes (five in the Second Court of Appeals) that you can reserve for rebuttal.

Each party's overall time for argument also varies, from a flat 15 minutes (in the Fourteenth Court of Appeals) to 20 minutes with 10 additional minutes for rebuttal (in the Fourth Court of Appeals). Particularly if your case gets transferred under docket equalization to a court of appeals you are not familiar with, be sure to check what the time limits are for argument.

Time limits in the CCA are set by Texas Rule of Appellate Procedure 75.3 at 20 minutes a side "unless extended in a special case." While you can move to extend the time for oral argument in the CCA or court of appeals, this is quite rare and would typically occur only in a very complex case or if your case is consolidated with others argued by different attorneys.

The default setting for how many minutes remain when the yellow light comes on also varies from court to court and, for some courts, even for different segments of the argument (opening vs. rebuttal). Just be aware that it could be different from what you are used to when you travel to a new court for argument.

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[4] *In re J.M. & L.M.*, 05-04-00306-CV, Dallas Court of Appeals.

Delivering the argument

Former Solicitor General (and Supreme Court Justice) Robert Jackson once said about oral argument:

> I made three arguments in every case. ... First came the one that I had planned—logical, coherent, complete. Second was the one I actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.[5]

Let's hope this gives you some comfort knowing you're in good company if you have some ambivalence about your own oral arguments. It helped me when my first appellate chief, John Stride, shared it, just knowing that in the best of cases, delivering the argument is always a bit of a mess.

What to bring with you to the lectern. The best advice is to try to bring as little with you to the lectern as possible. I've had several arguments where I haven't had the chance to look at my notes beyond the first minute in the case. Michael Dreeben, former longtime Solicitor General who is now a lecturer at Harvard Law School, suggests doing a moot court without any notes to see how it feels. My colleague at the State Prosecuting Attorney's Office, John Messinger, routinely does his opening argument that way. For many people, me included, having your outline brings peace of mind that the information is right there should you forget something. Either way, don't let your notes or the planned argument in your head get in the way of making eye contact with the judges and staying alert to all the nonverbal signs that a judge has a question. The Rules of Appellate Procedure set the absolute minimum threshold in saying, "Counsel should not merely read from prepared text."[6] The best arguments go to the absolute other extreme.

Also, no one intends to have a pen in their hand during argument, but especially on rebuttal if you've just finished jotting down a note on the way to the lectern, you can forget it's there. I've done it. So just be mindful.

There will be nerves. Even the most experienced attorneys are affected by nervousness. Michael Dreeben, after more than a hundred arguments, puts his level of nervousness before Supreme Court arguments at "slightly less" than "abject terror." Don't expect that you can eliminate nerves. But being prepared, getting more arguments under your belt, taking slow deep breaths, and using some visualization techniques can help you be able to perform despite the nerves. Plus, for many of us, the nervousness disappears once you start talking. So, remind yourself of that, bring a trusted friend or colleague who will, or consider other distractions that can take your mind off it entirely.

Really listen to the question. Attorneys can get so caught up in the moment that they stop listening all the way to the end of the question. Sometimes it's because they think they know where it's going or have anticipated being asked something similar, but it turns out that isn't the case. It might be easy to think this is good management of limited time. But in reality, it is a missed opportunity to address the court on a potential stumbling block that the justice has identified for you. What's more, it can be frustrating to the justice because he feels like he hasn't been heard. This mistake can easily slip by you unless someone tells you that you are susceptible to it or you go back to view a recording of your argument. As with speaking too fast, sometimes it's a matter of pent-up energy. Focus on being truly present and genuinely curious about what that judge wants to know.

Attorneys can get so caught up in the moment that they stop listening all the way to the end of the question. Sometimes it's because they think they know where it's going or have anticipated being asked something similar, but it turns out that isn't the case.

Responding to questions and transitioning back. If the question calls for a "yes" or "no," give that answer directly or explain why you cannot. You want the justices to know that you are not avoiding the question and that you are prioritizing addressing their concerns over accomplishing your agenda.

After you have sufficiently answered the question, you ideally want to either pivot back to your argument, or better yet, advance through to your argument, picking up where your answer left off. Earlier in my career, I looked at argument as a way of identifying whether judges were mostly for me or against me. And it was lost on me that softball questions are so named because they offer a better chance to hit the ball. I would typically just agree and leave it at that. But helpfully, a softball question can sometimes come from a judge who knows his colleague better than you and can help direct an argument where it is more likely to land a hit.

To further mix metaphors, now I look at oral argument more like a game of volleyball, where

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[5] *TIME Magazine*, April 10, 1964.

[6] Tex. R. App. P. 39.2.

the judges are moving from one side of the net to the other. Sometimes their questions come in the form of a serve from the opposing team that is difficult to return. That same judge can then join you on your side of the net and set you up for a spike. Either way, your job is to keep the ball in the air. You can keep this going after your answer by returning to earlier points in the argument, "That ties back to Judge X's question," or moving on to something new, "The easiest way to resolve this issue ... ."

Give short answers for judges who, by that point, often have short attention spans. It is not unusual for the justice presiding on the panel to turn to the attorney standing up for rebuttal and ask, "Do you have anything else?"

Making concessions. Most arguments have weaknesses, and you can sometimes gain credibility (or at least not lose it) by acknowledging that weakness. Consider the following exchange from *United States v. Rahimi*, the Supreme Court argument about banning gun possession by those with domestic-violence protective orders like Zackey Rahimi, who shot up a Whataburger before his guns were taken away:

> *Chief Justice Roberts:* You don't have any doubt that your client's a dangerous person, do you?
> *Mr. Wright:* Your Honor, I would want to know what "dangerous person" means. At the moment —
> *Chief Justice Roberts:* Well, it means someone who's shooting, you know, at people. That's a good start. *(Laughter.)*
> *Mr. Wright:* So ... so that's fair.

Instead of waiting, as Mr. Wright did, for the room to turn against you, it is better to acknowledge deficiencies in your argument gracefully, and then immediately press your argument. Still, concessions must be made intelligently. If you don't fully understand your case and haven't considered what concessions you can make ahead of time, there's a danger that you inadvertently turn yourself into a ping-pong ball. That is, that you'll agree to one position in answer to one justice's question, only to agree with the opposite position in answer to different justice's question.

What if you don't know the answer? It is OK to pause and take a few seconds before answering a question. If you don't know and haven't anticipated a particular question, that is also OK. Every attorney gets to that point some time. It is always better to be forthright and say you don't know but that you will find out and file a supplemental letter brief. No one expects you to know everything. If you bluff and turn out to be wrong, you'll be filing a letter brief anyhow to correct the error, only this time, you'll also be digging yourself out of a hole first.

Know when to quit. In no other part of your argument is it more critical that you be brief than in its conclusion. As the Appellate Rules helpfully remind us, "Counsel is not required to use all the allotted time."[7] Give short answers for judges who, by that point, often have short attention spans. It is not unusual for the justice presiding on the panel to turn to the attorney standing up for rebuttal and ask, "Do you have anything else?" Signal that you are mindful of the judges' view that most of the productive things have already been said, by saying, "Judge, I just have two points" and then get to them quickly.

Only go over your time if you have the presiding judge's permission. This is the rule.[8] Sometimes, the problem is that the advocate forgets to look down at the clock. Even that is no excuse for ignoring the signs of restlessness from the judges gathering their papers, ready to be done.

Finally, while lawyers are often taught to end with a prayer, there is no requirement in the rules that you do so. If the justices haven't figured out what relief you want at that point, it is probably too late, and a brief, "I'll pray for an affirmance," is pretty vacuous and not worth saying. A better way to end, is simply to make eye contact with the judges as you say, "If there are no other questions," pause, then say, "Thank you." ❇

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[7] Tex. R. App. P. 39.3.

[8] See Tex. R. App. P. 39.3.

Running criminal histories for voir dire even faster

It is often an "all hands on deck" effort to get a jury seated.

By Mike Holley
CDA Investigator in Kaufman County & Investigator Board Chair

Many DA and CA investigators ask potential jurors to complete questionnaires, then we use open-source media (Facebook, etc.) to peer more closely into their backgrounds. We count on them to tell the truth about their qualifications, and it is our duty to trust—but verify.

How do we determine whether potential jurors are qualified to serve? Chapter 35 of the Code of Criminal Procedure states that, among other things, a qualified juror:

- must be registered to vote,
- must never have been convicted of theft or any felony, and
- must not be under any indictment or legal accusation of theft or any felony.

It is often the duty of DA and CA investigators to run the computerized criminal history (CCH) on all prospective jurors to determine whether anyone was deceptive about one of the above three disqualifiers and to arm our prosecutors with the truth.

Is everyone in the state actually submitting CCH inquiries on prospective jurors during the selection process? If the answer is no, does the time it takes to submit those inquiries factor into play? Are some DA and CA investigators submitting an inquiry to an in-house database, checking to see if panelists have criminal history only in their own counties? Due to time constraints, are some counties accepting potential jurors' willingness to self-disclose without any verification at all?

For the offices whose investigators are diligently requesting CCHs on prospective jurors, how long does it take? How many investigators are pulled from other duties to assist? From my 13 years of membership in TDCAA and three years serving on the Investigator Board, I have learned from my brethren across the state how a lot of us check on potential jurors' backgrounds. Most are submitting CCH inquiries on the summonsed individuals who appear for jury duty, which is potentially hundreds of submissions. An NCIC (National Crime Information Center) inquiry of this size easily requires hours of data entry or dividing the task among multiple investigators (if an office happens to have that luxury).

The act of sifting through sound-alikes and aliases alone can be a grueling task. One of our sound-alikes recently led us to believe an individual was a young white man covered in Aryan Brotherhood tattoos, only to discover the actual perspective juror was an elderly African-American woman who appeared to be the Avon lady!

DPS to the rescue

Can we submit CCH requests in a more efficient manner, and is it possible to receive a rapid response to large-batch submissions? Unequivocally, *yes*!

Thanks to our friends at the Texas Department of Public Safety, we have been able to submit large-batch CCH queries on the DPS Secure Site for many years. Although many offices throughout the state are utilizing this service, I have discovered that many are unaware it exists. Our investigators are usually receiving responses on the entire batch in less than five minutes. To be clear, we are submitting 150–200 criminal history requests in one batch and receiving an almost instant response.

The DPS Secure Site allows for a batch upload and provides very specific instructions regarding the required format and file type. Carefully following DPS's instruction, our IT personnel created a file conversion for the district clerk's list of potential jurors. Prior to this file conversion, a

skilled investigator proficient in typing 120 words per minute would likely spend hours entering a massive amount of data. The batch upload practice has been a game-changer during voir dire when time is of the essence.

A couple of things to remember: The use of the DPS Secure Site is permitted to authorized users only and requires a signed user agreement. (If your office is not already using it, consider getting authorized to use the DPS Secure Site.) The DPS Secure Site does not allow a user to submit CCH inquiries on a master list of individuals summoned to appear for jury duty. Rather, users are permitted to conduct CCH searches only on the *individuals who actually respond to the summons and appear* for jury service and have been duly sworn in. An NCIC (national) CCH query should always be performed on the much smaller number of remaining individuals after the majority have been struck for cause or otherwise dismissed.

A simple file conversion can truly give your office a tune-up for voir dire, freeing up investigators to focus on other essential tasks and better serve the office and community.

I will admit: The first time I read the DPS Secure Site batch upload instructions, it brought back horrible teenage memories of algebra and calculus! I humbly accept the fact that file format language is not a part of my vocabulary, and I have learned to never underestimate the superpowers possessed by IT personnel. A simple file conversion can truly give your office a tune-up for voir dire, freeing up investigators to focus on other essential tasks and better serve the office and community.

Many thanks to DPS for making this possible!

Special thanks to Kaufman County DA Investigator Austin Jones, IT Specialist Ron Rios, and the administrators of the Texas Department of Public Safety Secure Site for their contributions to this article. If you'd like more information on the content of this article, please email the author at mike.holley@kaufmancounty.net. ❇

Sealing juvenile records

If you're prosecuting in the juvenile system long enough, you will run across applications to seal juvenile records. It is another advantage that the Texas Family Code gives to juvenile offenders.

By Kathleen Takamine
Assistant Criminal District Attorney in Bexar County

On the whole, juvenile records are kept strictly confidential. The code limits access to such records, with the public having no right to them. Sealing is basically an additional benefit. While juvenile records have always been protected, sealing records heightens those protections.

This all goes back to the general purpose of the juvenile justice system, which is to ensure the safety of the public while still providing treatment and rehabilitation for juveniles.[1] Our duty as prosecutors is to ensure this balance by weighing the safety of the public with appropriate consideration for the juvenile.

What are "juvenile records"

Family Code §58.251 defines record as "any documentation related to a juvenile matter, including information contained in that documentation."[2] It also defines juvenile matter as "a referral to a juvenile court or juvenile probation department and all related court proceedings and outcomes, if any."[3] This section includes electronic and physical records.[4] There are records that are exempt from this section, such as Texas Juvenile Justice Department (TJJD) records collected or maintained for statistical or research purposes, Department of Public Safety (DPS) or local law enforcement records relating to a criminal combination or criminal street gangs under Chapter 67, and DPS records on sex offender registration under Code of Criminal Procedure Chapter 62.[5]

The bottom line is that records subject to sealing include all files of the juvenile courts; juvenile probation department; prosecutor's office; law enforcement agencies; TJJD; and any private or public agency that had custody of, provided supervision to, or provided services to the juvenile.[6] That is a lot of records from a lot of agencies across the board. When an application comes across your desk and is set for a hearing, it pays to read it carefully and know what laws apply and find out if there have been any changes in the law since the last time you read up on them.

Sealing vs. expunction

I've had attorneys bring up expunctions in juvenile court. Sealing a record under Chapter 58 of the Family Code and expunging a record under Chapter 55A of the Code of Criminal Procedure are not the same.

Texas Family Code §58.265 specifically states that any juvenile record to which the code applies can't be expunged. Really, there is only one place where a juvenile's records can be expunged and that is found in the Alcoholic Beverage Code.[7] A "minor" under the Alcoholic Beverage Code is anyone under 21, which includes persons defined

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[1] Tex. Family Code §51.01.

[2] Tex. Family Code §58.251(4).

[3] Tex. Family Code §58.251(2).

[4] Tex. Family Code §58.251(1) & (3).

[5] Tex. Family Code §58.252.

[6] Tex. Family Code §58.259.

[7] Tex. Alcoholic Beverage Code §106.12.

as a child under the Family Code.[8] However, these offenses as applied to juveniles are Class C misdemeanors and are outside the jurisdiction of juvenile courts.[9] These are not considered "juvenile matters" as defined by the Family Code[10] and therefore do not fall under §58.265.

Another difference is that when you expunge a record, you are erasing all records on one specific case. When a juvenile court seals a juvenile record under the Family Code, in most cases, the youth's entire juvenile criminal history will be sealed.[11] The only situation where the sealing affects only one case is where the juvenile court enters a finding of "not true" (juvenile-speak for "not guilty"). In this situation, the court will automatically order the sealing of the records on that specific case,[12] and it will not include any other cases.

Finally, in expunctions, all records related to that one case are basically destroyed. The Code of Criminal Procedure prohibits "the release, maintenance, dissemination, or use of the expunged records and files for any purpose."[13] A sealed juvenile record is not destroyed. Sealed records can still be accessed by petitioning the juvenile court for access by only a few parties.[14]

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[8] See Tex. Family Code §51.02(2).

[9] See Tex. Family Code §51.03 and §51.04.

[10] Tex. Family Code §58.251.

[11] See Tex. Family Code §58.258.

[12] Tex. Family Code §58.2551.

[13] Tex. Code Crim. Proc. Art. 55a.401(1).

[14] Tex. Family Code §58.260. "(a) A juvenile court may allow, by order, the inspection of records sealed under this subchapter or under §58.003, as that law existed before September 1, 2017, only by: (1) a person named in the order, on the petition of the person who is the subject of the records; (2) a prosecutor, on the petition of the prosecutor, for the purpose of reviewing the records for possible use: (A) in a capital prosecution; or (B) for the enhancement of punishment under §12.42, Penal Code; or (3) a court, the Texas Department of Criminal Justice, or the Texas Juvenile Justice Department for the purposes of Art. 62.007(e), Code of Criminal Procedure. (b) After a petitioner inspects records under this section, the court may order the release of any or all of the records to the petitioner on the motion of the petitioner."

Keep in mind that the decision to release sealed juvenile records will rest on the juvenile court that signed the order. I will touch upon the effects of record sealing later.

Records ineligible for sealing

Before I discuss how to seal juvenile records, note that some records are absolutely not eligible to be sealed. These are found in Family Code §58.256(d) and include the following:

1) if a person was adjudicated and received a determinate sentence,

2) a person who is currently required to register as a sex offender, and

3) a juvenile who was sentenced to TJJD and has not yet been discharged.

If any of these situations is present, the juvenile court cannot order the sealing of the record. In regard to sex offender registration and commitment to TJJD, once the person is no longer required to register or has been released from all TJJD supervision (including parole), the person can apply to have the juvenile records sealed.[15]

Two ways of sealing records without application

In some circumstances, juveniles can have their records sealed without an application. These will obviously not cross a prosecutor's desk. Juveniles in these situations do not have to apply to the juvenile courts to have their records sealed. Instead, government entities will initiate the process once they determine that certain criteria have been met.[16] Or, if the juvenile court finds that the delinquent conduct allegations are "not true" ("not guilty"), the court shall order the sealing of the records under §58.2551.

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[15] Robert O. Dawson, *Texas Juvenile Law*, p 399 (Texas Juvenile Probation Commission 9th ed. 2008).

[16] Tex. Family Code §§58.253 and 58.255. See also Dawson, *Texas Juvenile Law*, p 396.

For no-application sealings, there are two different criteria: one for delinquent-conduct cases[17] and one for Conduct Indicating a Need for Supervision (CINS)[18] cases.

For delinquent cases,[19] the criteria include that the juvenile:

- be at least 19 years old,
- has no felony adjudications (misdemeanor adjudications are fine),
- has no pending juvenile delinquent charges or adult felony or jailable misdemeanor charges,
- has not ever been certified as an adult in a juvenile case, and
- has no adult felony or jailable misdemeanor convictions.

For CINS cases,[20] the criteria include:

- records relating to CINS conduct must have been filed with the juvenile court clerk,
- the juvenile is at least 18 years old,
- the case has not been referred to the juvenile probation office,
- the juvenile has no adult felony convictions, and
- the juvenile has no pending adult felony or jailable misdemeanor charges.

In cases involving delinquent-conduct charges, DPS initiates the no-application sealings because it is in the best position to find out whether a juvenile has meet the criteria for sealing. DPS maintains the Juvenile Justice Information System (JJIS) and has access to this information.[21] Once DPS determines that a juvenile is eligible for record sealing, authorities there contact the juvenile probation department that submitted the records.[22] The juvenile probation department verifies that the juvenile is eligible, notifies the juvenile court within 60 days of receiving the information from DPS, and turns over a list of all the referrals related to the juvenile.[23] The juvenile court will then seal the record within 60 days of receiving the information from the probation department.[24] If the juvenile probation department finds that the juvenile is not eligible, it must notify DPS within 15 days of receiving the information.[25]

CINS cases are not reported to JJIS, so it is up to the local probation department to monitor and report a juvenile's eligibility.[26] For these types of cases, the juvenile probation department notifies the juvenile court and turns over the entire list of referrals.[27] The juvenile court has 60 days to seal the record.[28] This is not discretionary. The Family Code is clear that the probation department shall notify the juvenile court once the criteria is met.

This was mentioned earlier, but one other way to have a record sealed without an application is if a juvenile court enters a "not true" finding on a juvenile. This is automatic on the court's part and is done without a hearing.

Two ways of sealing records with application

These are the cases where the prosecutor's office will be able to argue its point of view. Juveniles who have been adjudicated in a felony case or have not met the criteria for sealing without application have to apply for sealing.[29] There are requirements that must be met before the court can grant a sealing with application, and the court has full discretion in granting or denying an application for sealing.[30]

This was mentioned earlier, but one other way to have a record sealed without an application is if a juvenile court enters a "not true" finding on a juvenile. This is automatic on the court's part and is done without a hearing.

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[17] See Texas Family Code §51.03 for the definition of delinquent conduct.

[18] See Texas Family Code §51.03. Basically, conduct of juveniles who commit fine-only offenses.

[19] Tex. Family Code §58.253.

[20] Tex. Family Code §58.255.

[21] Tex. Family Code §58.254. See also Dawson, *Texas Juvenile Law*, p. 396. JJIS is covered under Tex. Family Code, Chapter 58, Subchapter B, and is basically a computerized database of all information involving the juvenile justice system.

[22] Tex. Family Code §58.254(a); see also Dawson, *Texas Juvenile Law*, p. 396.

[23] Tex. Family Code §58.254(c); see also Dawson, Texas Juvenile Law, p. 396.

[24] Tex. Family Code §58.254(f).

[25] Tex. Family Code §58.254(e).

[26] Dawson, *Texas Juvenile Law*, p. 397.

[27] Tex. Family Code §58.255(b).

[28] Tex. Family Code §58.255(c).

[29] Tex. Family Code §58.256. See also Dawson, *Texas Juvenile Law*, p. 397.

[30] Tex. Family Code §58.256(e).

Every application is required to have:[31]

- the person's full name, gender, race or ethnicity, date of birth, driver's license or identification number, and Social Security number;
- the conduct or offense that was referred to the juvenile probation department, including the date of the offense; and
- a list of all the entities that the juvenile believes have possession of records on him or her.

If any of this information is not included, there should be an explanation of why it's missing.[32] If the information is missing and no reason is given, it does not necessarily mean that the application will be denied. In my experience, these cases are set for a hearing and the information or reason is given at the hearing.

A prosecutor can also agree to the sealing, thus negating any need for a hearing. Whether I agree depends on the person's record. Once I receive the application (it has to be served on the State from the court), it is imperative to have the person's criminal background checked. For example, if the juvenile had a misdemeanor evading detention case and no other criminal history, it likely doesn't serve anyone to fight that application. It gets more complicated in cases with serious charges, when a prosecutor should proceed to a hearing before the juvenile court.

If these agencies–DPS, TJJD, public and private agencies and institutions, and various others–receive any inquiries about the person who is the subject of the sealing order, they must report that records do not exist on that person.

Once an application is filed, the juvenile court can either sign the application without a hearing, as long as the required information listed above is included, or set the matter for a hearing.[33] If the court sets it for a hearing, it must be set within 60 days of the application being filed.[34]

What is the basic criteria for sealing a record? At the least, the person applying for the sealing must show:

- s/he is at least 17 years old; if under 17, s/he must show that one year has passed after the "final discharge" of the juvenile case;[35]
- s/he does not have a current pending juvenile referral with any juvenile probation department or juvenile court (this is where criminal background checks come into play);[36]
- s/he had not been certified as an adult in their juvenile case;[37]
- s/he does not have an adult felony conviction;[38] and
- s/he does not have any pending adult felony or jailable misdemeanor cases.[39]

This is the bare minimum of what must be proven.

At the hearing, prosecutors have an opportunity to oppose the application. The Family Code gives the court discretion to grant or deny the application, but the court cannot deny it without a hearing.[40] The hearing may simply be the prosecutor arguing the case, or the prosecutor may bring in witnesses, such as the victims, victims' families, or the juvenile probation officer.

After the hearing, the court will make its ruling. If the court denies the application, the matter is done. There's nothing specific in the Family Code that prohibits the person from submitting another application sometime later, but I personally have not seen it done.

If the court grants the application, then the sealing process begins.

Orders to seal records

This section applies to both sealing with application and sealing without application scenarios.

Once the order is signed, all adjudications relating to the person are vacated and the proceedings are dismissed and treated as though they had never occurred.[41] People whose juvenile records are sealed could honestly say that they had never had any cases in the juvenile system.[42]

The court has 60 days to send out the order to the court clerk, the prosecutor's office, law enforcement agencies, DPS, TJJD (if the person had

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31 Tex. Family Code §58.256(b).

32 *Id.*

33 Tex. Family Code §58.256(e).

34 Tex. Family Code §58.257.

35 Tex. Family Code §58.256(c)(1).

36 Tex. Family Code §58.256(c)(2).

37 Tex. Family Code §58.256(c)(3).

38 Tex. Family Code §58.256(c)(4).

39 Tex. Family Code §58.256(c)(5).

40 Dawson, *Texas Juvenile Law*, p. 397.

41 Tex. Family Code §58.258(c).

42 See Tex. Family Code §58.261.

been sentenced to TJJD), the juvenile probation office, and all entities listed in the order.[43] The Family Code clearly outlines the actions required of the agencies receiving the court order, and these are all mandatory actions—no discretion is allowed. If any of these entities do not have any records on the person, they must send written verification of that fact to the juvenile court.[44] If the entity receives the order but can't verify the person due to lack of identifying information in the order, the entity has 30 days to inform the juvenile court of the matter.[45] The court will then have to procure the missing information and send it to the inquiring entity.[46]

If each of these agencies receive any inquiries about the person who is the subject of the sealing order, they must report that records do not exist on that person.[47]

Department of Public Safety. Under the Family Code, DPS is required to limit access to JJIS records to only TJJD for purposes of conducting research and statistical studies and destroy any other records relating to the person in the order.[48] This includes all DNA records.[49] Once this is done, DPS must send written verification of its required actions to the juvenile court.[50]

Texas Juvenile Justice Department. TJJD is required to seal all records pertaining to the person subject to the order with the exception of records kept for the purpose of research and statistical studies.[51] The Department must also send written verification of its actions to the juvenile court.[52]

Public or private agencies and institutions. These include agencies or institutions that had custody of or provided supervision or services to the person who is subject of the order.[53] This would be juvenile detention centers, secured placement centers, residential treatment centers, and the like. They are required to seal all records concerning the person subject to the order and send written verification of the sealing to the juvenile court.[54]

Others. This is the catch-all category, which would include the prosecutor's office and juvenile probation. For these groups, they must send all records relating to the person to the juvenile court, delete anything that references the person's record, and send written verification of the reference deletion to the juvenile court.[55]

Remember that the best way to get the most up-to-date information on sealing records or other juvenile topics is to rely heavily on the actual statute. Bottom line: Always familiarize yourself with the law in any matter dealing with defense motions. Do not get stuck with outdated information.

Remember that the best way to get the most up-to-date information on sealing records or other juvenile topics is to rely heavily on the actual statute.

Conclusion

This is my penultimate article in a series on juvenile matters. I have been in the juvenile system for so long, it's good to be reminded of how the juvenile process works and why such processes are in place. My next article will be on juvenile specialty courts in Bexar County. I look forward to sharing this information and hope that it gives other jurisdictions ideas to help balance the goals of protecting the public while rehabilitating juveniles. ❇

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[43] Tex. Family Code §58.257(b).

[44] Tex. Family Code §58.259(e).

[45] Tex. Family Code §58.259(d).

[46] *Id*.

[47] Tex. Family Code §58.259(c).

[48] Tex. Family Code §58.259(a)(1)(A) & (B).

[49] Tex. Family Code §58.259(a)(1)(B).

[50] Tex. Family Code §58.259(a)(1)(C).

[51] Tex. Family Code §58.259(a)(2)(A).

[52] Tex. Family Code §58.259(a)(2)(B).

[53] Tex. Family Code §58.259(a)(3).

[54] Tex. Family Code §58.259(a)(3)(A) & (B).

[55] Tex. Family Code §58.259(a)(4).

How to practice law by the rules (government attorney edition)

As a very young lawyer, I read an article in the December 1985 *Texas Bar Journal* titled "How to Practice Law by the Rules" authored by David M. Ellis and Mark A. Shank.[1]

By B.D. Griffin
County Attorney in Montgomery County

The article did not discuss the Rules of Procedure, Rules of Evidence, Disciplinary Rules, or even the Rule Against Perpetuities. The "rules" proposed by the authors are those that "make the practice of law simple (though not, of course, easy)." Over almost 40 years, I have read the article many times, and as the County Attorney in Montgomery County, I require all assistant county attorneys joining the staff to read it too. (You can read it on TDCAA's website; just look for this article in the Journal section.)

To my knowledge, both Messrs. Ellis and Shank spent or have spent their entire practice in the private sector representing primarily non-governmental clients. For 28 years, my practice was similar to theirs, and for the last 12 years now, I have been with the County Attorney's Office. For the past six years I have been the elected county attorney. While the practice of law in a government office differs significantly from practicing in the private sector, there is truth and wisdom in all the rules suggested by Ellis and Shank, and many of the rules are applicable to the practice of government law. Some of their rules are described below, along with some of my additions and corollaries that are particular to the practice of government law.

Shank and Ellis identify 11 rules. Some are not so much rules as observations. Some of the primary rules, such as My Mama's Rule ("Why not just tell the truth?") and Mark's Daddy's Rule ("The more unpleasant the task, the more immediately you need to do it") are well-known and described in many contexts.[2] A number of their rules are specific to litigation: Allen's Witness Rules ("Listen to the question; answer the question"); Joe Canterbury's Observation ("There is a point in every case when a lawyer begins to believe his own bull"); and Smokey's Rule ("Don't lay any bull on the jury"). A couple of the rules relate primarily to litigation but are helpful in other contexts: Barefoot's Rule ("Whenever opposing counsel asks for something, do it if you can—unless it will hurt your client"); Bill Keller's Admonition ("You cannot stir up a bucket full of mud without getting a little on you"), and the Chief Justice Warren Burger Reply Rule ("Never assume your opposing counsel is a klutz"[3]).

Some of the new rules identified below have arisen over the years in both my private practice and government service. Jim Wesley's Rule of Satisfaction is essentially a comment made by an attorney with whom I shared offices when in private practice. Martin's Ali Baba Rule was triggered by a situation with dueling county department heads. Recent events (see Ben's Disney Observation) provided impetus for additional rules and the creation of this article. Before I embark on a discussion of the "new" rules, two of the original rules, the Office Assignments Rule and My Daddy's Telephone Rules, deserve emphasis for government lawyers.

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[1] *Texas Bar Journal*, December 1985, pg. 1376.

[2] Messrs. Shank and Ellis's presentation of these Rules is very insightful and well worth reading nonetheless.

[3] As Shank and Ellis point out, "To assume that person is a klutz is to give away your advantage. More likely, your opposition is a good old guy or gal, just trying to make you think he or she is a klutz."

Office Assignments Rule

The Office Assignments Rule is a guide for those who report to and receive tasks or direction from more than one person in the office. In private practice, law firms have partners, associates, and legal assistants or paralegals. Generally, the partners direct others and are not subject to direction by another. Associates are generally subject to direction by multiple partners, and legal assistants are given work by multiple partners and associates. In many government offices, there may be several levels of attorneys: the elected district attorney or county attorney or other department heads, as well as section or division chiefs, trial court chiefs, supervisors, and mentoring attorneys. As Shank and Ellis state, "Because the number of directors is almost always greater than one, directees (those to whom tasks or cases are delegated) are subject to conflicting demands." The solution is the Office Assignments Rule: "You never have to be a victim of a conflict unless you so choose."

The implementation of the rule is straightforward: When confronted with conflicting directives, communicate with those giving the directions. Inform the multiple task assignors of the situation and ask them to jointly determine the priority of the tasks. If the assignors cannot resolve the situation, the issue moves up the ladder. The result is that work assignments are resolved by establishing the priorities (or sometimes by shifting a task to another designee), conflicts will be avoided, and the person receiving the direction will not alienate his superiors who are assigning the tasks.

My Daddy's Telephone Rules

This addresses telephone communications: "Answer your own phone often enough to confuse your callers, and always return calls."

Shank and Ellis's explanation of these rules is priceless, especially in the age when the most immediate form of communication was the telephone. By answering your own phone regularly, callers will not know whether they initially will be speaking to you or your assistant. If your assistant answers (even if such is the norm), the caller will feel certain it is because you are busy and unavailable and not because (as Shank and Ellis describe) you are a "pompous buffoon" who always has his calls screened. This effect is achieved only if you adhere to the second part of the rule: Always (promptly) return calls. Failure to return calls will tell the callers, including your clients and/or constituents, that you do not wish to communicate with them for a variety of reasons (including that you are a pompous buffoon who thinks he is more important than the caller).

Telephone communication has changed in the world in which we currently operate. For many, the primary means of communication are texts and emails and not the phone. In that regard, My Daddy's Telephone Rules's first half of answering the text or email yourself is presumed (even if you use AI, the response will be from your device). The second half needs modifying to conform to current practices: "Always promptly return calls, emails, and texts."

The result of not following this modified rule is the same, except now there is a digital record of your failure to respond. For most government attorneys, this failure is also subject to public information requests.

Additional rules for government attorneys

In addition to Shank and Ellis's rules, some additional ones specifically apply to the practice of government law. Some are unique to government practice, and some may have application to private practice (especially when dealing with government entities).

Jim Wesley's Rule of Satisfaction. One of the finest lawyers I've ever known was James B. Wesley. Jim started as a certified public accountant (CPA) before obtaining his law degree and bar license. In addition to retaining his CPA license, Jim was board certified in estate planning and probate law as well as commercial real estate law and farm and ranch real estate law. Jim's legal abilities were surpassed only by his friendship and wisdom. I had the pleasure and privilege to share offices with Jim after 11 years with a couple of different law firms. Jim was somewhat older (and clearly wiser), and he imparted to me one of the few absolute truths about the practice of law. I call it Jim Wesley's Rule of Satisfaction: "A lawyer's satisfaction in the practice of law is directly related to the quality of his clients."

Of course, a "quality client" can be different for various areas of the law. In private practice, one would hope that a quality real estate client would be different from a quality criminal client (unfortunately, that is not always the case). Common characteristics of a "quality client" in private practice would entail aspects such as open communication, respect for your opinion, prompt payment, and referring you to their busi-

Jim Wesley was somewhat older (and clearly wiser), and he imparted to me one of the few absolute truths about the practice of law. I call it Jim Wesley's Rule of Satisfaction: "A lawyer's satisfaction in the practice of law is directly related to the quality of his clients."

ness associates, partners, co-conspirators, cellmates, and others needing legal services. A quality client for a government lawyer carries some of the same or similar attributes: respect for your opinion; contacting you before an issue escalates or worsens; honesty and candor; and fully disclosing all known facts of the matter.

Not all government lawyers have clients as we generally tend to think of them. For example, a district attorney represents the State but essentially acts as the community's representative, i.e., makes the final decisions in the case and does not have to confer with a client representative on the pursuit of a criminal charge. In Montgomery County, the county attorney has no criminal jurisdiction. One of our primary responsibilities is to represent the county as an entity and all county officials in all civil proceedings as well as advise client representatives on other legal matters such as employment, contracts, procurement, economic development, open meetings, open records, and state and federal litigation. As such, we deal with a variety of clients and client representatives, including commissioners court, other elected officials, county departments, and department heads. For government lawyers (especially those with non-prosecutor clients), Jim's Rule of Satisfaction certainly applies.

Wesley's Rule of Satisfaction and the Stealers Wheel Corollary point out the importance for a government attorney to develop and maintain good relationships with their clients; otherwise, our satisfaction in practicing law will be greatly diminished and we will understand and experience Messrs. Shanks and Ellis's David's Corollary to My Mama's Rule ("There are worse things than being fired").

Steelers Wheel Corollary to Wesley's Rule of Satisfaction. For government lawyers, however, there is a very important distinction, which I call the Stealers Wheel Corollary. Steelers Wheel was a rock group in the 1970s. One of its biggest hits was "Stuck in the Middle with You," the refrain of which goes, "Clowns to the left of me / jokers to the right / here I am stuck in the middle with you."[4] The Stealers Wheel Corollary to Jim Wesley's Rule of Satisfaction is: "The client can fire you, but you cannot fire the client."

Government attorneys do not get to pick our clients or their representatives. For us, the attorney-client relationship exists and will continue for so long as the client and/or you remain in office, regardless of how good or bad the client is in your perspective. Wesley's Rule of Satisfaction and the Stealers Wheel Corollary point out the importance for a government attorney to develop and maintain good relationships with clients; otherwise, our satisfaction in practicing law will be greatly diminished and we will understand and experience Messrs. Shanks and Ellis's David's Corollary to My Mama's Rule ("There are worse things than being fired").

Ben's Disney World Observation. When my son, Ben, was 10 years old we went to Disney World in Orlando, Florida. For a 10-year-old, it is truly a magical place and validates Disney's slogan that Disney World is "The Happiest Place on Earth." Ben, now 36, and I were lucky enough to attend two rounds of the Masters golf tournament at Augusta National in Georgia this past April. Tickets to the Masters are the hardest tickets to acquire in sports. As we're both avid golfers, a trip to the Masters was a bucket list item that we were unsure would ever happen. On the second day, Ben turned to me and remarked, "Disney is wrong—*this* is the happiest place on earth!" His remark gave birth to Ben's Disney World Observation: "It's all about perspective."

This observation applies not only to the practice of law, but also to dealing with witnesses, clients, coworkers, bosses, spouses, children, and life in general. Everyone does not have the same perspective on an issue or situation. Divergent perspectives are especially true in government where differing job responsibilities lead to differing priorities. (See Martin's "Ali Baba" Rule, below.)

Martin's Ali Baba Rule. Martin Simonton was my father's law partner in the 1960s until he passed away in 1982. Martin was from another era. In their law office, he had the habit of sitting in the reception area while smoking his cigar so he could (over)hear many conversations while people were waiting to sign closing papers. On one such occasion Martin heard two dealmakers describing their latest plans and proposed deals. Apparently, some of these involved elaborate schemes potentially taking advantage of the situation or parties. Martin drew on his cigar, exhaled, and remarked, "Now I know how Ali Baba felt when he saw the 40 thieves." The story created Martin's Ali Baba Rule: "Know your situation and the people with whom you are dealing."

As government lawyers, we do not get to choose which side of an issue we will be on or who we represent (see Stealers Wheel Corollary to Wesley's Rule of Satisfaction). It is extremely important, however, to a) assess the situation and the strength of your position, and b) know the priorities of the other side. As a government lawyer, we can sometimes be caught between competing interests of our clients.

[4] The reference is not intended to indicate that my clients are "clowns" or "jokers."

Soon after joining the county attorney's office, I was confronted with a supplanting issue involving the county auditor and the grant department head. Each had separately asked for an opinion on the supplanting issue while presenting it in different ways. Their differing interpretations were not a result of trying to gain an advantage or attempting to sway my opinion, but rather that the respective jobs lent a different perspective to the issue (and the resolution of the issue would affect them differently). Our commissioners court has five decisionmakers, each of whom have different constituents and local issues. A county policy may affect each of the decisionmakers and their constituents differently as well as affect one or more other elected officials differently. As a result, they may each address an issue from differing perspectives. As a government attorney, it is important to recognize those instances and analyze the issues so that the respective perspectives may be adequately addressed.

Red Forman's Rule of Cats. "That '70s Show" was a sitcom about a group of teenage friends that aired in the late 1990s and early 2000s. When my son was in high school, "That '70s Show" was in syndication and aired weekdays in the early evening. Ben and I would end up watching the reruns most evenings during dinner. The primary father figure was Red Forman, who had opinions on whatever was happening (and not happening). One of his most famous sayings dealt with cats: "Here's my problem with cats. Best case scenario, you get the smartest cat in the world—and it still craps in your house." Red Forman's Rule of Cats in translation: "There is no such thing as the perfect scenario or perfect case. You may still have to deal with something distasteful."

Even the best case scenario will have some detriment or issue that can cause a problem. Red Forman's Rule of Cats reminds us to examine every situation for the problems and potential downsides.

Wile E. Coyote Rule. Wile E. Coyote is a cartoon character created by Chuck Jones and Michael Maltese. He is a coyote who constantly seeks to catch the Road Runner by using elaborate traps and machines from Acme Company, but he always fails no matter how well-planned or well-equipped. Usually his traps backfire, causing him to fall from a mountain, get crushed by a boulder, or be smacked by his own contraption—while the Road Runner says, "Beep! Beep!" and speeds away unharmed and free. Wile E. is the inspiration for the following rule: "No matter how much you plan, something unexpected (often detrimental) will happen."

A couple of observations in light of this rule: We should 1) plan for the unexpected so that a case or matter does not fall off the cliff, and 2) be mindful that if you are setting a trap for an opponent, it may backfire on you (see also The Chief Justice Warren Burger Reply Rule).

Amy's Corollary to Jim Wesley's Rule of Satisfaction. Since Wesley's Rule of Satisfaction was the first and arguably is the most important new rule for government attorneys, it is appropriate to conclude this article with Amy's Corollary to Jim Wesley's Rule of Satisfaction: "Practicing law with quality people creates a quality law practice."

I have been blessed to work with great people during my entire tenure with the County Attorney's Office. Due to page limitations, I cannot name the corollary after every marvelous person with whom I have worked, but I'll mention one. Amy Davidson joined the office less than six months after I started, and she is my first assistant. Amy's knowledge, expertise, and compassion make her the perfect namesake for the corollary that it is the people with whom you work that makes the difference in your practice of law.

A couple of observations in light of the Wile E. Coyote Rule: We should 1) plan for the unexpected so that a case or matter does not fall off the cliff, and 2) be mindful that if you are setting a trap for an opponent, it may backfire on you (see also The Chief Justice Warren Burger Reply Rule).

The results

So what are the benefits for following the Rules? To quote Messrs. Shank and Ellis: When you come to the office, 1) you feel good, 2) you do not get ulcers, 3) you sleep at night, and 4) you do not burn out on the practice of law after only a few years. Adding to those results for government lawyers: 1) you contribute to the safety, security, and well-being of your community; 2) you prepare for the unexpected; 3) you work with a group of genuinely good people; and 4) you never send your client a bill. The practice of government law is dynamic and brings you into contact with diverse individuals: opposing counsel, clients, elected officials, and members of the community. Having now been in government law for 12 years, I have found that as Jim Wesley's Rule and Amy's Corollary emphasize: Good people make being a government attorney a satisfying and quality profession. ❇

TCOLE's requirements for prosecutor's offices

This article will attempt to shed light on three issues going on with TCOLE (the Texas Commission on Law Enforcement) that affect county attorney and district attorney's offices.

By Jeff Case
DA Investigator in Wilbarger County

They are:

1) new law enforcement (LE) hires,
2) Target 100 (training) initiative, and
3) policies now required by TCOLE

New hires

First, thanks to the new SB 22 funding from the state, prosecutor offices across Texas are looking to increase office staffing, including possible new investigator positions. There are certain steps that are required when hiring new commissioned peace officers, which I won't go into in this article, but find a guide at www.tcole.texas.gov/document/law-enforcement-agency-audit-checklist.pdf. It will walk you through the step-by-step process in hiring newly commissioned LE staff.

Target 100 initiative

Secondly, TCOLE has started a training initiative for all licensed officers entitled the Target 100 initiative.[1] The purpose is to have 100 percent of licensees in compliance with training requirements at the end of each continuing education cycle. Some of you may have already received a letter or email from TCOLE to inform you of any current staff with outstanding training requirements. (I got one!) The current training cycle ends August 31, 2025, and failure to complete training by that date may result in TCOLE suspending your license for at least 90 days. Officers can log into their "My TCOLE" accounts and find which classes they may still need to take. (For me it was the Law Update. Got it done!)

New required policies

Lastly, and perhaps the most bothersome thing in my opinion, is that TCOLE is now requiring each agency that employs licensed commissioned officers to submit a list of policies. These mandatory policies include those on misconduct allegations,[2] personnel files,[3] and hiring procedures.[4] TCOLE field service agents will provide sample model policies for you to review if needed; the footnotes also contain links to TCOLE sample policies. These were to be adopted and submitted to your field agent by June 1; because this date has already passed, submit policies as soon as you adopt them.

The TCOLE website states that their purpose is to create a web-based confidential database that can be shared with other agencies looking to hire new officers who may have been accused of misconduct. TCOLE's requirements for offices' personnel files also requires that a license holder's file contain any commendations, congratulations, and honors, as well as any misconduct that resulted in disciplinary actions and periodic evaluations by a supervisor. According to TCOLE, these files (upon completion of a release of information by the license holder) may be shared with any prospective law enforcement employer looking to hire a licensee.

In September 2024, TCOLE required that all agencies submit a host of different policies on the following topics:

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[1] www.tcole.texas.gov/target-100.

[2] www.tcole.texas.gov/reporting-misconduct-allegations-faq; here is a sample policy: www.tcole.texas.gov/document/mp-ma.pdf.

[3] TCOLE's sample policy on personnel files: www.tcole.texas.gov/document/mp-pf.pdf.

[4] TCOLE's sample policy on hiring procedures: www.tcole.texas.gov/document/mp-hp.pdf.

- medical and psychological examinations of licensees[5]
- pursuit (even though your office may not even be involved in traffic enforcement, I was told the policy is mandatory)
- use of force
- professional conduct of officers
- domestic abuse protocols
- response to missing persons
- supervision of part-time officers and
- impartial policing.[6]

Whew! Oh, and after all that make sure you have an office organizational chart, staffing projections, and a list of any school resource officers you may employ.

But wait—there's more! Any agency, including county or district attorney's offices, that was established before June 1, 2024 (which means all of us) must establish that we are a benefit to the community. We must also have sustainable funding sources that meet or exceed the continued operating expenses outlined in a line-item budget.

Required equipment

Now let's look at the physical resources and equipment each agency, including CA's and DA's offices, must make available to their licensed peace officer employees. The list includes:[7]

- at least one firearm per officer (most investigators, including me, like to carry our own firearm, but an agency must make a firearm available if the officer doesn't already have one),
- at least one less-lethal force option (pepper spray for me, please!),
- a bullet-resistant vest that is NIJ (National Institute of Justice)-compliant, within warranty, and never been compromised (no pre-shot vests, please!),
- a radio communication device,
- at least one cell phone per officer, and
- a uniform for any officers who conduct patrol or security duties *or* service of civil process (guess what? That's us!).

Finally, any agency established after June 1, 2024, *must* provide at least one agency-owned and -insured motor vehicle. Agencies established before that date may use personally owned patrol vehicles if they have not provided agency-owned vehicles since that date. (Is anyone using their personal vehicles? Is that a thing?)

Requirements regarding facilities

Now let's get into the actual office facilities. If your department is involved in criminal investigations (which we are), then we must have an evidence storage room or other secure storage facility for any evidence collected. Also, if your offices are public (which we are), then we must provide signs outside that say how to receive immediate assistance in an emergency; how to make a non-emergency report of a crime; *and* (here we go) how to make a complaint about a member of the agency via mail, online, or by phone.[8] And just a reminder: TCOLE may take action against agencies that fail to meet these standards, including denial of applications for new agencies or other actions as authorized by law. I am unsure what this means other than suspending licensees.

In addition to all of this, we are still required to file racial profiling reports[9] or exemptions annually.

I write all of this to be informative and to vent a little bit honestly, but I will also say that our local TCOLE field service agent has been great in ensuring that all local agencies and our office have policies in place well before any deadlines. Our local agent provided our office with the link to the sample policies and updated us on the due date for adoption. These were super-easy to adapt as our own. I am assured that all the agents will be just as helpful to you all.[10]

In the end I remind myself that as law enforcement officers in the greatest state of the United States, we are all held to a higher standard and simply want to comply in whatever way the state deems necessary.[11] ❇

I write all of this to be informative and to vent a little bit honestly, but I will also say that our local TCOLE field service agent has been great in ensuring that all local agencies and our office have policies in place well before any deadlines.

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[5] TCOLE's sample policy on medical and psychological examination of a licensee: www.tcole.texas.gov/document/mp-mpel.pdf.

[6] TCOLE does not provide model policies for many of these topics, but the author is happy to share those adopted by his office to anyone who would email him such a request. He's at jcase@co.wilbarger.tx.us.

[7] www.tcole.texas.gov/document/adopted-rule-21116-amended.pdf.

[8] www.tcole.texas.gov/content/complaint-procedures.

[9] www.tcole.texas.gov/content/racial-profiling-reports.

[10] Here is a link to the list of field service agents: www.tcole.texas.gov/search?s=field+service+agents.

[11] Here are two more hyperlinks that might be helpful: www.tcole.texas.gov/document/proposed-rule-211-16-establishment-or-continued-operation-appointing-entity.pdf and www.tcole.texas.gov/content/forms-and-applications.

How collaboration strengthens the fight against domestic violence

This is one story I'll never forget. She was 62 years old when she came to my office in tears.

By Glennda Wilke
Victim Services Coordinator in Kendall County

She was afraid her husband would find her, so she waited until he fell asleep so she could leave the house without him knowing. (He worked nights and slept during the day.) Her husband had abused her since their relationship began about a year and a half before. She told me she needed a safe place to go.

I asked what her husband would do if he found out that she was planning to leave. She said he would beat her and never let her leave the house without him. She was not at my office very long because she had to get home before he woke up. We made a plan for her to return the next day with her bags packed, and we would find shelter for her.

When she got to my office, she was very nervous and scared. We called the Kendall County Sheriff's Office and made a report. She had a car but no gas, so we called Hill Country Family Services. Folks there were very generous to give her a $50 HEB gas card to fill up. We called several shelters in the surrounding area, but they were all full. After reaching out to The Grace Center Women's Shelter in Fredericksburg, they offered her a room. She left for the shelter and let me know that she made it there safely. She called me later that day and thanked me for helping her.

This is just one example of how community collaboration can make all the difference for crime victims. In Kendall County, we have strong partnerships between law enforcement, advocacy groups, and nonprofit agencies. Together, we help survivors of domestic violence find safety, regain control, and begin to heal.

The impact of domestic violence

Domestic violence continues to be a critical public safety challenge in Texas and across the nation. Its impact is deep and widespread, cutting across all demographics. While prosecutors and law enforcement are essential to addressing these crimes, they cannot confront the full complexity of domestic violence alone. Real, sustainable progress depends on collaborative partnership—cooperation among public agencies, nonprofits, the healthcare sector, educational institutions, faith-based groups, and the wider community. A coordinated response ensures victims receive not only justice but also the support services necessary to recover and rebuild their lives.

Domestic violence includes physical violence, coercion, stalking, emotional abuse, and financial control. The Centers for Disease Control and Prevention (CDC) reports that approximately one in four women and one in 10 men in the United States experience intimate partner violence in their lifetimes.[1] This is not merely an individual matter but a community concern. These statistics highlight the importance of supporting survivors at every stage, from initial disclosure and filling protective orders, to courtroom testimony and long- term safety planning.

Kendall County has always had a large collaborative support system dedicated to helping survivors of domestic violence and sexual assault. Through partnering with law enforcement, healthcare providers, and non-profit providers, our community continues to support those in need. We do so with training and monthly or bimonthly meetings between agencies. It is rewarding knowing that our collaborations are so effective and meaningful.

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[1] Centers for Disease Control and Prevention (CDC). Intimate Partner Violence. 2021. www.cdc.gov/violenceprevention/intimatepartnerviolence/index.html.

Local agencies and what they offer

Hill Country Crisis Council
- 24–7 hotline and support for family violence and sexual assault survivors
- emergency shelter, legal advocacy and accompaniment, safety planning, and counseling

Kendall County Women's Shelter
- emergency shelter for family violence survivors, their children, and pets
- 24–7 hotline, counseling, support groups, resources, and referrals

Hill Country Family Services
- food and financial assistance
- clothing and essential items
- counseling
- mental health services
- life skills training (such as financial and budgeting)

Mission for Health offers medical and wellness services, from basic care to medication support.

Transformation House
- transitional housing
- trauma-informed therapy
- referrals
- life skills training (such as financial and budgeting)

Hill Country Daily Bread
- mentoring services
- essential physical resources, such as food, clothing, personal hygiene items, household necessities, and diapers

Key partners

1) Law enforcement. Police officers are often first responders in domestic violence situations. Prosecutors benefit from partnerships with officers trained in trauma-informed response, evidence collection, and lethality assessment protocols. High-risk teams that include detectives, victim advocates, and prosecutors can preemptively intervene in potentially lethal cases.

2) Healthcare providers. Hospitals and clinics are critical in the response for domestic violence and sexual assault survivors. Medical professionals trained to recognize and respond to signs of abuse can refer victims for both counseling and legal assistance. Healthcare records, injury documentation, and expert witness testimony often play a pivotal role in prosecution. Plus, healthcare providers are critical in helping survivors feel supported by offering compassionate care and not judging the survivor's life choices. Victims can start to feel a sense of control over their lives that was taken away.

3) Schools and educators. Teachers and school counselors are in a unique position to detect signs of abuse in children and families. Collaborating with school districts and resource officers can help promote early intervention programs, raise awareness of reporting procedures, and educate students about healthy relationships. School personnel play an essential role in safety planning for children living in abusive homes, for example, by making sure the schools get copies of protective orders and that staff are aware of custody orders or no-contact orders in place. Communication between parents, school personnel, and law enforcement can ensure that everyone is prepared to respond if an abuser attempts to approach a child on campus.

4) Faith-based and cultural organizations. Faith leaders often serve as trusted advisors. Building relationships with local churches, mosques, temples, and cultural centers can expand outreach and help reduce stigma, particularly in underserved or immigrant communities. Absolutely, there is a need for training. Aside from going from church to church and agency to agency individually, I send out emails introducing myself and our office, inviting staff to attend community events, such as Domestic Violence Awareness Month activities. We also offer flyers about victim services and what they can do to help victims of violence.

5) Nonprofits and advocacy groups. Shelters and advocacy organizations provide services vital to victim safety and recovery. These partners offer emergency housing, counseling, job training, case management, and legal help. Joint training and data sharing (with appropriate privacy safeguards) enhance both service delivery and prosecutorial effectiveness.

6) Employers and business leaders. Local businesses can implement workplace protections, such as safe leave policies and emergency planning for employees experiencing domestic violence. They can also provide funding or in-kind support to shelters and prevention programs.

Healthcare records, injury documentation, and expert witness testimony often play a pivotal role in prosecution. Plus, they are critical in helping survivors feel supported by offering compassionate care and not judging the survivor's life choices.

7) Therapy dogs as trauma support. Some communities are incorporating therapy dogs into survivor services, offering comfort during forensic interviews, court appearances, and counseling sessions. Their calming presence can ease anxiety, especially for children, and help victims feel safe enough to speak. This simple yet powerful support reflects how creative partnerships can make justice and healing more accessible.

8) Mental health providers. In Kendall County, partnering with mental health providers means maintaining an active list of trusted counselors and therapists for referrals, including those who speak Spanish. Advocates can help survivors with access to services by coordinating appointments, referring them to local agencies, and connecting them to support groups or low-cost services through local agencies.

Survivors' voices should be central to policy development and service design. Such collaboration isn't just more compassionate–it's also more effective.

Effective collaboration

Regular interagency training. When agencies engage in cross-training, they build shared understanding and improve the consistency of their collective response. For example, our office hosted a training on protective orders that was available to law enforcement, prosecutor offices, advocacy centers, justices of the peace, and anyone else with access to victims. It was a very successful training.

Information sharing protocols. Memoranda of understanding (MOUs) can outline procedures for sharing non-confidential data while protecting victim privacy. They spell out what information can be shared between agencies, preventing confusion and making sure all partners are on the same page.

High-risk teams. Multidisciplinary teams (MDTs) should review and respond to cases involving repeat offenders, strangulation, stalking, or firearms. Our MDT consists of prosecutors from the DA's office, the Children's Advocacy Center, Hill Country Family Services, and the local mental health and developmental disabilities (MHDD) organization.

Survivor inclusion. Survivors' voices should be central to policy development and service design. Such collaboration isn't just more compassionate—it's also more effective. One survivor suggested creating discreet resource cards that are small enough to fit in a pocket or hidden inside a wallet, because large pamphlets could be seen by abusers. That suggestion led to the development of a compact, bilingual tent card we now distribute to schools, agencies, libraries, and law enforcement offices within Kendall County.

Conclusion

Domestic violence is not just a legal issue—it is a community issue. Prosecutors can and should lead the charge. Sustained change requires broad, coordinated support. By engaging schools, hospitals, nonprofits, faith communities, and businesses, prosecutor offices across Texas can help build a future where every person is safe from violence and supported in recovery.

Community collaboration is not a luxury—it is a necessity. Each agency contributes unique strengths, but it is often the prosecutor who stands at the intersection of legal strategy and victim advocacy. By championing a multidisciplinary, survivor-centered approach, prosecutors not only enhance public safety but also help rebuild lives. Together, we can break the cycle of abuse—and forge a justice system rooted in dignity, safety, and hope. ❇

How to charge roadway fatalities involving intoxication

There is an awful scene that is all too commonly repeated on Texas roadways: red and blue lights flashing, traffic backing up as onlookers survey the wreckage, and ambulances slowly carrying off people with little or no hope of resuscitation.

By William Hix
Assistant Criminal District Attorney in McLennan County

The trope is so commonplace that entire organizations have sprung into being to stem the tide of tragedy that follows in the wake of intoxicated driving.

As prosecutors, when one of these case files hits our desks, we must wrestle with an intensely emotional and challenging decision process. The families of victims, the community at large, and our elected bosses have very high expectations about how these types of situations should be handled. The most critical decision for a case where a person (or multiple people) have died in a vehicular collision where a potential defendant was intoxicated is what charge to pursue. Rather than defaulting to the obvious charge, intoxication manslaughter, prosecutors should carefully evaluate the specific situation to find the shortest pathway to justice for their communities.

Intoxication manslaughter

Whenever a case file containing a fatality wreck with intoxication as a factor first arrives, either in the news or on your desk, most prosecutors will immediately recall something about "intox manslaughter" from their law school criminal courses. As outlined in Texas Penal Code §49.08, intoxication manslaughter occurs when a person operates a motor vehicle, aircraft, watercraft, or amusement ride in a public place while intoxicated and, by reason of that intoxication, causes the death of another by accident or mistake. There are a few wonderfully unique benefits to utilizing this charge, and there's one very big factor to consider in terms of your evidence.

First, the biggest benefit to the prosecution of this charge that applies in all circumstances where it is employed: There is *no* mental state attached. "Intoxication manslaughter is a strict liability offense; thus, no culpable mental state is necessary to convict a defendant of intoxication manslaughter."[1] This is a big departure from the other charges that could be employed in similar circumstances, all of which require proof of varying mental states, from intentional conduct all the way to negligent conduct and everything in between. Perhaps one of the saddest aspects of these cases is directly reflected in the lack of mental state required to prove it, that nobody involved wanted this to happen.

The most significant challenge associated with this charge is that the prosecutor must prove that the defendant's intoxication *caused* the accident. As you are evaluating the evidence, ensure that you have admissible proof that the defendant's intoxication—rather than roadway conditions or the actions of the deceased—caused the wreck. Anecdotally I can recall a case where a highly intoxicated driver struck and killed a bicyclist; however, it happened in the middle of the night, it was raining, and the cyclist was riding in the middle of the street on a curving two-lane road. That was a case where intoxication manslaughter would have been incredibly challenging to prove.

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[1] *Cook v. State*, 328 S.W.3d 95 (Tex. App.–Fort Worth 2010, pet. ref'd).

Importantly, "the State is not required to prove that intoxication is the *sole* cause of the accident."[2] There are many types of evidence, both direct and circumstantial, that you can use to prove up this element. Courts have included things like:

- "Being intoxicated at the scene of a traffic accident in which the actor was a driver is [also] circumstantial evidence that the actor's intoxication caused the accident, and the inference of causation is even stronger when the accident is a one-car collision."[3]
- "Several eyewitnesses testified that defendant hit reflectors in the road as he approached the complainant, drove in excess of the posted speed, refused to take a field sobriety test, fell asleep at the scene while waiting in a police officer's car, and had red, bloodshot eyes. The toxicologist testified that defendant's blood alcohol concentration (BAC) was between .109 and .110 at time his blood was drawn two hours after accident."[4]
- "Defendant drove his vehicle in excess of the posted speed limit, ran the red light, and collided with the victims' vehicle without braking."[5]

Essentially, the tradeoff you make when choosing manslaughter instead of intoxication manslaughter is that you are electing to take on the burden to prove recklessness instead of legal intoxication.

All of these things can go on the evidence scale to prove an intoxication manslaughter case, but as you will see in the discussion of some of our other charging options, you may not need to have that fight at all to get to the same place in terms of punishment.

It must absolutely be noted before moving on that there is an enhancement possibility that intoxication manslaughter shares only with capital murder cases. In §49.09(b-2), the charge is enhanced to a first-degree felony if the individual killed is either a firefighter or an emergency services personnel acting in their professional capacities as further defined in §49.09(b-3). In addition, where there are multiple victims, the legislature added a new first-degree felony in Senate Bill 745. It is effective September 1, 2025, and it applies to offenses committed after that date.

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[2] *Simmons v. State*, 672 S.W.3d 821 (Tex. App.–Corpus Christi–Edinburg 2023, pet. ref'd).

[3] *Id.*

[4] *Garcia v. State*, 112 S.W.3d 839 (Tex. App.–Houston [14th Dist.] 2003, no pet.).

[5] *Carrillo v. State*, No. 08-01-00471-CR, 2003 WL 1889943 (Tex. App.–El Paso, Apr. 17, 2003).

In a situation where the deceased fits one of these categories, intoxication manslaughter charges should be strongly considered.

Manslaughter

Dropping the word "intoxication" from your charging instrument to simply read "manslaughter" changes significantly more than just where it lands in the alphabet. You have a different set of elements to prove when prosecuting a manslaughter charge under Penal Code §19.04 (including a reckless mental state), but this charge is worth adding to your toolbelt to deal with the situation of a roadway fatality with intoxication. We are still dealing with the same second-degree felony punishment range as we would be in an intoxication manslaughter case, with the same parole eligibility dates, so there isn't a meaningful difference there. Essentially, the tradeoff you make when choosing manslaughter instead of intoxication manslaughter is that you are electing to take on the burden to prove recklessness instead of legal intoxication.

The best situation for this charge is where there is significant circumstantial evidence that a defendant had been drinking before getting behind the wheel and operating a vehicle, but not necessarily strong enough evidence to prove beyond a reasonable doubt that he was legally intoxicated. An indictment for manslaughter pursued in this way would simply allege as the reckless behavior all the facts and circumstances that tend to show the defendant was under some influence of an intoxicant, in addition to any of the dangerous driving behaviors such as speeding or weaving between lanes. The benefit here is that you are no longer required to prove that the defendant's *intoxication* was the cause of the wreck; instead, you are proving that the defendant's *recklessness* (impaired driving) was the cause of the death. You can couple bad driving behaviors, which may or may not be directly linked to intoxication, with all the circumstantial intoxication evidence to show jurors a clear picture of recklessness without the need to hyper-focus on any single piece of the recklessness puzzle.

Aggravated assault

An additional charge to include in your arsenal to deal with roadway fatality cases is counter-intuitively not a homicide charge at all. The elements of aggravated assault causing serious bodily injury are very provable in many of the circum-

stances in which a prosecutor would consider charging either intoxication manslaughter or manslaughter. In fact, statutorily speaking, death is included in the definition of serious bodily inury.[6] Beyond even that, courts consider aggravated assault and intoxication manslaughter (assuming the same deceased victim) to be the *same offense* for double jeopardy purposes.[7]

Electing to pursue an aggravated assault charge rather than manslaughter or intoxication manslaughter would be highly case-dependent in a strategic sense. The best use for this approach would be a situation in which the victim does not immediately pass away from her injuries. Yes, technically you can charge standard manslaughter here, but it can be highly effective to hold back some of your best punishment evidence (that the victim did die) until the punishment phase begins. Picture the scenario where you, the prosecutor, can argue in closing argument of guilt-innocence that the defendant's actions left the victim clinging to life in a hospital bed—then imagine the gut punch to the jurors in the opening statement at punishment when revealing that the victim lost her fight to live. The benefit to charging such a case in this way is that you circumvent the need to connect the death beyond a reasonable doubt back to the defendant. With this approach, you are freed up from the requirement of proving the connection so you don't get bogged down in medical testimony, which some jurors can have difficulty understanding.

A potential enhancement to an aggravated assault punishment range to keep an eye out for: Penal Code §22.02(b)(1)(B): If the actor uses a deadly weapon (the vehicle) in the commission of the assault and causes a traumatic brain or spine injury that results in a "persistent vegetative state" or "irreversible paralysis," you have a first-degree felony. This would be a charge to pursue only if medical expert testimony is very solid on these issues, but the enhancement here makes good rational sense; a defendant who causes this level of injury should not get the "benefit" of the fact that the victim, rather than dying, suffers one of these two lifelong conditions.

[6] See Texas Penal Code §1.07(46).

[7] *Gunter v. State*, 673 S.W.3d 335 (Tex. App.–Corpus Christi–Edinburg 2023, pet ref'd).

Criminally negligent homicide

The next charge up for discussion is more in the category of "be aware when it is a lesser" than anything else. For our purposes, we always need to be conscious what defensive strategies we are exposing ourselves to in our charge selection. This charge, which is a state jail felony, could be requested as a lesser-included offense of manslaughter.[8] Importantly, criminally negligent homicide is *not* a lesser-included offense of intoxication manslaughter or aggravated assault.[9] Being aware of these potential defensive lesser-included offense requests and their applicability can guide you not only in your charging decision, but also in how you present the case.

In a situation with a highly sympathetic defendant, it is also valuable to consider criminally negligent homicide as a potential non-trial (plea) resolution to the case.

Felony murder

Ensuring that you consider all the possibilities brings our discussion around to the felony murder charge, as laid out in §19.02 of the Penal Code. The two big pillars that form this charge are the 1) commission or attempt of a felony, and 2) in furtherance of the commission or attempt, the defendant commits an act clearly dangerous to human life. This charge carries a first-degree punishment range.

There are two felonies to keep an eye out for in these case facts: felony-level DWI *and* evading arrest or detention in a vehicle (think DWI that turns into a high-speed chase), which can both function as an underlying felony for this charge.[10] Courts have been clear that felony DWI can be an underlying felony for the felony murder charge, and most of these have been in the context of DWI–3rd or more. There is no distinction made between *how* the DWI becomes a felony in the

[8] *Wasylina v. State*, 275 S.W.3d 908 (Tex. Crim. App. 2009).

[9] *Torres v. State*, 52 S.W.3d 285 (Tex. App.–Corpus Christi–Edinburg 2001, no pet.), *Juneau v. State*, 49 S.W.3d 387 (Tex. App.–Fort Worth 2000, pet ref'd).

[10] *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007), *White v. State*, 208 S.W.3d 467 (Tex. Crim. App. 2006).

Picture the scenario where you, the prosecutor, can argue in closing argument of guilt-innocence that the defendant's actions left the victim clinging to life in a hospital bed–then imagine the gut punch to the jurors in the opening statement at punishment when revealing that the victim lost her fight to live.

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caselaw, so either DWI–3rd or more or DWI with a child passenger can function as the foundation.[11]

The enormous upside to a felony murder prosecution predicated on a DWI–3rd or more is twofold. First, there is no mental state required in the proof, and second, the jury will know from the reading of the indictment alone that the defendant is a repeat DWI offender who never learned his lesson.

The second prong here, an act clearly dangerous to human life, is a relative no-brainer where a trial prosecutor can exercise whatever evidentiary creativity you can muster. You can call long-serving law enforcement officers as experts, enter statistics from the Department of State Health Services, or even call a representative from Mothers Against Drunk Driving if you care to. You also have the distinct advantage of putting opposing counsel in the bind of trying to argue that impaired driving or fleeing from the police in a vehicle is somehow not an act clearly dangerous to human life. Most witnesses that the defense could call for any purpose would have to concede this point under even cursory cross-examination.

Injury to a child

Worth mentioning is the option to charge injury to a child if the decedent victim is under 14 years old at the time of death. Use this approach cautiously due to a real evidentiary challenge connected to the result-oriented mental states required for an injury to a child prosecution. By choosing this charge, you hand defense counsel the ability to argue that the defendant did not know and could not know that there was a child in the vehicle that he struck, and the law does hold that a defendant's mental state in such a case is connected to the result, not the conduct itself.[12] Given that challenge, it would be difficult to secure a conviction for anything above a second-degree felony if you can convince a jury that the defendant was reckless regarding the result. If your fact pattern takes place in the parking lot of an elementary school, maybe this is the charge you want; otherwise, proceed carefully.

Remember this

The most powerful advantage we have as Texas prosecutors is to select the charge we walk into a courtroom to prove. To extend a combat sports analogy, we get to choose the kind of fight we want to have. If we know our opponent can't grapple, we should probably have a wrestling match. Selecting the charge that gives us the fewest and most provable elements based on the facts is critical to sustained trial success. Keeping all options in mind can be the difference between there being no real consequences for the offender and him going to prison for the next 20-plus years. ❇

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[11] *Bigon v. State*, 252 S.W.3d 360 (Tex. Crim. App. 2008).

[12] *Banks v. State*, 819 S.W.2d 676 (Tex. App.–San Antonio 1991, pet ref'd).