The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

How our office onboards new prosecutors

Prosecutors are no strangers to the hustle of managing a court's schedule and juggling a full caseload.

By Amy M. Eades
Assistant District Attorney in Brazos County

Now in my fifth year as a prosecutor, I'm surprised when my daily to-do list isn't derailed by a crisis or two, but I wasn't always so accustomed to this pace.

Over the last two years, our office has gained four new prosecutors who are just starting their careers. Watching our newest teammates acclimate to the pace and weight of their new roles and integrate into our office made me wonder: How did I get here from where I began five years ago?

A shift in the office

There is a strong call to jump right in and be molded from the scrapes and bruises one will assuredly receive in the first year of prosecution. While lessons can be learned through challenges and few things can replace the honing of experience, the rise of restorative justice programs, such as pre-trial diversion, has changed the types of cases on the trial dockets. Many of the cases that are typically handled by young attorneys, such as low-level drug possession or those with first-time offenders, are diverted. This means that there are fewer opportunities for young attorneys to jump into trying lower-level felonies or misdemeanors. As opportunities for courtroom experience decrease, the need for training increases.

Experienced and supervising attorneys in each office can bridge the gap to create a more direct route from a new attorney's first day on the job to that person's self-sufficiency. Over the last few years, COVID-19 and increasingly busy court schedules have required new attorneys to work more independently. In our post-pandemic office, our new attorneys need more frequent and structured support in addition to the on-the-job training they were receiving from court chiefs and their court teams.

Building a formal training program takes the guesswork out of planning and benefits the entire office by ensuring that new attorneys have foundational knowledge to become successful prosecutors. We looked at the infrastructure and resources already in place within our own office to help them excel though training and mentorship. But we also asked if there is a better way.

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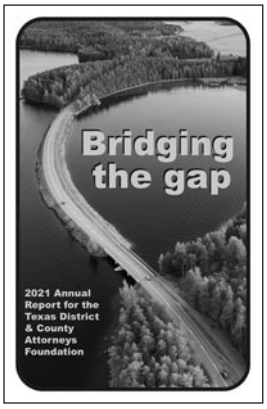
The 2021 Annual Report recently published

Many of you have received a paper copy of the Foundation's 2021 Annual Report, a booklet we produce and mail out every year about this time to recap the previous year's goings-on in the Foundation.



It includes updates on training, victim services, and publications, and it highlights those individuals and corporations that have contributed to the Foundation's growth and well-being. It also showcases photos from our conferences and receptions, as well as a list of the Texas Prosecutors Society, both new inductees and longtime members. It's chock-full of Foundation information!

If you didn't receive one in the mail, you can read the Annual Report online at the Foundation's website, tdcaf.org.

2022 Foundation Board

The TDCAA board of directors has appointed the Foundation Board for 2022 (listed in the box below). It is a great group, led this year by Ken Magidson, former DA in Harris County and one-time United States Attorney for the Southern District of Texas. I would like to give a special welcome to Joe Bailey, our newest board member. Joe is a former Harris County ADA and law partner to the legendary Mike "Machine Gun" Hinton, who served on the Foundation Board until his passing in 2020. Thanks, Joe, for joining this great group!

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Mike Hinton Memorial Scholarship reminder

Want to go to TDCAA's Annual Criminal and Civil Law Conference but don't have the funds? Just a reminder that the Foundation, through generous gifts in memory of Mike Hinton, can provide a scholarship you! Fill out the application (search for it on our website) and send it in. Call me at 512/971-8425 with any questions. But hurry, applications are due April 30. ❇

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The uncomfortable business of keeping short accounts

Andy Lucas, County Attorney for Somervell County, died January 28 at the age of 49, from injuries he sustained in a motor vehicle crash.

By Jack Roady
TDCAA Board President &
Criminal District Attorney in Galveston County

Andy left behind his bride of over eight years, two children, and an extended family; he was a husband, a father, a grandfather, a brother, an uncle, and a son. I did not know Andy personally, but the sad news of his passing set me to thinking. Death can seize us or someone we love at any time.

This instance of sudden loss made me reflect on how critically important it is that we keep short accounts in every aspect of our lives. What do I mean by "keep short accounts"? The phrase comes from a simpler time in our history when shopkeepers would allow customers to "run a tab" and then settle their debts at a later date. To keep short accounts, then, meant to pay off those charges quickly rather than let them accumulate. Our modern equivalent would be paying off our credit card purchases as they accrue on a monthly basis.

What do I mean by "keep short accounts"? The phrase comes from a simpler time in our history when shopkeepers would allow customers to "run a tab" and then settle their debts at a later date. To keep short accounts, then, meant to pay off those charges quickly rather than let them accumulate.

But the principle has another application: The Lord's Prayer—as many of us learned it—includes the phrase, "And forgive us our debts, as we forgive our debtors." Other translations replace "debt" with "sin," both meaning an offense for which something is owed. These sins or offenses or debts are things which should be kept in short account.

I first heard of "keeping short accounts" in a Sunday sermon, in the context of keeping things right with God by regularly confessing our sins—the idea being that the more we allow our offenses to accumulate, the more we allow spiritual scar tissue to grow and hinder our true fellowship and worship. But the principle extends far beyond keeping things right with God. In fact, the Puritans used to say, "Keep short accounts with both God and men." It means we don't accumulate backlogs of bitterness, guilt, resentment, or shame. It is probably not a new concept to any of us—we all know that we should not let personal offenses remain unresolved, but rather we should settle matters with one another quickly and urgently.

But we don't. As those who work in the legal profession, and especially as prosecutors, we are some of the most conflict-inclined, itching-for-a-fight people on the planet. So why is it, then, that we can be the most conflict-averse, head-in-the-sand people when it comes to resolving disputes with those we know and love, especially when it comes to seeking forgiveness and forgiving others? Admitting that we have made a mistake—or worse, that we have intentionally harmed another—is hard. It means admitting that we fell below a standard of right conduct. It means we violated a sense of who we think we are, or at least who we want to be: We like to think we are always kind, generous, truthful, selfless, magnanimous. and benevolent.

But we're not. There are times when we are just plain cruel, covetous, deceitful, selfish, mean-spirited, and vengeful. And when that happens, we ought not just say, "That's who I am," or "I'm wired that way," or "They'll just have to get over it." Instead, we ought rightly to settle the dispute—we ought to keep short accounts.

What does that look like if we are the offending party? It certainly doesn't mean saying something like, "I'm sorry if you were offended by what I said." Rather, it means we own it. We express sorrow for the act, we acknowledge our part in the wrong, we do not excuse our conduct, we do not spread the blame, we look for ways to make things right and restore the relationship, and we ask forgiveness of the person we have offended. And then we change our ways so we don't keep repeating the behavior!

What does that look like if we are the offended party? It means we forgive freely and continually. It means we don't hide in our corner, arms crossed and brow furrowed, waiting for an apology. That's just poisoning our own well. Instead, we seek out the other person and take responsibility for initiating restoration. We forgive those we like, and we forgive those we don't like. We forgive the powerful who can harm or help us, and we forgive the lowly who have nothing to offer us in return.

And if we don't keep short accounts, what of it? Will we recognize immediate harm if we do not quickly seek forgiveness or grant it? Probably not. But over time, if we allow even the smallest of offenses to accumulate, we build walls, stone upon stone, of bitterness and distrust that can become insurmountable and permanent barriers. And those barriers will destroy not only our professional relationships, but also our friendships and families.

So what in the world is a column like this doing in *The Texas Prosecutor* journal? Should these principles of forgiveness and reconciliation influence our professional responsibilities as prosecutors representing the State? Perhaps, but that is another lengthy discussion for another time. But I write this here and now because I just don't want to miss the moment. Andy Lucas's tragic and unexpected death was a terrible loss not only to his family, friends, and community, but also to our profession as a whole. Its awful suddenness should startle us, unsettle us, and remind us that we are not promised tomorrow. Knowing that, we should also know what a terrible thing it would be to waste even a moment of our days allowing the bitter seeds of unforgiveness to grow in our lives.

The apostle Paul said that if possible, as far as it depends on us, we should live peaceably with everyone. We do that by keeping short accounts with God and with one another. The hard work of reconciliation is uncomfortable, humbling, and risky. But it's necessary. Therefore, may Andy's death spur each of us to take inventory of our own lives to see if there are any accounts that we need to get settled. And if there are, let's get to them today. ❇

Rule 3.09 and the ABA

At its February 2 meeting, the State Bar Committee on Disciplinary Rules and Referenda voted to advance a proposed American Bar Association (ABA) model rule creating an ethical duty for prosecutors to, with regard to *Brady* evidence discovered post-conviction, disclose, investigate, and seek to remedy a wrongful conviction.

By Rob Kepple
TDCAA Executive Director in Austin

The proposed rule was included in the *Texas Register* and the March edition of the *Texas Bar Journal*. A public hearing is scheduled for April 6 at 10 o'clock a.m., presumably by Zoom.

At this stage, some prosecutors continue to question the need for a new ethical rule. As you know, under the Michael Morton Act, prosecutors have a continuing duty after conviction to disclose *Brady* evidence.[1] In addition, in 2013 the Legislature enacted Government Code §81.072, which specifically provides that a prosecutor may face a grievance under Rule 3.09 if a wrongful conviction was caused by a *Brady* violation. Many prosecutors are also troubled by the newly proposed ethical "duty to investigate," which implicates prosecutorial immunity and highlights a lack of resources to take on such a task. In response, several prosecutors have formed an ad hoc committee on this issue and have been in contact with the State Bar Committee on Disciplinary Rules and Referenda over this proposed new rule.

At past meetings, some members of the Committee on Disciplinary Rules and Referenda argued that the duty to correct wrongful convictions is a moral duty. If that is the case, the ad hoc committee of prosecutors asked the committee to explore why, logically, such a rule shouldn't apply to *all* lawyers—with the proper limitations. Indeed, Arizona and North Carolina have carefully crafted rules that do just that. These states impose this ethical duty on all lawyers, but they also provide: 1) protections for client confidentiality; 2) a good faith exception in the body of the rule; and 3) a defense if the information is already in the hands of the appropriate governmental agency, defendant, or defense attorney. The thinking is that if this is indeed a moral duty, the entire Texas legal community should share in that responsibility.

The public hearing will be important, because at this stage it has been difficult for anyone not on the bar committee to participate in the process. There is no prosecutor on the committee, and while prosecutors may send in letters, the committee is not obligated to actually discuss the issues raised in the letters. In fact, at the February 2 meeting, committee members publicly addressed exactly none of the issues raised before voting unanimously to move forward. It would be nice to actually have a conversation with the members and focus on the issues prosecutors care about.

Here is the link to the proposed rule and the latest letter from that ad hoc committee of interested prosecutors regarding the committee's work: www.texasbar.com/AM/Template.cfm?Section=cdrr&Template=/cdrr/vendor/participate.cfm. You can click on the "meeting materials" and "supplements" links to access the proposed rule, the prosecutor committee letter, and a letter from a law professor and others.

Stephens v. State: a refresher on separation of powers

On December 17, 2021, the Court of Criminal Appeals issued an 8–1 opinion in *Stephens v. State*. The Court held that Election Code §273.021,

which purports to delegate a prosecutor's power in the judicial branch to the Attorney General, a member of the executive branch, is unconstitutional as a violation of the Separation of Powers Clause. It is a pretty straightforward opinion and reflects the consistent view long held by Texas prosecutors about the proper role of the Attorney General in the area of prosecution assistance. Many of you have read the often-updated Texas Prosecution 101[2] which describes the constitutional boundaries of the Attorney General's abilities to prosecute a criminal case.

The significance for local prosecutors? We don't expect that there will be much change in the long-standing relationship that Texas prosecutors have with the assistant attorneys general who help you on so many cases. Their work is invaluable, and district and county attorneys have enjoyed a great working relationship with the prosecutor assistance folks. One pro tip coming from *Stephens*, though: It would be a good idea to document your delegation of authority to the AG's office, either by swearing in the assistant AG as an assistant prosecutor in your office, or if necessary because of a conflict, withdrawing from the case and making sure the attorney general's office is appointed as the prosecutor pro tem for that case.

Lee Hon, Polk Countian of the Year

Congratulations to Lee Hon, Criminal District Attorney in Polk County, on being recognized by his community as the "Countian of the Year." Lee, who is stepping down at the end of the year, has had a great career as a Texas prosecutor in his hometown. Lee is a former TDCAA Board President and has been active on behalf of the profession throughout his career. I have much appreciated his steady hand and calm demeanor, especially during some tough legislative sessions. We will miss him.

TDCAA committees for 2022

Our members are what make TDCAA run. We are truly a member-driven organization, and that has contributed greatly to our ability to bring you timely, relevant, and accessible training and services. I want to thank everyone who has volunteered to serve on a TDCAA committee this year; they are listed in the box at right and on the next page.

Endnotes

[1] Tex. Code Crim. Proc. Art. 39.14(k).

[2] https://www.tdcaa.com/wp-content/uploads/Texas-Prosecution-101-2018.pdf.

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Two types of training that go great together

TDCAA's 2022 training calendar is one of our best yet.

By Brian Klas
TDCAA Training Director in Austin

This year will see our return to the live, in-person training that made us famous. That's right. Famous. With top-of-the-line presenters covering the most pressing issues in prosecution, attendees are sure to learn something they can immediately apply to the business of justice. Coupled with the networking and collegial conversation that cannot be adequately replicated in the virtual world, our on-location training will continue to serve as the backbone of TDCAA's training portfolio.

A full spate of live training, however, does not signal the looming eradication of future online offerings. The pandemic taught us how to operate in an online environment and showcased its many benefits. With the Reese's Peanut Butter Cup as a model—where two different halves harmonize into one magical whole—we are dedicated to producing remote training that complements our in-person training. We're so confident in the value of virtual courses that we hired an assistant training director, Gregg Cox, to run the online show. If you don't know him, Mr. Cox is a longtime prosecutor with a trove of experience. Even as I type this, he is deep in his electronic laboratory cooking up a collection of curated content purpose-built for the remote learner.

Enough puffery. Let's look at some of TDCAA's near-future training!

Prosecuting Violent Crimes Conference in April

If all has gone according to plan, then you are reading this in mid-March. That means you still have time to register for and attend our April specialty conference, Prosecuting Violent Crimes. It will include full-day tracks on domestic violence, adult sexual assault, officer-involved offenses, and homicide. We've tinkered with the design of each track to allow for deeper coverage of these tough topics. Hosted in Houston and aided by some of the most experienced prosecutors in the state, it will cover the skills and knowledge necessary to successfully prosecute violent crimes.

Civil Law Conference in May

Next up is the yearly Civil Law Conference at the historic Menger Hotel in San Antonio. The live Civil Conference has been cancelled two years in a row, with last year's morphing into an online-only course. TDCAA's Civil Committee knows how important it is for prosecutors assigned to civil work to share ideas and network—those relationships are the string and soup cans, if you will, that connect civil practitioners so no one is marooned alone on an island. Not settling for networking alone, the committee put together a fantastic lineup on the issues faced when advising and representing county government.

Plan to attend if you are Teddy Roosevelt-curious—apparently, he recruited some of his Rough Riders in the Menger's bar, and there are a couple of bullet holes in the wall from Roosevelt's own gun. And you can't beat San Antonio in May.

Advanced Appellate Advocacy Course in June

A great human probably once said that June is a time for new things, and this year we're trying out something new-ish: an Advanced Appellate Advocacy Course. Alan Curry with the Criminal Dis-

Child welfare law has long been recognized as a training need, and online delivery is a great fit for it. The course will be available on our website for the foreseeable future so it can assist anyone who finds him or herself newly assigned to a CPS docket.

trict Attorney's Office in Galveston County will be the course director, and he will be ably assisted by Emily Johnson-Liu with the State Prosecuting Attorney's Office. They have designed a complete program for new and intermediate appellate prosecutors to sharpen their advocacy skills.

The course will be split into two parts. The first will happen over two days in June here in Austin. About a month later, the second part will occur alongside the first two days of our Advanced Advocacy Skills Course at the Baylor School of Law in Waco (more on that course later in this column). Splitting up the Appellate Course in this way will accommodate efficient and meaningful training in the two skills an appellate attorney must possess: strong writing and oral argument. Like its trial advocacy counterpart, the Appellate Course will require an application, and attendance is limited. Keep an eye on our website and your mailbox for a brochure containing more information and an application.

Two courses in July

Our examination of the training calendar ends in July. We'll start the month with the TDCAA's regularly scheduled Prosecutor Trial Skills Course for new prosecutors. Like this last January, I expect that we'll be capping attendance because of the size of the hotel ballroom and the design of the course, so register as soon as that brochure hits your mailbox.

At the end of the month, we will kick off our Advanced Advocacy Skills Course at the Baylor School of Law, which has once again graciously opened its doors to us. This year, our case scenario for the Advanced Course will be sexual assault of a child, and Sunni Mitchell, an ADA in Fort Bend County, is our course director. We're excited for Sunni take on this responsibility and join a long line of tremendous prosecutors who have previously filled that role. If you are looking for ways to take a leap in your professional prosecutor development, the Advanced Trial Advocacy Course is for you. Remember that both the Advanced Appellate and Advanced Trial Advocacy Courses require an application, and attendance is limited.

Online courses already available

Did I mention that Gregg Cox is in his lab working on remote training? As you read this, our Fundamentals of Child Welfare Law course is available for viewing online. With help from the Texas Children's Commission, we designed this course for newer attorneys assigned to a Child Protective Services (CPS) caseload. It offers five-plus hours of MCLE taught by experienced, knowledgeable attorneys from both prosecutor offices and the Department of Family and Protective Services (DFPS). Child welfare law has long been recognized as a training need, and online delivery is a great fit for it. The course will be available on our website for the foreseeable future so it can assist anyone who finds him or herself newly assigned to a CPS docket. Rather than having to wait for a live event to cover the ins and outs of this area of law, attorneys can get what they need on our website as soon as they need it.

More online development is occurring as I type, and whether you are a peanut butter or a chocolate fan, it is exciting stuff. Stay tuned! And don't forget to check our website, TDCAA.com, where you can find the most recent training updates and register for all of our courses. ❇

The new drawing board and *Pugh v. State*

In *Pugh v. State*,[1] the Court of Criminal Appeals has given us a definitive statement on the admissibility of computer-generated animations in state criminal trials, in an exhaustively detailed and well-written 61-page opinion by Judge David Newell.

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

While that may seem like a daunting read and perhaps give rise to unease for what the technological future may hold in criminal prosecution and defense, it is at its core the same principles prosecutors have used for more than a century: The animation is a blackboard for a State's witness.

Background

The underlying case arose in my very own Taylor County and involved the death of William Keith Delorme, whose body was found in the parking lot shared by three Abilene bars on the morning of October 9, 2015. Mr. Delorme had caused a scene at one of the bars the night before, acting strangely, demanding his car keys, and threatening the bartender and other patrons with a knife. The defendant, Allen Pugh, and several friends managed to get Delorme outside, and Pugh was heard to say, "If [Delorme] tries to pull out that knife again, we'll put him under the car," and "we should knock [Delorme] out or something." One of Pugh's friends testified that the last thing he saw as he was driving away that night were stationary brake lights on Pugh's car.

Delorme's body was found the following morning by a man out walking his dog. Officers responding to the scene saw that tire tracks leading to the body in the caliche and gravel parking lot started from 85 feet away. Officer David Thompson Jr., a certified crash reconstructionist, noted the tracks left debris that indicated an acceleration pattern and no deceleration marks at any point. There was a turn in the tracks, and the pattern indicated steering input, which showed the vehicle was not out of control. Officer Thompson used a range finder to map 28 reference points, measuring the tires, wheelbase, nearby buildings, and other objects. He used computer software to create a two-dimensional diagram of the scene, later entered at trial (below).

Delorme's autopsy was performed the next day. Dr. Richard Fries testified that Delorme's crushing-style pelvis injury, posterior rib fractures, and compression of blood from the abdominal cavity were all indicative of somebody who was not only struck but also run over by a vehicle. Fries believed that if the body were dragged under the car, it was likely not for a significant distance, not more than 10 feet.

A warrant for Pugh's truck was obtained, and the vehicle was taken in and inspected. Investigators noted rub marks in dirt on the undercarriage, as though it had recently run over a deer or hog, and Bluestar reagent indicated the possible presence of blood. The rub marks started around the front of the vehicle on the driver's side, went under the left floorboard, and continued along to the back of the vehicle; pieces of skin and hair that were found along the undercarriage were collected and later connected to Delorme by DNA analysis. When Pugh was interviewed by detectives, he initially denied having run over Delorme, then stated that Delorme had lunged at him with a knife at the driver's side window and either laid across the truck or held onto the mirror as Pugh "floored it" trying to get away. Pugh was charged with Delorme's murder.

When Pugh was interviewed by detectives, he initially denied having run over Delorme, then stated that Delorme had lunged at him with a knife at the driver's side window and either laid across the truck or held onto the mirror as Pugh "floored it" trying to get away.

Presenting the case

The case presented an interesting dilemma for trial prosecutors Arimy Beasley and Zach Gore (and later for myself on appeal). Usually when prosecutors are presented with a set of facts worked up by the local police department's traffic division, we are proving up an intoxication manslaughter, not an intentional murder. Arimy knew from reviewing the video of Pugh's interview with police that Pugh's argument at trial would be self-defense, and it would be critical to show the jury that the reconstruction evidence didn't support that claim. Pugh's statement to police was that he must have somehow driven over Delorme as he lunged at his driver's side window; the physical evidence showed that the car began accelerating 85 feet away and that Delorme was struck with the front of the car and went under the middle. Arimy asked the Abilene Police Department's traffic division officers if it were possible to make a moving three-dimensional animation of the vehicle's travel path, and Officer Tyson Kropp, also a certified traffic reconstructionist, agreed to do so.

Officer Kropp used the data gathered from the crime scene to map it in three dimensions. He also relied on DNA and forensic evidence collected by police officers and personnel, photographs taken by the lead CID (criminal investigation department) personnel, the autopsy report, and acceleration tests he performed himself in a similar parking lot. He used the medical examiner's opinion that Delorme's injuries were sustained to the left and right sides of his body to orient Delorme in the animation. The rub marks and DNA evidence showed how Delorme was struck and the path his body made under the vehicle. Officer Kropp combined all of this data to create four different animations of the scene: a bird's eye view, northwest view, southwest view, and first-person view from inside the vehicle. All of the animations depicted the vehicle traveling 85 feet, striking a stationary human figure, and running him over from the front to the back of the vehicle. All four were brief, lasting less than eight seconds each. All animations were provided to Mr. Pugh's defense counsel a month before the trial date. The animations can be seen on the Court of Criminal Appeals website;[2] they are also hyperlinked in the text of Judge Newell's opinion.

Prior to trial, defense counsel filed a motion to suppress the animations, arguing that they were speculative and that the probative value was substantially outweighed by the prejudicial effect under Rule 403. At the suppression hearing, Officer Kropp testified to the data he relied on and the techniques and technology he utilized in creating the animations, and all four animations were played for the court. The judge ruled that the first-person view from the driver's seat was too speculative as to what the driver actually saw and unduly prejudicial in showing the figure representing Delorme being run over from the driver's view. The judge denied the motion to suppress the other three animations. The three exhibits were proven up and played for the jury as demonstrative evidence to illustrate Officer Kropp's expert testimony over the renewed objection of defense counsel. But counsel did not object to the expert testimony of Officer Kropp and Officer Thompson, which would be significant in the arguments made later.

The court of appeals

Pugh appealed the admission of the three exhibits to the Eleventh Court of Appeals, arguing that the trial court abused its discretion in admitting animations that depicted Delorme as stationary and unarmed in contradiction of Pugh's own testimony that Delorme was lunging toward him with a knife; that depiction was unfairly prejudicial, speculative, and misleading. The State responded that the Eleventh Court of Appeals and others had long found that computer animations of crash reconstructions based on objective scientific data are admissible to demonstrate an expert's opinion in *Murphy v. State*,[3] *Venegas v. State*,[4] and *Castanon v. State*.[5] Pugh argued these cases did not apply because none had attempted to depict a human form.

The Eleventh Court held that the trial court did not abuse its discretion: The animations were based on objective data, measurements from the scene, and evidence collected from the truck and the autopsy report, and they depicted nothing gruesome.[6] Pugh filed a petition with the Court of Criminal Appeals, which granted review.

As the judges saw it

Pugh argued in brief and oral argument before the Court of Criminal Appeals that any staged recreation that attempted to depict a human figure was inherently speculative and prejudicial, citing the Court's prior opinion in *Miller v. State*,[7] as well as the lower court opinions in *Lopez v. State*[8] and the companion cases of *Hamilton v. State*[9] and *Lewis v. State*.[10] The State responded that each of those cases had very different facts and holdings.

In *Lopez*, the Second Court of Appeals in Fort Worth held that a reenactment of a parking lot drug deal using live human actors was highly prejudicial due to both deviations from testimony and the use of actual humans. *Miller* was a video reenactment of an automobile ride to the scene of a capital murder; the Court distinguished it from *Lopez* and found that it was merely a series of pictures of the route taken. *Hamilton* and *Lewis* involved a highly prejudicial computer animation, but a very different one from the one in our case: It did not involve expert opinion or crash scene reconstruction at all. Rather, it was a crime scene reenactment much the same as *Lopez*, showing a complicated, haphazard shootout involving at least four human participants, with many details either differing from witness testimony or simply fabricated, in part due to a lack of computer memory.

In oral argument,[11] I attempted to simplify the matter even further: The animation was really no different from a two-dimensional diagram of the buildings, truck, and victim drawn on an easel and used to illustrate Officer Kropp's opinion. The only real difference is that the vehicle's motion was shown rather than implied. I stressed that since there was no objection to the reliability of the expert's testimony, there was no abuse of discretion in admitting a diagram that helped him explain it, even a moving one.

The Court of Criminal Appeals unanimously affirmed the Eleventh Court and, in short, held that a demonstrative computer animation illustrating otherwise reliable expert testimony is not inadmissible purely because it potentially involves some depiction of human behavior. An animation may be admitted to illustrate otherwise admitted testimony if it is shown that it 1) is authenticated, 2) is relevant, and 3) has probative value that is not substantially outweighed by the danger of unfair prejudice. The Court noted the defendant did not object that the underlying expert testimony and opinions were unreliable under Rule 702, so the only question regarded the admissibility of the demonstrative exhibits themselves. The exhibits were authenticated as a visualization of the expert's opinion: Officer Kropp testified that they fairly and accurately reflected what they purported to reflect, they accurately depicted what he intended them to, they had not been altered in any way, and they fairly and accurately represented what the available evidence showed.

Judge Newell explained that the animations were relevant because they assisted the trier of fact in understanding the testimonial and documentary evidence in a concise and easy-to-understand form, much like a blackboard might be used to illustrate testimony visually. The animation combined the tire tracks; acceleration patterns; medical evidence of Delorme's injuries; and the forensic evidence of blood, DNA, and skin found beneath Pugh's vehicle to consolidate and illustrate the testimony of multiple witnesses,

The Court noted the defendant did not object that the underlying expert testimony and opinions were unreliable under Rule 702, so the only question regarded the admissibility of the demonstrative exhibits themselves.

provide a clear understanding of the State's theory of the case, and show why Pugh's version of events was inconsistent with the physical evidence.

Judge Newell then addressed the heart of the matter, the Rule 403 analysis, and held that the probative value of the animations was not substantially outweighed by the danger of unfair prejudice. The probative value weighed in favor of admissibility, as the animations "enabled the jury to visually evaluate the plausibility of both the State's theory and [the] appellant's self-defense claim" and "conveyed the evidence more effectively than if a witness had merely described it."[12]

As to unfair prejudice, the Court noted that the animations were actually the least gruesome depiction of Delorme offered into evidence; the autopsy and crime scene photos were understandably graphic, but the animation of Delorme was little more than a stick figure and it involved no blood or gore. Unlike the "pure speculation" animation in *Hamilton* and *Lewis*, the exhibits here accurately reflected the objective evidence and were not based on speculation that might have misled or confused the jury, having been based on calculations derived from objective data and quantifiable measurements.[13] While Pugh's argument centered on Delorme's placement within the exhibits, Officer Kropp's placement of Delorme was supported by objective evidence: His body was discovered 85 feet from where the acceleration marks started, traveled from the front of the back of the undercarriage, and was dragged no more than 10 feet. Judge Newell questioned Pugh's core contention that the exhibits improperly and implicitly conveyed to the jury that the victim did not engage in provocative behavior and instead noted that the exhibits showed no behavior on the part of the victim—the immobile, featureless figure was clearly not meant to convey any information about the victim's behavior at all. It was merely a human-shaped placeholder to show Delorme's position, a stick-figure marker on our moving blackboard.

Ultimately, the Court concluded there is no *per se* prohibition against animations depicting human behavior in demonstrative exhibits, agreeing that the admonition in *Miller* (by way of *Lopez*) regarding the "inherent danger" of staged recreations involving human beings was dicta in that case. Moreover, unlike *Hamilton* and *Lewis*, the exhibits in this case didn't attempt to recreate any complex human behavior, as the figure representing Delorme merely served as a marker for the place that the strike occurred and how the truck traveled over the body. The animation used no extraneous and speculative detail, only what was necessary to illustrate the expert's conclusions. Adding a knife as Pugh suggested would have actually added speculation to the exhibits and changed their focus as a demonstrative aid.

Judge Walker concurred and wrote separately to express his thoughts on the power of computer animations. Because they can be so highly persuasive, he urged defense attorneys not to "sit on their hands" when faced with computer animations composed by the State but rather to seek expert assistance and animations of their own when possible. To this end he urged defense attorneys to consider filing *Ake v. Oklahoma* motions requesting their own experts, and he admonished trial courts to remember that indigent defendants may be entitled to funds for expert assistance, including computer animations. He also suggested that if funds are not available to supply an indigent defendant with his own expert and animations, then courts could consider using Rule 403 to level the playing field in the interest of fairness by keeping the State's animations out. However, there's an important distinction at play here: the availability of funds to pay an expert for a computer animation—and the availability and willingness of an expert to testify. In other words, funds don't make for expert opinions; facts do. An ethical expert won't testify as to an opinion wholly unsupported by the facts, and the unavailability of an expert on those grounds is a completely separate question from how experts are funded. Judge Walker's concurrence expressing support for excluding the State's demonstrative evidence over funding issues should not be misread as support for excluding the State's demonstrative evidence when an expert simply can't be found to support the defendant's theory of the case. In *Pugh*, it's extremely unlikely that an expert would have signed on to Pugh's version of events—the data just didn't support it.

The animation used no extraneous and speculative detail, only what was necessary to illustrate the expert's conclusions. Adding a knife as Pugh suggested would have actually added speculation to the exhibits and changed their focus as a demonstrative aid.

Going forward

What's this mean to you, the hard-working, front-line prosecutor? I'm so glad you asked. First, if you intend to use any sort of animation as a demonstrative exhibit, read Judge Newell's opinion in *Pugh* fully. It is extensively detailed and exhaustive, and an article of this length can't possibly tell you everything you need to know. The quick take is that demonstrative exhibits used to illustrate expert opinion testimony must be based on scientifically reliable testimony that is based on objective data, and here there was a wealth of it: the measurements and photos taken at the crime scene, evidence from the undercarriage, acceleration patterns that officers observed, acceleration tests Officer Kropp performed, and autopsy results. Be aware that while the Court did not issue a blanket prohibition against depicting human behavior in a computer-animated demonstrative exhibit, in this case the Court found that Rule 403 favored admission in part because there was no attempt to depict human behavior—Delorme's figure was used only to show his position prior to impact, not his actions. As a demonstrative exhibit is not itself evidence, consider requesting a limiting instruction to that effect as discussed in the opinion, even if the defendant does not do so himself.

Prosecutors must also be aware that what's good for the goose is good for the gander, and if animations can be used by the State, they can and will be used by the defense. This may lead one to an attack of the vapors, but before we panic, let's return to our analogy: The animation is a blackboard that either side may use, and the blackboard doesn't replace evidence—it merely depicts the evidence already entered. The jury needs to be reminded that the trial is not a competition of who has the better animation, but rather which animation and which expert better match the facts, testimony, and physical evidence. Use your blackboards wisely. ❇

Endnotes

[1] No. PD-1053-19, _S.W.3d_, 2022 WL 224275, 2022 Tex. Crim. App. LEXIS 31 (Tex. Crim. App. Jan. 26, 2022).

[2] Each video can be viewed at www.txcourts.gov/cca/media.

[3] No. 11-10-00150-CR, 2011 Tex. App. LEXIS 7230, 2011 WL 3860444 (Tex. App.–Eastland Aug. 31, 2011, no pet.) (mem. op.).

[4] 560 S.W.3d 337, 347-48 (Tex. App.–San Antonio 2018, no pet.)

[5] No. 08-15-00225-CR, 2016 Tex. App. LEXIS 12421, 2016 WL 6820559, at *3 (Tex. App.–El Paso Nov. 18, 2016, no pet.) (mem. op.).

[6] *Pugh v. State*, No. 11-17-00216-CR, 2019 WL 4130793, 2019 Tex. App. LEXIS 8009 (Tex. App.–Eastland Aug. 30, 2019, pet. granted) (mem. op.).

[7] 741 S.W.2d 382 (Tex. Crim. App. 1987).

[8] 651 S.W.2d 413, 416 (Tex. App.–Fort Worth), pet. granted, case remanded, 664 S.W.2d 85 (Tex. Crim. App. 1983), op. withdrawn by *Lopez v. State*, 667 S.W.2d 624 (Tex. App.–Fort Worth 1984, no pet).

[9] 399 S.W.3d 673 (Tex. App.–Amarillo 2013), aff'd, 428 S.W.3d 860 (Tex. Crim. App. 2014).

[10] 402 S.W.3d 852 (Tex. App.–Amarillo 2013, no pet.), aff'd, 428 S.W.3d 860 (Tex. Crim. App. 2014).

[11] Oral arguments may be seen on the Court of Criminal Appeals' YouTube channel at https://youtu.be/TiG_KUK7bO0.

[12] Quoting *Wright v. State*, 178 S.W.3d 905. 912-15 (Tex. App.–Houston [14th Dist.] 2005, pet. ref'd) and *Milton v. State*, 572 S.W.3d 234, 240 (Tex. Crim. App. 2019).

[13] The Court noted in footnote that the excluded exhibit showing the driver's point of view carried with it significant danger of unfair prejudice because it speculatively focused more on what Pugh actually did or did not see and centered the viewer's attention on the victim's behavior or non-behavior. I conceded in argument that the trial court had likely made the right call in excluding that animation.

The animation is a blackboard that either side may use, and the blackboard doesn't replace evidence–it merely depicts the evidence already entered.

Photos from our Prosecutor Trial Skills Course in January

Photos from Train The Trainer

Photos from our Long-Range Planning Committee meeting

How our office onboards new prosecutors (cont'd from the front cover)

A new onboarding program

Inspiration can come from both familiar places and unexpected ones. When I was growing up, my mom told many stories at the dinner table about the challenges she faced and solutions she used as an employee, manager, and mentor in the corporate world. One such system was an onboarding program to train new employees on office philosophy and policies, as well as on technical skills required to complete daily tasks.

Historically, our office has supplemented TDCAA's formal training with informal, in-house "lunch & learn" courses on various topics on an as-needed or as-it-comes-up basis. These presentations are usually organized after someone does extensive research on a particular issue or discovers a nuance of law or procedure while preparing for trial. It has always been a priority in our office to spread knowledge and information as a team and create space for all of us to contribute based on their own skill sets or strengths.

We built on the foundation of the "lunch & learn" training to create our New Prosecutor Onboarding Program (NPOP). It has two components: skills development and mentorship. In this article, I hope to give readers a look into our building and planning process, an overview of how the first round of skills development went, honest feedback, and our next steps.

Building and planning an onboarding program

The first questions we needed to answer to build our program were:

1) What do new prosecutors need to be successful?

2) What is the best way to provide those resources?

Young prosecutors struggle with basic concepts that more seasoned attorneys forget we had to learn too. Do you remember learning:

- where to send subpoena requests
- how to read a computerized criminal history
- how to request certified copies of judgments
- how to cross-examine a witness
- how to negotiate and make plea offers
- how to use the county records system

In the midst of drinking from the firehose in the first month or two of being a new prosecutor, there are also concerns about asking stupid questions and not knowing what they don't know—the idea that they may be missing something without even realizing it because they have little to no context for the work that they're doing.

No magic potion can replace the deep well of information prosecutors gain with time and experience, through failures and triumphs. The hope for NPOP was to provide foundational knowledge of the information new prosecutors need in the first 30–60 days and, we hope, some much-needed context and relief from anxiety.

Before building a program, I built a planning team—a brain trust. Each person in any office has a unique set of strengths: Some are top-notch researchers and writers, some are great at big-picture ideas and strategy, and others excel when it comes to time management and leadership. Each person's assets contribute to the overall success of the office. It was important to include on the planning team people with knowledge and experience in teaching and prosecution; more importantly, I wanted people who were excited about building something new (and a little scary). I was lucky to find those things in two people who taught me as a new attorney: Ryan Calvert and Philip McLemore. Ryan is well-known for his years of experience in prosecution as well as is his love for and skill in teaching. Philip has been a prosecutor for eight years and was an educator before beginning his career as an attorney. When I spoke with them about my idea, they were both all in.

We started in mid-March 2021 with the goal of having content, presenters, and schedule ready to roll out five months later. We split the training into two categories: soft skills and technical skills. Soft skills included office philosophy, case evaluation, plea offers, meeting with victims and witnesses, and negotiation. Technical skills included subject-matter training (search and seizure, controlled substances, family violence, etc.); trial preparation and advocacy; and administrative duties, such as using the county records system, requesting records, filing deadlines, accessing discovery on the county server, and expert witness and contact lists. The two lists were comprehensive and were intended to ensure that new prosecutors would have some knowledge of each topic by the end of the program.

Beyond the subject matter, we also organized the topics based on what was most pressing and what would make the most sense for the flow of the program. Most topics were presented lecture-style by one or more people depending on the subject matter, but trial advocacy skills were taught in a mock trial setting. Some presentations were structured to include a practical application that required participation from the new attorneys. For example, after learning about our intake division, each new attorney would prepare and present a case for grand jury.

Once the content map was finalized, we looked at the strengths and knowledge bases of the people we work with every day to identify the contributors for each topic. Our roster of presenters included District Attorney Jarvis Parsons and First Assistant Brian Baker, chief-level and mid-level prosecutors from every division, investigators, and victim assistance coordinators. Pulling in people from every division was a great way to expose the new attorneys to people they wouldn't otherwise interact with in their first few months.

By the end of all the planning and editing, our program featured one-hour training sessions that would happen two to three times per week for 13 weeks. We knew that this schedule would be heavy for the new attorneys who were learning new concepts, integrating into our office, and figuring out how to manage their time, and I felt that mentorship was an essential function of NPOP. The goal in establishing a mentorship program was to dedicate a friendly face for new teammates who could provide support on work-related topics or what's going on in their lives.

The goal in establishing a mentorship program was to dedicate a friendly face for new teammates who could provide support on work-related topics or what's going on in their lives.

Through my own personal experiences as a young attorney and conversations with other prosecutors, a common obstacle to growth is the feeling that you are bothering someone by asking too many questions. To fill this gap, the new attorneys were assigned mentors who were outside of their direct court teams, and the two met weekly to discuss that week's trainings or any other issues. This allowed new attorneys to ask questions they felt were too trivial to take to a chief, get feedback on cases from another perspective, and discuss time management and how they were adjusting to their new career.

The program also allowed mid-level prosecutors serving as mentors to grow as leaders by developing their management and conflict-resolution skills, as well as by giving them some ownership of their new teammates' success. With the overarching disclaimer that this program, the presenters, and the mentors were intended to supplement instruction from their chiefs, we also wanted to help our new coworkers add to their list of go-to people they could rely on for advice or questions in the future.

How the first round went

Come August, it was time for our inaugural onboarding class, and it was not easy. There were many moments that I doubted the idea, what we had built, or the possibility of success. But we pressed on and I'm so glad we did.

My years in the school band taught me that no matter how well-rehearsed a performance was, the first full run-through was always a little rough and scary. But the band simply played through the mistakes and noted the things that didn't go well so that we could improve in the future. During NPOP's first full fun-through, we hit rough patches, but I reverted back to these tenets: There will be moments that don't go as planned, so make notes, recognize areas for growth and change, and keep going.

Because it was important to see how everything worked together and to evaluate our big-picture strategy as it relates to the structure, pace, time commitment, and content of the program, I sat in on almost every training session to make notes about the things that went well, my observations, and any thoughts on how to improve. One thing I was looking for was consistency of information. A true testament to our office philosophy and mission was seeing threads of consistency weaving throughout each of the sessions. Despite the differences in the presenters' style when it came to execution of ideas, the same themes were carried through from one session to the next. This unplanned repetition of information was a great surprise and something we plan to incorporate more intentionally in the future.

I also paid close attention to the level and types of engagement during and after the sessions—I wanted to know what questions attendees were asking. Attendees included two attorneys who had been in the office for about eight months and two others who had only been in the office for a few weeks. This made for interesting evaluation of the program's scheduling. While all of the questions were helpful and purposeful, it was clear that the two attorneys with months of courtroom experience and interoffice interactions had more context for the topics. For

example, after a session about preparation for a hearing, one more seasoned attorney asked about a previous experience she had in court and what she could have done differently. I was pleasantly surprised to see that NPOP was creating space for the new attorneys to talk about their experiences, both good and bad, in the courtroom. From a planning perspective, it was also interesting to note that some aspects of NPOP may be better suited for a new attorney with six to nine months of experience. We plan to discuss such a change in the coming months.

After the program, we asked the new attorneys to complete an anonymous questionnaire to gauge their satisfaction with the program including its structure, pace, time commitment, content, and presentation. Our goal was to provide positive support, so we wanted to know how beneficial and effective the program was (or was not). The responses suggested changes, such as providing more step-by-step instructions on certain tasks, changing the order of the subjects, shortening the sessions, and adding information regarding other county agencies, such as the jail or probation department.

While the responses to the questionnaires remain anonymous, each participant shared some thoughts to be used in this article. Here are excerpts from what they had to say:

> "I really enjoyed having a new speaker for each topic. This was a great way to work closely with much more experienced prosecutors in the office. Most of the time, we become very close and comfortable with our court team because those are the people we work with every day, try cases with, and see in docket. While that is a great way to learn, the onboarding program allowed for yet another way to help us learn from other prosecutors in the office as well, all who have different skill sets. It allowed me to feel comfortable enough to ask questions to prosecutors in the office. Now, a year since I started in this office, I feel like have I learned so much thanks to the onboarding program and the wonderful mentors I have met."

> "While learning from the experienced prosecutors in my office was exciting, it also triggered a fear that I think many new prosecutors can relate to—that I wouldn't be as great as the prosecutors I admire. This concern was addressed from the beginning of the program. Each prosecutor who presented or led a practical exercise made it very clear that he or she started in the same position that we were in. Each of the experienced prosecutors in our office had to learn how to do this job—the right questions to ask for a tough cross-examination and how to do an effective voir dire. The onboarding program gave us a solid foundation and encouraged us to develop our skills and find our own style."

> "As a new prosecutor, almost everything can seem overwhelming and confusing. In learning from so many different people in the office, I could see different ways to approach each aspect of a case, including evaluating cases at intake, making plea offers, and preparing for trial. The opportunity to practice trial advocacy skills in a low-stakes environment and hearing about the way others approach those skills really helped me to refine how I prepare for court."

> "I came into this office as a first-time prosecutor. Having just graduated law school a few months prior to my first day and still waiting for my bar exam results, I had no context of what the reality of being a prosecutor really was. This job started at a full run, which means I was encountering situations and topics that I had no experience with and not much of an idea of where to start."

Continued on page 23 in the green box

BELOW: The first class of participants in the Brazos County DA's Office's New Prosecutor Onboarding Program (left to right): Monica Mendoza, Yasmeen Aboellhasan, Victoria Fazzino, and Anjelica Harris.

Creation and revision of the Victim Impact Statement

The Victim Impact Statement (VIS) remains the most effective way for victims' voices to be heard throughout the criminal justice system.

By Jennifer Hill
Program Supervisor, Crime Victim Clearinghouse, Texas Department of Criminal Justice Victim Services Division

A long history of milestones contributed to the establishment of crime victims' rights in Texas and ultimately to the creation and ascribed uses of the VIS. In this article, I will share the purposes of the statement; how the VIS and related documents are revised each biennium; and the role of attorneys representing the State in ensuring victims of crime are afforded the rights enumerated in Texas Constitution, Code of Criminal Procedure (CCP), and Penal Code.

Creating and revising the VIS

Before the late 1970s, crime victims in the United States did not have rights in the criminal justice system. The 1970s and 1980s saw great strides in the expansion of crime victims' rights and services. The formation of victim service groups, such as People Against Violent Crime and the Texas Association Against Sexual Assault, worked to push victim rights legislation forward.[1] In 1982, President Ronald Reagan's Task Force on Victims of Crime brought national focus on the needs of crime victims.[2] The Task Force's Final Report offers recommendations related to the passing of legislation mandating the creation of victim impact statements and their consideration before sentencing.[3]

In 1985, the 69th Texas Legislature passed House Bill 235, which created Chapter 56 of the CCP, codified the Rights of Crime Victims statute, defined statutory victims, and created the written VIS. This new statute gave crime victims the right to complete a VIS and have it considered at various stages of the criminal justice process; it also described the development and revision of the VIS form, the required elements of the statement, and its intended purposes. It is primarily the responsibility of the Texas Crime Victim Clearinghouse (TxCVC), with the participation of the Texas Board of Pardons and Paroles (BPP), and the Texas Department of Criminal Justice (TDCJ) Community Justice Assistance Division, to develop and update the VIS form after every legislative session.[4]

Purposes of the VIS

The VIS has four primary purposes, the first being to record the impact of an offense on the victim of that offense, including psychologically, personally, physically, and financially. This is different from an allocution in that the VIS is submitted in writing and reviewed by the prosecutors and judge before sentencing, rather than delivered orally after sentencing. Also, the written VIS follows the offender throughout the criminal justice system.

The second purpose of the written VIS is as a way for key decision-makers within the criminal justice system to consider the harm caused by the crime. These key decision-makers include:

- the prosecutor, who is required to consider the VIS before a plea bargain agreement is accepted,[5]
- the judge, who is required to consider the VIS before a plea bargain agreement is accepted or before sentencing,[6] and

- the Board of Pardons and Paroles, which is required to review the VIS before voting to release or deny an inmate for parole or mandatory supervision,[7] as well as whether to recommend clemency to the governor.

The third purpose is as a tool for victims to request notifications, document the victim's notification preferences, and provide victim contact information to be used by criminal justice agencies to notify the victim throughout the process. A few of these notifications include, but are not limited to, the right to be informed:

- by the prosecutor of relevant court proceedings, including appellate proceedings, and to be informed if those proceedings have been canceled or rescheduled;
- by an appellate court of the court's decisions;
- by the entity that has custody of the inmate, when an inmate convicted of an offense completes the sentence and is released, dies, or escapes; and
- by the TDCJ when the inmate enters the parole review process, is released to parole or mandatory supervision, or discharges the sentence.

It is important to note that if a court sentences a defendant to a period of community supervision, the prosecutor has the responsibility to forward the VIS to the community supervision and corrections department supervising the defendant.[8] If a court sentences a defendant to imprisonment in TDCJ, the court shall attach to the commitment papers a copy of the VIS.[9]

The final purpose of the written VIS is to provide victims with information about crime victims' rights and how the statement is used in the criminal justice system.

Revisions to the VIS

The VIS Revision Committee makes essential updates to the VIS after each legislative session to ensure these documents are user-friendly for victims and criminal justice professionals alike. The committee safeguards the victim's voice within the criminal justice system and provides an important perspective on how the VIS is used to meet victims' needs in different counties. Below is a summary of key revisions made to the VIS and related documents, which were approved by the VIS Revision Committee after the 87th Legislative Session.

- The VIS's title changed to "Your Voice, Your Right!" and a QR code directing victims to

There are so many barriers to entry—in life, in our profession, and within our own offices. Through programs like NPOP, we can knock down some of the walls that stop a brand-new prosecutor from being confident and effective. The same sense of camaraderie that is built in the well of the courtroom can forge ideas of what a new prosecutor's first few months or years should look like. I hope that the lessons I learned during dinner conversations with my mom are just as helpful and inspirational to you and your team.

Our next steps

While the feedback from our new prosecutors shows that we made meaningful strides toward giving them the support and training they need to be capable and confident as quickly as possible, we also recognize improvements need to be made. A consistent note for change was that we bit off more than we could chew with our original 13-week framework in terms of the amount of information and the length of the schedule. The program's time commitment added to the stressful schedules of our new prosecutors. It also became clear that there was a significant benefit to having a few months of courtroom experience before going through parts of the program. We will use this information to make sensible changes.

This year, NPOP was our response to the growing demand on new prosecutors as well as the experienced prosecutors who work with them. Although the work on this project began in a conference room with coworkers, the true inspiration came many years before I became a prosecutor—around the dinner table with my mom. One of the greatest lessons we learned through this exercise is that this idea is not one-size-fits-all. The diverse experiences of the prosecutors within your own office are a great place to look as you start to ask questions about how your office can better prepare new prosecutors. My hope is that our experiment in innovation and change will spark conversations in other offices and that you strive to find answers that make sense for your people and organization. ❇

the TDCJ Victim Services Division website was added. Other clarifying changes were made to help unify the document and accommodate multiple offenses and charges.

- On the Just for Kids VIS, which is for use when the witness or victim is under 18, "Pseudonym" was added next to "My Name" to provide the option for a pseudonym to protect the victim's privacy and confidentiality.
- On the Supplemental Page, clarifying changes were made to unify the document with the VIS form.
- Under Recommended Processing Procedures, changes were made to simplify the procedures and make them more user-friendly for victim services and criminal justice professionals.
- On the "It's Your Voice" brochure, a section about clemency was added to make sure victim service and criminal justice professionals understand that the VIS allows the victim's voice to be heard during the clemency process as well.
- eVIS is an electronic version of the VIS that will enable victims to complete and submit the VIS online at their convivence. It is an ongoing project that we hope to have up and working soon.

Find all of the new documents online at TDCJ's website, www.tdcj.texas.gov/publications/victim_impact_statement.html.

Find all of the new VIS documents online at TDCJ's website.

For more information

You can access more information about the recent changes to the VIS by viewing our previously recorded webinar, Victim Impact Statement: 2021 Updates.[10] To locate other webinars, search our archives at https://ivss.tdcj.texas.gov/search-training-event. The TxCVC is also available to provide Victim Impact Statement trainings for your organization. To request training in your area, please submit the request via our online portal at https://ivss.tdcj.texas.gov/training-request. For more information about Victim Impact Statements, please contact the TxCVC at tdcj.clearinghouse@tdcj.texas.gov or call 512/406-5931 to speak to a TxCVC staff member.

Editor's note: The Texas Juvenile Justice Department (TJJD) also revised its Juvenile Victim Impact Statement, and it is available online at www.tjjd.texas.gov/index.php/doc-library/category/351-juvenile-victim-impact-statement. There are adults' and kids' versions available in both English and Spanish. ❇

Endnotes

[1] Institute on Domestic Violence and Sexual Assault (IDVSA). (2011). Milestones in Texas Victim Rights and Services, IDVSA at University of Texas, Austin, TX, Crime Victims' Rights Week 2011.

[2] Office for Victims of Crime (2005), Crime Victims' Rights in America: A Historical Overview, National Victim Victims' Rights Week 2005. Retrieved from www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4b.html.

[3] President Ronald Regan (1982), Presidential Executive Order 12360, President's Task Force on Victims of Crime, pp.18 & 36. Retrieved from https://www.ojp.gov/pdffiles1/ovc/87299.pdf.

[4] Tex. Code Crim. Proc. Art. 56A.151.

[5] *Id.*

[6] Tex. Code Crim. Proc. Art. 56A.157(a).

[7] Tex. Gov't Code §508.153(c).

[8] Tex. Code Crim. Proc. Art. 56A.159.

[9] Tex. Code Crim. Proc. Art. 56A.159(b)).

[10] View it at https://tdcj.adobeconnect.com/pdk9ugjonfg7.

Self-defense and jury instructions

We've all been there: a defendant has some half-baked self-defense theory, which everyone in the room knows is absurd, yet the defense lawyer is asking for a jury charge on it.

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Our first instinct is to fight the inclusion of the instruction; after all, we all know it's nonsense. But wait: Defendants are often entitled to defensive jury instructions regardless of how far-fetched the "facts" supporting the instruction or how dubious the reliability of the sources those "facts" came from.

What follows is a brief primer on the law of self-defense and a few of the many and varied ways in which a prosecutor's inclination to argue against the inclusion of a self-defense instruction in the jury charge is, although understandable, usually unwise.

Self-defense issues in the Penal Code

The definition of self-defense is simple enough on its face: "A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."[1] While self-defense seems simple enough in the abstract, one need look no further than the Penal Code section regarding it to see that it is not nearly so simple in reality.

Self-defense is not an available justification in numerous circumstances, including but not limited to:

1) in response to verbal provocation alone;

2) to resist an arrest or search that the actor knows is being conducted by a peace officer, regardless of the legality of that arrest or search;

3) where the actor consented to the other's use of force;

4) where the actor provoked the difficulty; and

5) where the actor sought an explanation from another while the actor was illegally carrying a weapon.[2]

Where the actor is justified in threatening or using deadly force against another, he may not recklessly injure or kill an innocent third person.[3] Therefore, a defendant may not receive a self-defense instruction as to the reckless injury or death of the innocent third party, even where he has a legitimate self-defense issue against another.[4]

Self-defense issues become more complex depending on whom or what is to be protected by the use of force, and the amount of force to be used. Deadly force can be used where the actor would be justified in using force under §9.31 of the Texas Penal Code and when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force, or to prevent the other's imminent commission of certain enumerated violent felonies.[5]

Force or deadly force can likewise be used to protect a third person where the use of force or deadly force would be justified under §§9.31 or 9.32 of the Penal Code and the use of force or deadly force is immediately necessary to protect the third person.[6]

Force or deadly force can also be used to protect property.[7] The possessor of property may use force to protect that property when and to the degree he reasonably believes the force is immediately necessary to prevent or terminate another's trespass on land or unlawful interference with property.[8] Deadly force can likewise be used to protect one's own or another's property to prevent the commission of certain offenses or to prevent flight therefrom.[9]

The defense bears the burden of adducing some evidence on which a jury could base a finding of self-defense.[10] The State bears the burden of persuading the jury that the defendant's actions were not in self-defense.[11] Self-defense is a fact issue for the jury, and a jury's finding of guilt is an implicit rejection of the defendant's self-defense theory.[12]

Entitlement to a jury instruction

Caution against contesting self-defense instruction. When considering whether to put a particular instruction in the jury charge, be it on self-defense or another defensive issue, prosecutors should keep in mind the potential appellate implications of refusing to include a requested instruction, or of not including a necessary instruction even where it was not requested. This is because under the governing law, even a failure by defense counsel to request a necessary instruction does not waive the consideration of the lack of that instruction on appeal.[13] Therefore, prosecutors should not only be circumspect about contesting including defensive instructions in the jury charge, but they should also proactively anticipate such issues and request (or at least suggest) the inclusion of such instructions in the jury charge themselves.

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The source of the evidence is irrelevant. While it is true that the defense bears the burden of production, this does not mean that the defendant must testify, nor in fact produce any evidence at all to be entitled to a self-defense instruction—the evidence submitted by the prosecution may necessitate the inclusion of a self-defense instruction in the charge.[14] Therefore, while it may be tempting to argue that the defense has not produced any evidence to support the inclusion of a self-defense instruction in the jury charge, this argument is a loser if the prosecution has presented that evidence because the defendant is entitled to rely on any evidence on the record, no matter its source, which supports a defense.

Confession and avoidance. Self-defense is a so-called "confession and avoidance" defense, meaning that the defendant must admit his conduct, then point to evidence on which a jury could base a finding that his actions were justified because he acted in self-defense.[15] Given this general rule, a prosecutor's first instinct when faced with a scenario where a defendant does not unequivocally concede his guilt to all of the elements of the offense may well be to argue against the inclusion of a self-defense instruction (or indeed an instruction on any other confession-and-avoidance defense). That instinct could be bolstered by a search of the caselaw on this issue, which over the years has presented some authority on which a prosecutor arguing against the inclusion of such an instruction could hang his hat.[16]

However, prosecutors must always keep in mind the general rule that the defendant is entitled to a jury instruction on any defensive theory raised by the evidence.[17] This general rule is further bolstered, and the prosecutor's instinct to argue against the inclusion of a self-defense instruction undermined, by authority stating that the defendant can be entitled to a self-defense instruction even where there is evidence that he made contradictory statements about his having committed the act or does not testify and thus does not actually "confess" or "admit" the conduct himself.[18]

The prosecutor researching this issue could find himself confused by these apparently contradictory authorities. Indeed, the Texas Court of Criminal Appeals has characterized its own application of the confession and avoidance doctrine as "somewhat inconsistent."[19] The Court of Criminal Appeals recently clarified this apparent inconsistency in the application of the confession and avoidance doctrine by holding (in *Rodriguez v. State*) that "all the facts surrounding the charged conduct may be relevant in deciding whether a defensive issue has been raised. ... The evidence need not unequivocally show that the defendant engaged in the conduct. ... Credibility is for the jury to decide; the court's only role is to determine if there is some evidence—even if weak, inconsistent, or contradictory—that a rational jury could find supports the defense. ... Consequently, in a case of conflicting evidence and competing inferences, the instruction should be given."[20]

In light of the Texas Court of Criminal Appeals' recent pronouncement on this issue, prosecutors are best served to include a self-defense instruction (or other confession and avoidance defense instruction) in the jury charge if there is any evidence from any source, no matter how weak or liable to impeachment, which could sup-

port such a defensive theory, and even where one might be inclined to argue about whether the evidence reflects a true "confession" to all of the elements of the offense.

Apparent danger. A prosecutor might be inclined to argue against the inclusion of a self-defense instruction where the victim was not using deadly force against the defendant. However, this is another path fraught with danger because the victim need not actually be using deadly force against a defendant for the defendant to use deadly force in self-defense; the Texas Court of Criminal Appeals has held that a "person has the right to defend himself from 'apparent danger' to the same extent he would if the danger were real."[21]

Self-defense against a non-aggressor amongst multiple assailants. Where the prosecution is for injuring or killing a person who was not an aggressor toward the defendant, it might well be a prosecutor's natural instinct to think that a self-defense charge would not be available. However, the Texas Court of Criminal Appeals has held that there is a nuance to this situation: "When the evidence viewed from the defendant's standpoint shows an attack or threatened attack by more than one assailant, the defendant is entitled to a multiple assailants [self-defense] instruction. The issue may be raised even as to those who are not themselves aggressors as long as they seem to be in any way encouraging, aiding, or advising the aggressor."[22]

Hence, even if the defense is conceding that the victim was not an aggressor, if there is any evidence that the victim seemed to be encouraging, aiding, or advising an aggressor, the defendant is entitled to a self-defense charge as to multiple assailants. A close reading of the Texas Court of Criminal Appeals' holding in *Jordan* is highly recommended should any prosecutor find himself presented with such a scenario.[23]

Inconsistent defensive theories. Prosecutors might, after swallowing the bitter pill of accepting a self-defense instruction they feel is unjust, be inclined to contest another instruction on an alternative and indeed contradictory defensive theory. The prosecutor should resist that temptation.

A defendant is entitled to a jury instruction on every defensive issue raised by the evidence, even if the defenses are inconsistent or contradictory,[24] so prosecutors should be slow to object to any such instruction.

Conclusion

While the inclusion of self-defense jury instructions the prosecutor believes to be nonsensical can doubtless be frustrating, prosecutors should remember that ultimately, the inclusion of these instructions is designed not only to protect defendants' rights and prevent the wrongful convictions of innocents, but also to ensure that it is juries rather than judges or prosecutors who are making the ultimate factual determinations. Our duty is to see that justice is done, and we rely on juries to be the conscience of the community. Placing the determination of whether the facts support a defensive issue with those juries merely places the decision-making authority where it rightfully lies.

Further, the inclusion of these instructions can be a land of opportunity for prosecutors; oftentimes, if a defendant secures multiple defensive instructions, these will in fact be inconsistent or contradictory theories in some respect. The opportunity to point out these inconsistencies is fertile ground for closing argument, and that is our real time to shine, not at the charge conference. ❇

Our duty is to see that justice is done, and we rely on juries to be the conscience of the community. Placing the determination of whether the facts support a defensive issue with those juries merely places the decision-making authority where it rightfully lies.

Endnotes

[1] Tex. Penal Code §9.31(a).

[2] Tex. Penal Code §9.31(b).

[3] Tex. Penal Code §9.05.

[4] *Id.*

[5] Tex. Penal Code §9.32(a).

[6] Tex. Penal Code §9.33.

[7] Tex. Penal Code §§9.41–9.43.

[8] Tex. Penal Code §9.41.

[9] Tex. Penal Code §§9.42, 9.43.

[10] *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991).

[11] *Id*.

[12] *Id.* at 913-14.

[13] See *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005) (addressing jury charge error under the *Almanza* standard–that jury charge error will still be evaluated for "egregious harm" even where the error was not objected to at trial).

[14] *Smith v. State*, 676 S.W.2d 584, 586-87 (Tex. Crim. App. 1984).

[15] *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020).

[16] See, e.g., *Ex parte Nailor*, 149 S.W.3d 125, 132-34 (Tex. Crim. App. 2004) (on postconviction writ of habeas corpus, holding that trial counsel was not ineffective for not seeking a self-defense instruction where the defendant would not have been entitled to such an instruction because the defendant's position was that he accidentally caused the victim's injuries and therefore lacked the requisite mens rea; thus, his position was one of negating the elements of the offense rather than confessing the elements and avoiding the conviction on the ground he acted in self-defense).

[17] *Jordan*, 593 S.W.3d at 343, citing *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996).

[18] *Rodriguez v. State*, 629 S.W3d 229, 237 (Tex. Crim. App. 2021) (holding that trial court erred in not submitting jury instructions on necessity, self-defense, and defense of a third person where defendant testified that he pulled out a gun to break up a fight but did not intentionally pull the trigger because evidence supporting competing inferences should have been submitted to the jury to decide); see also *Juarez v. State*, 308 S.W.3d 398, 403-05 (Tex. Crim. App. 2010) (examining the confession and avoidance doctrine in various applications, including the necessity defense and self-defense contexts, and ultimately holding that the trial court erred by refusing to give a necessity instruction where the defendant did not admit to the culpable mental state but did admit to the act because there was evidence from which the jury could have inferred the culpable mental state); *Roark v. State*, No. 01-19-00428-CR, 2020 WL 5823152 at *3-7 (Tex. App.–Houston [1st Dist.] Oct. 1, 2020, no pet.) (mem. op., not designated for publication) (examining Court of Criminal Appeals's holdings on confession and avoidance issue and holding that there was evidence in the record, though the defendant did not testify, from which the jury could have found all of the elements of the offense and the defensive theory to be true and that the trial court erred by not giving a necessity instruction).

[19] *Juarez*, 308 S.W.3d at 403.

[20] *Rodriguez*, 629 S.W.3d at 231-33.

[21] *Hamel v. State*, 916 S.W.2d at 493.

[22] *Jordan*, 593 S.W.3d at 343.

[23] *Id*.

[24] *Booth v. State*, 679 S.W.2d 498, 501 (Tex. Crim. App. 1984).

The road to recognition

From the start of her first term in office, Sharen Wilson, the Criminal District Attorney in Tarrant County, was determined to improve each and every aspect of our office, including the attorneys, staff, and investigators.

By Kyle Gibson
Assistant Chief Investigator in Tarrant County

When the proverbial "fork in the road" presented itself in deciding how to improve the Investigative Division, CDA Wilson did not take the road less traveled; rather, she chose the one that had never been traveled. She sought to have the Investigative Division recognized by the Texas Police Chiefs Association Foundation (TPCAF) as a Texas Best Practice Law Enforcement Agency. This recognition provides a benchmark for professional Texas law enforcement and would demonstrate to the community our commitment to providing high-quality service. CDA Wilson knew she had a great team of investigators, and she wanted everyone else to know it too.

After two and a half years of work, our office was the first prosecutor's office in Texas to earn this recognition, which was awarded December 17, 2021. This article documents the process we went through to achieve recognition with the hope that other prosecutor offices may be inspired to do the same.

What is the Best Practice Recognition Program?

The Texas Best Practice Recognition program (TBP) was started in 2006 and is administered by the TPCAF. It is a voluntary process for Texas law enforcement agencies to prove their compliance with 170 Texas "best practices." These best practices were developed by law enforcement professionals for efficient and effective delivery of service, reduction of risk, and protection of individual rights. Unlike a national accreditation program, such as the Commission on Accreditation for Law Enforcement Agencies (CALEA), the TBP program is designed specifically for Texas law enforcement agencies.

TBP's basic philosophy is to make its requirements achievable, to assist agencies in compliance, and to provide usable resources to interested agencies. The program itself involves four basic stages:

- an internal review and development of policies and procedures,
- an independent review to prove compliance with best practices,
- an onsite review by independent assessors, and
- a committee review to award recognition.

More than 100 agencies have been recognized by TBP, and it is considered the new gold standard for Texas law enforcement.

Do we qualify?

Before we could pursue recognition, we first had to ask, are we a law enforcement agency? Well, yes, of course we are: Our office's Investigative Division is comprised of 52 TCOLE (Texas Commission on Law Enforcement)-licensed, sworn personnel. But are we "law enforcement" enough to qualify for the recognition? It took some reflection to answer that question.

There are 170 best practice standards in 12 critical areas of law enforcement that need to be met. Those areas are:

- use of force,
- emergency vehicle operations and pursuits,
- search and seizure, and arrest, care, custody, and restraint of prisoners,
- domestic violence and employee domestic misconduct,

- off-duty conduct,
- selection and hiring,
- sexual harassment,
- complaint and internal affairs management,
- narcotics,
- SWAT and high-risk warrant service,
- dealing with the mentally ill and developmentally disabled, and
- property and evidence.

After a thorough review of what we do as investigators, we believed we could qualify for recognition even though there were a few significant areas which would not apply. We do not perform patrol functions, maintain a jail, nor operate a communications center. One of the great things about the TBP program is that it focuses on a more holistic approach in most areas. In other words, it demands that an agency have a policy on certain issues but does not dictate exactly what that policy says. The fact that we use the Tarrant County Sheriff's Department as our communication center and the county jail as "our jail" allowed us to meet most of the standards related to those areas—for example, that we have access to a 24-hour communications center and the use of two-way radios. We also ultimately made sure our policies reflected that.

After working through our concerns and developing a better understanding of the TBP process, we decided to pursue recognition and felt confident we could achieve it.

Another area which initially caused some internal concern was property and evidence. Our office has a Digital Forensics and Technical Services Unit that receives computers, cell phones, storage drives, and other forms of digital media for examination from local law enforcement agencies. We do not have a property room or technician to receive and release these items, but we have a secure temporary storage room. We return items to the submitting agency as soon as the forensic examinations are complete and try to keep items no longer than absolutely necessary. Again, TBP's flexibility allowed us to meet the standards related to a property room by having specific written protocols on controlling personnel access to it, documenting the release and disposal of items, and completing inventory audits and inspections.

After working through our concerns and developing a better understanding of the TBP process, we decided to pursue recognition and felt confident we could achieve it.

The process

A key component and first step to obtaining recognition is to do a critical self-evaluation of your agency. While our standard operating procedures (SOPs) did meet some of the best practice standards, they were woefully insufficient even though we had updated them in 2017. We knew that a complete rewrite of every policy was necessary, along with the creation of quite a few new ones. It wasn't so much that we were doing things wrong, it was simply that we could do things better. The TBP program provided a sample manual which we used as a template to create our own new policies.

And so began the discussions, debates, arguments, drafts, and rewrites. While this process was tedious at times, it was also a little cathartic. We reviewed everything we do, how we do it, who does it, and why we do it that way. The simple answer of "because we have always done it this way" was no longer sufficient. Every policy and procedure had to be justified. Duties were clarified and processes streamlined. Going through this critical self-evaluation truly made us a better and more effective agency. Slowly the policies came together, and our simple 54-page Standard Operating Procedures blossomed into a 221-page Policy and Procedures Manual with 39 policies in the TBP's 12 critical areas. While we thought we had the bulk of the work completed, we really were still at the beginning.

It was extremely important to CDA Wilson that the entire Investigative Division supported the new policies. First and foremost, you must have enthusiastic support from investigative supervisors and command staff because there is no way to get a seasoned investigator to believe in something the leadership does not believe in. But our command staff and supervisors knew we needed to make these changes and were onboard from the beginning.

To get 100-percent buy-in from our line investigators, we developed a two-prong approach. The first prong was training. We made sure investigators understood the recognition process and why we were pursuing it. A few investigators viewed the new policies solely as a tool of discipline, just more ways to write someone up for a violation. However, most viewed them as a guide that provided the rules to the game so that they could succeed and perform their duties at a high level. Our old SOPs were vague in many areas, which led to inconsistent application depending on which supervisor an investigator reached out

to. For example, there was not a lot of guidance in our existing use of force and deadly force policy; it was only eight lines long. Our parking policy was longer! We had no policies on active shooter response or investigator-involved shootings. How could we expect investigators to perform as expected when we did not provide them the expectations? Clear, thoughtful, well-written policies benefit everyone by preventing arbitrary decisions and holding each investigator to the same standards.

For the second prong, we established a policy review committee. The committee was voluntary, and more than a quarter of our investigators participated. One of the great benefits of working at a district attorney's office is the wealth of knowledge and experience our investigators have. Our average number of years of law enforcement experience is 27, and we did not want to waste it. The committee met multiple times over a few weeks to review each policy. The meetings were streamed live via Zoom so all investigators could listen and send comments to the group. This process was extremely successful as it identified some policies that contradicted others, work areas that were not covered at all, and issues that were of particular concern to the investigators. These meetings also allowed supervisors to explain the reasoning behind certain policies, giving line investigators a bigger picture of the process. Many times investigators on the committee worked through a policy issue on their own with little input from a supervisor. After completion of the review and rewrites, the policies were issued to the entire investigative division.

With the policies in place, we needed to show TBP that we were following them. This is done by providing "proofs." A proof is a way to verify we did what we said we were going to do or, more simply, that we followed our policy as written. It could be as simple as a training roster for a required course, a photograph documenting an item's location, or the written policy itself. Many of our proofs were forms. We created more than 30 new forms to assist us in recording activities. It may sound excessive, but it was necessary. We discovered we were not doing an effective job at documenting equipment use and disposal because we did not have a system in place to do it. This deficit repeated itself again and again, where we were not doing something because we did not have a formal way to do it. New forms and their related procedures solved these issues. Our new protocols also included audits and reviews of the documented information, which now provide valuable information for management decisions.

Additional training

One major focus area for best practices is training. The TBP program ensures that an agency is providing appropriate and required training in critical areas. A particular area we found we were lacking was training for new hires. We hire veteran peace officers, most of whom are starting a second career, having already retired from another agency, so the prevailing thought for many years was that there was no need to train newly hired investigators. Our critical self-evaluation revealed we were doing our new hires a disservice by not having a well-developed protocol to onboard them. There is a mindset change that needs to take place when a police detective becomes a DA or CA investigator. For example, most detectives are used to complete control over their cases, which is simply not the norm at a prosecutor's office. We operate in teams, and one prosecutor has ultimate control of the case. Except for a few specialized units, we do not work to build a case—we work to improve an existing one, with the goal of increasing the chance of a successful prosecution. Additionally, trial knowledge for most new hires is limited to the few times they were called to testify in court. We needed to draw back the curtain early to allow new hires a behind-the-scenes look at what a prosecutor's office does and why we do it. We implemented a core training program to formalize our onboarding and provided a method to ensure we were creating a solid, common foundation for our new investigators.

We also expanded our list of required trainings for each two-year TCOLE training cycle. We added defensive tactics, self-aid and buddy aid, and bloodborne pathogen training to ensure the safety of our investigators. Courses on implicit bias, de-escalation, crisis intervention, and mental health were included to ensure we are effectively serving our communities.

A particular area we found we were lacking was training for new hires. We hire veteran peace officers, most of whom are starting a second career, having already retired from another agency, so the prevailing thought for many years was that there was no need to train newly hired investigators. Our critical self-evaluation revealed we were doing our new hires a disservice by not having a well-developed protocol to onboard them.

The best thing we did was involve our investigators early. We never hid the ball but instead kept them informed on progress along the way. We used their time, talents, and experience to craft workable policies while simultaneously addressing their questions and concerns.

Our on-site assessment

With everything finally in place, our on-site assessment from authorities at TBP was set for the first week of December 2021. We were proud of the work we had done and felt confident we would pass. A normal assessment takes two days and typically involves policy review, employee interviews, a ride-along with a patrol officer, and tours of the jail, communications center, and property room. Our assessment was completed in just one day, with the exit interview the following morning. It was definitely not what we expected. We thought it would be more interactive, with the assessors questioning our chiefs. That never happened.

Instead, the assessors simply asked for a space to work and wanted contact only with our program manager. They asked to see our secure personnel and TCOLE file room, our temporary storage room, and the sheriff's communications center. The two assessors spoke to a total of nine people. Overall, 69 on-site standards were reviewed, and we needed to make modifications to only 13 of them. Most of the modifications were resolved by adding a sentence or two to a policy to meet the standard. One involved simply adding "in writing" to a policy about notifying a supervisor. We ended up with 28 non-applicable standards, the majority of which involved the jail operations.

We were a little tense heading into our exit interview with the assessors. Because we had little contact with them the previous day, we were not exactly sure where we stood and what their recommendation to the TBP Review Committee would be. Our fears were relieved fairly quickly as they praised the work we had done. They too admitted they were not sure what they were walking into, as we were the first prosecutor's office to seek the recognition. Overall, though, both assessors were impressed with our agency and would provide a positive report to the review committee. And then we waited.

The next two weeks were particularly long. The assessors had to generate a verification report to be sent to the review committee, who would then vote on awarding the recognition. We did not know who was on the committee or how they felt about our application. Would they view us as "law enforcement" enough? Did they want to limit the recognition to traditional agencies? Those questions lurked in our minds for 14 days until the email came: *We were recognized!*

We were elated to achieve this milestone, but our excitement was tempered somewhat by the realization of the work that lies ahead. The TBP Recognition is awarded for four years. We will have to submit annual reports and will be required to prove our compliance with the standards in that fourth year to keep the recognition.

The road was long. It took us almost two and a half years to reach our goal. We changed chiefs and assistant chiefs during this process and endured the chaos of COVID. Through it all we kept moving forward. Sometimes the progress was reduced to a crawl and at others it felt like a sprint, but we are exceedingly proud of our agency and the investigators we work with each day.

Our investigators now have a playbook to follow. They understand what is expected of them and what they can expect from their leadership. We have specific policies on performance appraisals, internal investigations, employee discipline, investigator appeals, and grievances that we did not have before. Policies not only provide a system of discipline but also hold our supervisors accountable to ensure fair and equitable treatment of the investigators they lead.

We no longer operate on the assumption that everyone knows what to do because they are experienced peace officers. This process forced us to not only look at what we do but also how we want to do it. New policies were created covering investigator duties, basic investigations, constitutional safeguards, search and arrest warrants, and warrantless searches and arrests. These new policies clearly define what our role is and how we do business. They keep all of us on the same page.

The takeaways

What did we learn that we can pass on to anyone else who might like to pursue recognition? First, make sure the team you assemble to work on developing new policies actually knows what investigators do. The majority of our initial team were familiar with the TBP process and had a wealth of law enforcement experience, but they were not knowledgeable of our particular office and the day-to-day work of a DA or CA investigator. This

led to lengthy and occasionally heated discussions about practical procedures, which prolonged the actual development of policy. Insider knowledge is crucial.

Secondly, stay small. When we initially started, we just kind of got going without having a clear path and set goals. The task seemed overwhelming at times because we worked on too many of the policies at once. Give yourself time to focus on each policy. Our shotgun method required us to constantly revisit policies we thought were complete. It is amazing how many times we discovered a policy did not address an issue we thought it did or said something we thought it didn't.

Lastly and maybe most importantly, include the office's line investigators. The best thing we did was involve our investigators early. We never hid the ball but instead kept them informed on progress along the way. We used their time, talents, and experience to craft workable policies while simultaneously addressing their questions and concerns. It has to be a team effort to succeed.

For those agencies who may think they are too small to seek recognition, just remember that size does not matter! Any agency, whether it has two investigators or 82, can achieve the award. That's the beauty of the program: It caters to your specific agency and the way you do business. Take a minute to read the list of recognized agencies on the Texas Chiefs of Police Association's website (www.texaspolicechiefs.org/getting-started-with-recognition) and you will see a very diverse group with departments of all sizes serving both urban and rural communities. All agencies can benefit from recognition because it demonstrates to your community that you are committed to serving them to the best of your ability.

In the end, was it worth it? Absolutely. The process was necessary and long overdue. We felt good going into the assessment because regardless of whether we received the recognition, we had laid the foundation for our investigators and agency to excel. CDA Wilson is not seeking reelection, and her term ends this year. We hope whoever becomes our new criminal district attorney will respect the work that we have done, understand the effort it took to achieve, and ensure our office's Investigative Division remains a Texas Police Chiefs Association Foundation Recognized Law Enforcement Agency. ❇

Professional Criminal Investigator (PCI) certificate recipients

Four Professional Criminal Investigator certificates were awarded at February's Investigator Conference. Recipients included John Brumme (pictured above on the right), Paul Lowrey, Baldemar Quintanilla, and Thomas Lee Tyler (pictured above on the left). Congratulations to all of these winners!

Leeway on the time requirement in continuous abuse cases

The Texas Legislature created the offense of Continuous Sexual Abuse of a Child[1] to encompass the realities of child sexual abuse and protect vulnerable children in Texas.

By Randle Smolarz
Assistant Criminal District Attorney in Bowie County

Although the legislature intended the statute to be flexible, its most inflexible aspect is the time element, which requires "during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims."

The recent opinion from the Court of Criminal Appeals in *Witcher v. State*[2] tests the limits of the statute's time requirement. In *Witcher*, the victim stated that the last sexual abuse occurred on July 28, 2018. Then she testified that the sexual abuse began "when [her brother] went to jail." Her sister later testified that their brother went to jail on June 10, 2018, "give or take."

To corroborate the date of the brother's incarceration, the State asked a sheriff's investigator about the dates in the indictment, and he "testified that the period of time alleged in the indictment was June 10, 2018, through July 28, 2018, and that he had confirmed that the brother was incarcerated 'around that time.'" The victim was 11 years old at trial, and the evidence showed she had mental impairment. She testified consistently with the same language as at pre-trial meetings, and our strategy was to combine the victim's ambiguous testimony with officers' testimony about the dates; however, the evidence just did not come out as strong at trial. Even so, the State believed the testimony was sufficient to meet the time requirement or put on additional information about the day the brother went to jail.

The jury found the defendant guilty of continuous sexual abuse of a child. On direct appeal,[3] the court of appeals reversed, stating that the evidence was insufficient to show the start date of the abuse and the jury could only have speculated as to this date.

In a 5–4 decision, the Court of Criminal Appeals disagreed, reversed the intermediate court, and remanded. First, the CCA stated that a jury could find that "the day the victim's brother went to jail," approximately June 10, was sufficient to determine a start date of the abuse.

Second, the relevant time period was 30 days: Did the continuous sexual abuse take place over 30 or more days as required by the statute? There are 46 days between June 10 (when the brother went to jail) and July 28 (when the child said the last abuse occurred); subtract 30 from 46, and we're left with 16 days of leeway. The Court held that the terms "around" and "give or take" do not mean more than 16 days, which would account for one-third or more of the relevant time period. "Consequently, the jury could have rationally inferred, without resorting to speculation, that the abuse began on June 26 or earlier,"[4] putting it within the 30-days-or-more requirement.

In dissent, Judge Keel (joined by three other judges) pointed out that the phrases "at some point," "around," "about," "maybe," "as close as possible," or "give or take" amounted to equivocations. She cited *Hooper v. State*,[5] the seminal

case for speculation versus inference. "An inference is a conclusion reached by considering other facts and deducing a logical consequence from them," while "speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented."[6] Similarly to the court of appeals' conclusion, Judge Keel concluded, "Given these equivocations, the jury had to guess about the meaning of the testimony, which means they had to speculate, and speculation will not support a finding beyond a reasonable doubt."[7]

Takeaways and best practices

The "one third" mention in the CCA's opinion suggests if the time period had been tighter than 16 days, the terms the victim used would have been considered speculation and not inference. Here, the CCA made a point to address each phrase describing the start date and hold that these words essentially (in this case) could not reasonably mean 16 days or more.

Even though the CCA allowed the inexact dates in this case, a much safer approach in future cases is to shore up the time period of the abuse with exact dates, especially if acts of sexual abuse occurred in a window tighter than 60 days. This is harder when a victim is younger—which, paradoxically, the Legislature attempted to account for when passing the Continuous Sexual Abuse of a Child statute. With younger children who do not know or use exact dates, the burden to provide contextual and descriptive events tied to real events becomes necessary to eliminate any ambiguity. A child victim equivocating on the stand is always a possibility—or, as here, the victim may have other issues that do not allow her to provide all the details.

Second, asking the lead investigator to confirm every element of the indictment may add a layer of corroboration that can save a case and support any sufficiency issue. After the *Witcher* case was submitted for PDR, I argued with our first assistant (who tried the case) that the officer's testimony should not have any weight in this circumstance because the officer did not provide direct evidence about when the brother went to jail. I was apparently wrong. But on these tight-window cases, prosecutors should use all they can get.

Finally, from the perspective of a general statutory interpretation, the Court of Criminal Appeals basically stated that when a word (i.e., "when") is used by a witness, it goes to the weight of the evidence and is purely a fact issue. Even with an ambiguity, the jury is free to believe whatever it deems credible. ❇

Endnotes

[1] Tex. Penal Code §21.02.

[2] *Witcher v. State*, No. PD-0034-21 (Tex. Crim. App. Jan. 26, 2022).

[3] *Witcher v. State*, No. 06-20-00040-CR, 2020 WL 7483953, *4 (Tex. App.–Texarkana December 21, 2020) (not designated for publication).

[4] *Witcher*, No. PD-0034-21 at 5.

[5] *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

[6] *Hooper* at 16.

[7] *Witcher*, No. PD-0034-21 (Keel, J., dissenting) at 2.

Even though the CCA allowed the inexact dates in this case, a much safer approach in future cases is to shore up the time period of the abuse with exact dates, especially if acts of sexual abuse occurred in a window tighter than 60 days.

‘Someone needs to shut that place down!’

A while ago, our elected County Attorney, Jo Anne Bernal, received a complaint about several bars that were operating as strip clubs without the required Sexually Oriented Business city permits.

By Amy Monsivais
Assistant County Attorney in El Paso County

There were also allegations of narcotics sales and use, money laundering by a street gang with links to a cartel, and prostitution, and there had been many calls to law enforcement, causing a drain on resources. Neighbors who lived near the bars were concerned and did not feel safe.

In addition to bars like this, there may be a local hotel where law enforcement responds to drug-overdosed people in the parking lot, aggravated assaults, shootings, prostitution, human trafficking, and the like. Maybe your county has a venue for “raves” with underage drinking and fights from Thursday to Sunday, or “after hours” clubs that are open after 2 a.m. and operate as a “BYOB” business. Perhaps you are aware of a massage parlor in a strip mall, where all of the windows are covered so no one can see inside, and the women who work there don’t ever appear to leave and speak little or no English. It seems like the only customers are men, and the business is always open.

Any of this sound familiar? These businesses are often a blight, and although there may be all sorts of problems coming out of these places and many offenders are arrested, these businesses remain open for more criminal conduct. Some are criminal enterprises that should be shut down. Others can be salvaged and can even become partners with law enforcement with a little work and willingness—and the power of civil enforcement. If you have had the chance to read past articles published in this journal about the wonders of Chapter 125 of the Civil Practice and Remedies Code (CPRC) or you’ve filed such a case yourself, then you know civil enforcement is a powerful tool.

Most prosecutors want to hold the “bad guy” responsible for his offenses, and that is not a bad perspective when prosecuting criminal cases, but using civil tools to fight crime may require a shift in perspective. Using civil tools, the goal is not always to go after a single person because the result can be more global, making a direct impact on the community. Determining the best way that criminal activity can be stopped at a property is not a punishment-driven analysis. Even when lawsuits are filed against a business owner or property, the goal focuses on the outcome, not the amount collected in fines.

Overview of CPRC Chapter 125

The CPRC allows prosecutors from the Attorney General’s Office; a city, county, or district attorney’s office; and individuals,[1] to file for injunctive relief on businesses with habitual criminal activity. Not just any activity works for this petition. The 28 relevant criminal acts are listed in §125.0015, and they basically cover crimes related to vices (drugs, gambling, and strip clubs), gangs (engaging in organized criminal activity, graffiti, etc.) and violence (murder, aggravated assault, trafficking, etc.).

One of the great things about the CPRC is that it can be used against the business owners and managers, property owner, business *in rem*, and property *in rem*. The beauty of suing a property or business *in rem* is that court orders apply to the physical property or business; a judgment may order the *place* where the nuisance exists shut down for one year.[2] This civil process is generally used to get a temporary injunction (TI), with a hearing set in 14 days. If the State shows

that prosecutors are likely to succeed on the merits of the case at a permanent injunction (to be set within 90 days of the temporary injunction hearing), the judge will grant the TI.

Once the TI is granted, the court may allow the business to re-open under conditions of a bond (in the amount of $5,000–$10,000). The conditions, known as "reasonable restrictions," are business- or property-specific and are meant to stop or reduce criminal activity at a place. If the business is an illicit operation, it is not likely to survive the conditions of the bond.[3] If the conditions are violated, a suit on bond or civil contempt can be pursued, and if the State shows a violation of those conditions, the judge can shut down the business for a year (the maximum time period allowed by law).[4]

This is how to abate a "common nuisance" as described by the CPRC. Actions can also be taken against properties that are a "public nuisance," which involve gang-related criminal activity.[5] The list of criminal activity for a common and public nuisance overlaps, so prosecutors have options when deciding how to apply the code.[6]

A lawsuit may not be necessary

If the property appears to be a legitimate business, the best practice may be to meet with owners and discuss what remedies may stop the activity. Motels and hotels fall into this category more often than not, partly because the remedy can be tricky. Some motels serve as a residence for people with low or fixed incomes or who suffer from mental illness, and closing down such a motel could make these residents homeless. The code allows for a receivership, and if that option is available in your situation, a receivership is one course of action.[7] A receiver is a person or entity that the court may appoint for up to one year that manages a business as necessary to abate the nuisance. It may collect rent, make repairs, purchase materials, renew contracts, and exercise all authority an owner of the property would have, except for selling the property. However, a receiver may prove difficult to find.

Instead, we have had success meeting with motel owners and asking that they apply the following suggestions:

- require valid picture ID to register and retain a photocopy
- do not rent rooms at hourly or very low rates
- make it clear that only registered guests are allowed in the motel or hotel rooms
- anyone visiting a registered guest must check in with the front desk and provide a valid ID that is photocopied and retained
- warn that unregistered persons are considered trespassers, and call the police to enforce trespassing
- issue parking passes to registered guests, and tow any cars parked in the lot without the pass
- evict occupants who are engaging in criminal activity
- install security cameras and allow law enforcement to view recordings upon request
- install LED lights for common areas

The feedback from law enforcement and owners after implementing these suggestions has been positive, and, so far, hotels have abated criminal activity without a lawsuit.

Other actions

The drawback of the TI is that the business may still be open and operate for at least 14 days pending the TI hearing. But there is another powerful option: the temporary restraining order (TRO). Like a TI, a TRO allows for a hearing ex parte (but check your local rules).[8] Procedurally, after the ex parte hearing, when citations issue and are served, the business is shut down immediately until the TI hearing. In practice, at least in El Paso, soon after the petitions are served, we get phone calls from defendants or attorneys wanting to know what they can do to re-open and/or avoid litigation. We use TROs against bars under the authority of Chapter 101 of the Alcoholic Beverages Code (TABC) and against illicit spas under Chapter 455 of the Occupations Code (OCC).[9] Doing so moves things along quite nicely.

Just like a TI, should the business want to re-open after a TRO, we have lists of reasonable restrictions that must be met before it can, and the business must post a bond whose amount can be negotiated. We are sure to tell defense attorneys that these are the same conditions we would ask the court to impose should we go to a TI hearing. Reasonable restrictions we've negotiated after obtaining a TRO in the past against a bar include:

- requiring all staff to complete and pass the TABC seller and server certification class, and producing the certificate upon law enforcement's request

In practice, at least in El Paso, soon after the petitions are served, we get phone calls from defendants or attorneys wanting to know what they can do to re-open and/or avoid litigation.

- hiring security guards or a security company licensed and bonded under Chapter 1702 of the Texas Occupations Code for peak hours or days
- installing and identifying the location of security cameras, preserving recordings for at least 30 days, and allowing law enforcement access to view them
- having a door counter and not exceeding the room's occupancy limit
- notifying customers engaged in assault that they are considered trespassers on the property and are not allowed back again
- purchasing a decibel reader and placing it at the nearest public entrance for employees and law enforcement to monitor, and agreeing to maintain inside noise levels that comply with the city's noise ordinance
- not allowing patrons to wear known gang or 1% insignia (usually worn as a diamond patch by members of outlaw motorcycle gangs and referencing outlaw status) inside the bar

When faced with a TRO, bars have agreed to reasonable restrictions, or in the alternative, to totally shut down. For example, a licensed bar in downtown El Paso had 450-plus calls for law enforcement service in less than three years. Forty-four of the calls involved minors, and emergency services were called out at least six times. These cases showed a pattern of serving alcohol to minors (promotions on social media for 18-and-over "college night" provided helpful evidence as such) and over-serving (proof of other promotions for $2 and $3 shots were also helpful). After the bar was shut down with a TRO, the owners wanted to meet and discuss what they could do to re-open. The above list of reasonable restrictions was discussed, along with allowing only patrons 21 and over inside the bar. This did not fit with their business model, so they decided to close instead and agreed to do so without a hearing.

Similar results have been achieved through agreed judgments or default judgments without a contested hearing. The examples above reflect restrictions for businesses where we obtained a TRO first. The threshold of these lawsuits is reactive rather than proactive, so a place where there is obvious habitual criminal activity and lots of arrests and convictions make it easier to prove up the elements for injunctive action.

The crimes happening in IMBs are not usually reported to law enforcement; there is not gang violence or shots fired at these businesses. Instead, there are sexual assaults and commercial sex acts from which others profit.

Illicit massage businesses

But what about the places where crimes committed on their premises do not generate numerous calls for service, as they do in a bad bar? I am talking about illicit spas, where a vulnerable population is exploited. An illicit massage business (IMB), like the one described at the beginning of this article, is often populated with women from small rural towns in China and Korea. The women in IMBs are victims of labor trafficking (at the least), often working off huge debts for long hours and living at the business like indentured servants. The women can make more money if they sell their bodies (or they are forced to), so IMBs are really storefront brothels where the workers are bought for sex.[10]

The crimes happening in IMBs are not usually reported to law enforcement; there is not gang violence or shots fired at these businesses. Instead, there are sexual assaults and commercial sex acts from which others profit. If prosecutors are lucky, local law enforcement can make cases for prostitution; let's also hope cases from IMBs are not limited to arresting the women for prostitution, but also includes looking farther up the chain for a promotion of prostitution charge.[11] Even if you have ample law enforcement to investigate criminal charges, to make an impact, the business must go. For an injunctive action, the law requires *habitual* violations[12]—does that mean prosecutors need three undercover cases for prostitution? Four?

Luckily, the CPRC gives prosecutors other options when it comes to IMBs. Section 125.0015 (18) lists "massage therapy or other massage services in violation of Chapter 455" of the Occupations Code (OCC) as a nuisance crime. There are all sorts of requirements in the Occupations Code that message therapists and establishments must follow, and the OCC has its own injunctive relief.[13] These mundane requirements are pretty easy to check, such as:

- the business's license and licenses of all therapists with photographs attached must be displayed,
- the human trafficking poster from the Texas Department of Licensing and Regulation (TDLR) must be posted,

- client initial consultation documents must be kept, and
- therapists cannot wear clothes designed to arouse or gratify the sexual desire of an individual, to name a few.[14]

The OCC says any licensed peace officer can conduct an inspection of a business holding itself out as a massage establishment. Massage businesses expect these inspections, and such inspections are a great tool to gather evidence and identify the women in an IMB.

A typical investigation

In El Paso, we first identify an IMB, often by indicators such as totally blocked windows, stock posters with photos of a rolled-up white towel next to a candle or stones on a woman's back, and a neon "open" sign. Once we find a suspected place, we check sites that advertise IMBs, such as RubMaps or Craigslist, to see if the business provides sexual services. Next, our investigator surveils the place, watching lights turning on and doors opening without anyone going in, which is evidence of people living there, and seeing only men go inside for 30 to 45 minutes at a time. We research licensing information from the TDLR website to see if the business is licensed as a massage parlor. Soon after, our investigator and a TDLR inspector will conduct a routine inspection, keeping an eye out for administrative violations and evidence of trafficking. They take pictures of any violations and of the women inside. There may be one person with a license who will explain that the other women at the spa are just "cleaning" or "visiting." Of course, from our previous surveillance and research, we know the women work there and do not leave, but they lie about it because they are unlicensed and know they cannot admit to working. Finally, once the women are identified and we verify they do not have licenses, we enlist local law enforcement to make an undercover purchase of—a massage!

If the goal is to make criminal cases (for labor trafficking, money laundering, promotion of prostitution, etc.), then of course prosecutors need something other than a deal for a massage with an unlicensed therapist, but for civil enforcement, this is enough. Habitual administrative OCC violations get prosecutors to a lawsuit. Advertisements from Craigslist or websites known to offer "erotic" services (often with pictures of a young Asian woman in a bikini) are suspicious for a legitimate massage establishment, right? Does a legitimate therapist need to be "beautiful and sweet?" These ads, combined with evidence noted above (all male customers, the women do not leave, etc.), paint a clear picture of what occurs in that IMB.

After at least three "deals" for a massage from an unlicensed therapist, we initiate an application for a TRO, TI, and permanent injunction pursuant to both the CPRC and the OCC. So far, once we've initiated a lawsuit, the IMBs agree to not operate, associate, advertise, promote, own, or have a financial or managerial interest in a massage establishment for one year (the statutory limit) from the date of the order, or open or work in another establishment with the same business name or any variation of that name.

Let's not forget landlords who turn a blind eye to such illicit businesses while also reaching out their hands to accept rent. Jurisdictions have different ways of dealing with landlords, from suing them right off the bat to ignoring them. We recently won a default judgment against an out-of-town landlord who allowed a second IMB to open after one was already shut down via lawsuit and who failed to respond to our office once it was brought to his attention (again). He ignored the lawsuit, and the court awarded a default judgment of $10,000 and a one-year closure of the space.

Conclusion

Texas has all sorts of codes and resources on the books that regulate businesses and how they should operate in our communities. Many civil codes have both injunctive and criminal remedies included. For example, the OCC's regulations on the many professions it regulates often include injunctive relief in addition to outlining criminal conduct that can be filed by most prosecutors. Avail yourself of the sources of jurisdiction and creative avenues, like those mentioned here, in your fight against nuisance properties and blight in your neighborhoods. I'm sure there are prosecutors reading this now who have used Texas law in a clever way to meet the need of their communities. When an officer or someone from the community says, "Someone needs to shut that place down!" you may be just the person to do it. ❇

Continued on the back cover

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Endnotes

[1] Tex. Civ. Prac. and Rem. Code §125.002(b) allows a suit to be brought in the name of an individual if that individual is a private citizen.

[2] See Tex. Civ. Prac. and Rem. Code §§125.002(b) and (e).

[3] Of course, this overview only scratches the surface of Tex. Civ. Prac. and Rem. Code Chapter 125, as there are elements that must be proved, procedures to follow, and more.

[4] Tex. Civ. Prac. and Rem. Code §§125.002(e), and 125.003(a).

[5] See Tex. Civ. Prac. and Rem. Code, Chapter 125, Subchapter D.

[6] This article focuses on applying the common nuisance statute.

[7] Tex. Civ. Prac. and Rem. Code §125.046.

[8] For instance, the El Paso Council of Judges requires applicants for TROs to state in the petition if the opposing party is represented by counsel (if known), and if so, the name of counsel and whether counsel was apprised of the application for ex parte relief.

[9] Jurisdiction under TABC does not include city or municipal attorneys.

[10] There is much more to unpack when it comes to issues at an illicit spa–there are week-long trainings on this subject. Think about how many massage parlors and nail salons are in your town and the people who work there. Do you see them out in the community? If you do not, where are they, do you think?

[11] Even so, consider whether it is right to arrest a manager. Often the managers of IMBs are women who started as victims and were "promoted" to the front. If you were paying off debts with sex, would you take the opportunity to work at the front instead? Again–there are entire workshops that exist on this issue.

[12] Tex. Civ. Prac. and Rem. Code §125.0015 (a).

[13] Tex. Occ. Code §455.351.

[14] Tex. Occ. Code §§455.204(a), (b) and (b-1), 455.207(a), 455.202(c)(1) and (b)(5).