The Texas Prosecutor

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

Changes to the attorney grievance process

Even if you've never had a grievance filed against you, you probably know someone who has or who one day will have.

By Emily Johnson-Liu
Assistant State Prosecuting Attorney in Austin

There are a few recent changes to the process to be aware of. As part of the sunset legislation that continued the State Bar for another 12 years, the legislature mandated changes to the Texas Rules of Disciplinary Procedure.[1] The Texas Supreme Court has now published the new rules, filling in the specifics.[2]

There are three principle changes. First, the State Bar's administrator of the grievance system—the office of the Chief Disciplinary Counsel (CDC)—is now authorized to set cases for a hearing and subpoena records at the investigation stage.[3] Second, the rules formally recognize a pretrial diversion program (Grievance Referral Program) and set criteria for eligibility.[4] Third, the rules establish sanction guidelines (not unlike the federal sentencing guidelines) correlating appropriate sanctions to specific rule violations and providing aggravating and mitigating factors.[5]

Some background

To put these changes in context, a quick overview of the process and history is helpful. (The flowchart on page 18 provides an at-a-glance view of it.) Grievances are first screened to see if they allege a violation of the Rules of Professional Conduct. If not, the grievance is called an "inquiry" and is dismissed. But if it does allege a violation, a grievance is classified as a "complaint" and the accused attorney is notified and asked to respond. An investigation ensues to determine if there is "just cause" to believe misconduct occurred. "Just cause" is cause that would "induce a reasonably intelligent and prudent person to believe" professional misconduct requiring sanction occurred.[6] If there is no "just cause," the complaint is set for a quicker (sometimes telephone) resolution by a local grievance committee (a process now called "summary disposition"). If just cause exists, there are two ways to proceed:

1) an evidentiary hearing is set before a local grievance committee to adjudicate whether misconduct occurred and impose a sanction, or
2) the attorney can opt for a trial in district court.

Originally, the grievance committees performed all these tasks—screening, investigating, determining just cause, and adjudication.[7] It was a decentralized system—but it was also inconsistent. A committee in one part of the state might dismiss a case early in the process while another might have someone with specialized knowledge investigate it. With each sunset review, however, the process has become more centralized and standardized, often with the CDC carrying out more duties.

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About *The Texas Prosecutor*

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Prosecutor Management Institute gets additional staffing

The Prosecutor Management Institute (PMI) has been receiving rave reviews from those who have attended.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

(You can read one such review from Midland County District Attorney Laura Nodolf on page 35.) We now have that good problem of keeping up with demand. The Management Institute has been supported in large part by the Foundation and TDCAA staff, led by our Training Director **Brian Klas**. We have enthusiastically worked to polish our existing course, Fundamentals of Management, and we continue to develop new modules. But we need help!

I am proud to announce that we now have that help. **Kathy Braddock**, a former Harris County Assistant District Attorney and former Chief of Staff at that office, has agreed to join the PMI team and lead the work in getting the courses to you. Kathy is already a PMI trainer and staffs the Border Prosecution Unit, so she will hit the ground running. Thanks to the Foundation Board for making this happen, and thanks, Kathy, for joining the team. ❇

Recent gifts to the Foundation*

Isidro Alaniz
Richard Alpert
Gordon Armstrong
Dustin Boyd
David Finney
Paul Johnson *In Memory of Brent Robbins*
Robert Kepple *In Honor Of Ted Poe*
Robert Kepple *In Memory of Brent Robbins*
Robert Kepple *In Memory of Jack Ogg*
Crawford Long *In Memory of Tom Moore*
Doug Lowe
Lyn McClellan *In Honor Of Leslie Brock Yates*
Lyn McClellan *In Honor of Joe Bailey*
Lyn McClellan *In Honor of Jerry Guerinot*
Richard Miller
Edward Porter
Steven Reis
A. Ross Rommel

* gifts received between February 3 and April 6, 2018

SBOT Committee on Disciplinary Rules

As part of the Sunset review and re-authorization of the State Bar of Texas, the legislature created a new Committee on Disciplinary Rules and Referenda.

By Rob Kepple
TDCAA Executive Director in Austin

The committee's job is to consider and propose new disciplinary rules and amendments to existing rules. Read the entire statute at Tex. Gov't Code Chapter 81, Subchapter E-1.

The State Bar and the Chief Justice of the Supreme Court were responsible for picking the members of this new committee. They made their picks—and there are no prosecutors on it. In my view that is a major problem: A proposed new rule impacting the duties of prosecutors could be unveiled way too late in the process for our profession to have meaningful input on the proposal. We have asked that a prosecutor be allowed in the room and be available as a resource to the committee during the process.

As this edition of *The Texas Prosecutor* goes to press, we are waiting for clarification of the role prosecutor(s) can play here. We will do our best to keep you informed, but for the time being we encourage you to keep an eye on the work of this committee. It could impact your bar card.

Investigator Section by-law revision

As a member of a prosecutor office in Texas, you are well-represented by your leaders. They are constantly looking at improving how your association serves you and leading the profession to excellence.

I am proud to let you know that the Investigator Board is moving to amend its by-laws to better represent investigators around the state. First, it will expand the board terms from two to three years. It turns out that two years simply isn't enough time or enough meetings to have an impact. Second, the current board will consider combining some regions with modest numbers of investigators while preserving the size of the board with at-large positions. That way, the board can stay a truly representative force for the section.

The board intends to iron out a plan this year for consideration at next year's Investigator School. If you have any questions or input, feel free to email me at Robert.Kepple@tdcaa.com, or call me at 512/474-2436. I'd be happy to talk with you about it!

Thanks to David Simon

Speaking of TDCAA investigators, I want to give a shout-out to **David Simon**, an investigator with the Galveston County CDA's office. While we were at the Investigator School in Galveston this February, one of our attendees got sick and had to be taken to the hospital. By the time I got to the ER, David was already there, communicating with the sick person's office (on the other side of the state) and with his family and friends. It was impressive to see someone take charge to be sure one of our own was safe and sound.

But as I well know, that is so typical of a TDCAA investigator. You all are the most reliable people I have ever met. When there is a job to do, investigators get it done. Thanks, David, and thanks to you all.

The Lord's Work

I had the good fortune to prosecute at the Harris County DA's Office in the 1980s. The plum assignment for anyone wanting to try cases was the 228th District Court with Presiding Judge **Ted Poe**. Judge Poe was known as a great prosecutor in his own right, and you knew you were in for a ride if you were assigned as the No. 2 in that court—which I was for a year. I was not a natural at trial, but after trying three aggravated robbery trials in one week (which I think the judge liked to do just to see if you could handle it), I hit my stride and never looked back. And as demanding as the judge (as a former prosecutor) could be on prosecutors, we never took it personally when he grinned and suppressed all of our evidence.

That's because if you were a prosecutor back then you undoubtedly went to TDCAA's Prosecu-

tor Trial Skills Course and heard Judge Poe's talk on "The Lord's Work." There has never been a finer inspirational speech for prosecutors, and it was the final talk of the week that sent young prosecutors back to their courts energized to fight for victims of crime. Yes, Judge Poe could be hard on us, but we knew that was because we had a sacred duty to discharge and there was no room for shoddy work. He had convinced us of that as a "baby" prosecutor.

I had the pleasure of recently visiting with Judge Poe, now a long-time Congressman from Texas's Second District, when I was in Washington, D.C. I had no problem finding his office in the massive federal building because the Gonzales "Come and Take It" battle flag hangs in the window. I'm happy to report that Judge Poe is retiring at the end of the year after a great career in Washington, and he is coming home to Texas. My guess is he won't be sitting on a bench any time in the near future, but I sure wouldn't mind hearing "The Lord's Work" again! Thanks, Judge, for what you have done for me and our profession.

Judge Ted Poe (on the right) and myself in his Washington D.C., office.

Andy Schuvalov

I am saddened to tell you of the passing of a great friend of the profession, **Andy Shuvalov**. Many of you never met Andy. He was a former CDA in Deaf Smith County, and most notably, the Director of the Texas Prosecutor Council, which was a state agency abolished (one of the few) in 1985.

The council was established in 1977 after a district attorney was disbarred but refused to resign from office. The Legislature responded to that difficulty by creating a state agency to both discipline and train prosecutors. The council, made up of prosecutors and laypersons, sponsored prosecutor training and assistance and actively reviewed complaints about prosecutor conduct. The council doled out reprimands and filed removal actions when warranted. In its last year of operation, for instance, the council reviewed 119 complaints, dismissed 75, issued three reprimands, and filed one removal lawsuit (which resulted in a resignation).

Andy had a tough job. Over time, people began to appreciate that the dual role of both a "helper" and a "hammer" set the agency up for irreconcilable conflicts. With the emergence of TDCAA as prosecutor training outfit and the State Bar as a disciplinary organization, the council did not survive sunset review in 1985.

Until his passing, Andy was nonetheless proud of his work in advancing the profession of prosecution, and he had the right to be. Texas was well-served by his dedication to our profession.

Congratulations to Joe Brown

Joe Brown, the former Grayson County Criminal District Attorney, was sworn in in late February as the United States Attorney for the Eastern District of Texas. Joe had been the CDA in Sherman for 17 years, he is a past TDCAA board member, and he served on the Texas Juvenile Justice Board. We have long enjoyed Joe's strong leadership and support. Something tells me that will continue in his new role!

It was the mayors—who knew?

There is still plenty of discussion about exactly who and what gets the credit for the drop in crime rates since the mid-1990s. Most people acknowledge that longer sentences for violent offenders plays a part in it; others talk of everything from better supervision and rehabilitation programs to the abolition of lead paint in nurseries.

But this opening sentence in the announcement of yet another "smart on crime" group caught my attention: "National crime statistics have been trending downward since 1991, due in large part to the efforts of mayors and city leaders." Now *that* is a new one.

Notwithstanding the eyebrow-raising claim to the past success in reducing crime rates, the newly formed Mayors for Smart on Crime may be onto something. After all, for the longest time people talked about how solving crime necessitated addressing its root causes. It seems no one has mentioned that in a long time—instead, people have focused on criminal justice (what happens after the crime has been committed) and more recently on prosecutors. Undoubtedly there is much prosecutors, as leaders in the criminal justice arena, can do, but when mayors and local leaders also talk about broader issues, such as mental health and investment in the community, my guess is our profession is all in.

For more on the new group, go to https://www.smartoncrime.us. ❇

Leveling up your advocacy skills

Warm weather is in full swing, so you know the 2018 training year is about halfway over.

By Brian Klas
TDCAA Training Director in Austin

Even though we're well on our way to the Annual Update in September, we still have one of the training team's crown jewels coming up in late July with the Advanced Trial Advocacy Course.

You all know that TDCAA training is driven by the prosecutors, VACs, investigators, and support staff who make up our membership. Like the thought-reading television technology of the future, the show you see is built with you in mind. But *unlike* the thought-control television technology of the future, the association does not arbitrarily dictate what our membership needs—although referring to ourselves as "the association" may start to raise eyebrows. We take great pains to find out what training you want and then provide it.

One conference that has long sated your training desires is the Advanced Course. Every year in late July or early August, TDCAA descends upon the surprisingly cool city of Waco. For years now, the Baylor University School of Law has graciously allowed us to use its facilities for a week of intense trial advocacy development. Thirty-two prosecutors are exposed to the most current information related to a specific case type. They take that information and, in groups of eight attendees and three faculty advisors, apply it to live trial practice in jury selection, open, direct, cross, and close. It all happens in gorgeous courtrooms with real "juries" (Waco townsfolk who volunteer their time), as well as on video. Attendees then receive feedback from their groups and review their performances with a faculty advisor, who gives them valuable feedback on what they did right and what they did wrong. We even provide you with a copy of the performance for additional work down the road.

Anyone who has had the opportunity to listen to or view himself speak publicly knows that once you cut through the confusion of sounding like a stranger, there is no better way to improve presentation and advocacy skills. I myself can sound real country (read: yahoo) and occasionally speak faster than my mouth can move. I know that because I listened to a recording of myself at trial once. Things I thought were effective as I was saying them were actually overbearing when I heard them on tape, and what I thought were huge mistakes in the moment came across as quite humanizing. This is the kind of feedback you get at our Advanced Trial Advocacy Course.

Planning for Advanced takes about a year. The training committee officially chooses the type of case (that is, the offense) at its fall meeting. The goal is to pick an offense that prosecutors are trying a lot, presents unique issues, and needs more advanced training. (This year, the case type is intoxication manslaughter with a focus on drugged driving.) Once we settle on an offense, we locate a prosecutor with a real-life case that fits; that case will form the basis of all the course's exercises. After attendees have applied for the course and are accepted, we send them the case file containing offense reports, labs, videos, and anything else necessary to understand and present the evidence. To make the most of the week, attendees are expected to review the case file before showing up in Waco.

This year's case comes from Galveston County and was tried by our course director, Kayla Allen. We are also fortunate to have the actual officers and a DPS toxicologist as State's witnesses and as defense experts. The case is a hard one—but a winnable one.

Drug-based intoxication manslaughter was chosen as the case because historically, intoxication based on substances other than alcohol has not been addressed well in Texas (or any state, for that matter). Prosecutors and law enforcement have had success in combatting alcohol-based DWI offenses

with better investigations, case analysis, and case disposition. It's to the point that many of today's misdemeanor prosecutors have never worked in a world without breath or blood samples on DWIs. That one simple bit of evidence often answers the most difficult question in a DWI case: whether the defendant was intoxicated while driving.

Proving how wrecks happened and how impairment caused them is a situation unique to intoxication manslaughter. There is a bunch of physics at play, and a difficult balance must be reached between eyewitnesses, photographs, and expert testimony on reconstruction. These are advocacy skills unique to these kinds of cases and will be explored at this school.

Intoxication cases involving drugs are even more difficult. The simple surety provided by a breath slip or blood alcohol lab report is no longer available when the intoxicant is prescription medicine or an illicit drug. In short, there are no *per se* standards for drugs, and they are likely not coming. New tools and techniques must be developed, and prosecutors must learn how to employ those tools to see justice done. The Advanced Course this year will delve into current scientific limitations and how good old-fashioned police work can fill in the gaps. Drugged drivers are on the roads today. They are injuring and killing people in Texas, and prosecutors have a job to do.

If you want to go to TDCAA's Advanced Trial Advocacy Course and your elected thinks you are ready for the challenge, then fill out an application and return it to us. The worst thing that could happen is you get a very nice email from me letting you know we don't have a spot.

One change

I should note one change to the planned 2018 curriculum. In an earlier edition of this journal, I wrote that we were planning an advanced appellate training along with the trial advocacy course. Unfortunately, due to a smorgasbord of reasons, that can't happen this year. I know this is an area of great interest for prosecutors assigned to appellate work, and I am looking for time and formats to conduct more appellate training in the future. I hate that we weren't able to pull it off this summer, but the issue is far from closed.

If you're at all curious, apply!

Attendance at our Advanced Trial Advocacy Course is limited to those with at least three to five years' experience who submit a completed application. You probably already got one in the mail, but if you folded your application into a fan to beat the summer heat, you can download one from our website. On that application, there is a requirement for your elected boss (or you, if that is you) to sign off on the form. That signature tells us that you aren't the only one who believes you will benefit from this course and that if accepted, you will be in attendance. These spots are coveted, and we don't want to lose one at the last minute. (We know things happen, but we limit those things as much as we can.)

When deciding who will be accepted, we consider a lot of factors. We absolutely look at current office assignments (e.g., people in their office's vehicular crimes unit). We also look at geographic representation, number of current applications from a given office, and a person's trial experience and total years of experience. The bottom line is, if you want to go and your elected thinks you are ready for the challenge, then fill out an application and return it to us. The worst thing that could happen is you get a very nice email from me letting you know we don't have a spot. And for you bean-counters out there, this course is free. TDCAA picks up the check for travel, hotel, and the training itself, and we provide a per diem for food. There is very little out-of-pocket expense for you or your office.

The most common question I get from potential Advanced attendees is, "Will this course help me?" Like all great questions, the answer is, "It depends." There are two sides of the course. The classroom work will focus on intoxication manslaughter-specific issues, and the trial practice portion will use an intoxication manslaughter case as a vehicle to strengthen advocacy skills. You have to have enough trial experience to make the practice meaningful, and you must have sufficient understanding of intoxication manslaughter issues for the assignments to make sense. Obviously, if you need both the intoxication manslaughter training and have enough trial experience to make the practice meaningful, then yes, this course can help you. Don't let that strict-sounding criteria scare you off, though. If you are an experienced prosecutor who has not recently had the opportunity to get honest feedback, watch yourself in trial, and see other talented prosecutors in action, then this course will absolutely help you. Nothing ventured, nothing gained.

Intoxication manslaughter charges based on drug-impaired driving are some of the hardest prosecutors try. Learning during your first such trial is how it often is done. This year's course provides a great primer to those who have not tried such a case and a terrific opportunity to hone skills for those who have. ❇

Transferred intent and the mistake-of-fact defense

In *Rodriguez v. State,* prosecutors asked the Court of Criminal Appeals (CCA) to overrule *Thompson v. State,* a case that gave a nearly universal right to a mistake-of-fact defense in any case that involved transferred intent.[1]

By Andrea L. Westerfeld
Assistant County & District Attorney in Ellis County

The CCA declined to overrule *Thompson*, but it did narrow its reach. More importantly, the Court clarified other issues about aggravated assault and the mistake-of-fact defense that will make future cases easier to understand.

Thompson v. State

In 2007, the CCA decided *Thompson v. State*, an injury to a child case.[2] The defendant was an associate pastor at a church who worked with the children's Bible-study program. When the Bible-study teacher reported that an 11-year-old boy was misbehaving, Thompson and his brother drove to the boy's house, and Thompson beat the boy with a tree branch more than 100 times over an hour and a half while his brother held the boy down. Thompson was charged with first-degree injury to a child.[3]

First-degree injury to a child requires the intentional or knowing infliction of serious bodily injury, while third-degree requires only the intentional or knowing infliction of bodily injury. The jury charge contained a transferred intent instruction, authorizing the jury to convict if the defendant intended to cause bodily injury but caused serious bodily injury instead. The jury convicted Thompson of first-degree injury to a child.

Transferred intent and mistake of fact

On appeal, Thompson argued that the transferred intent statute was too broad and could not create liability for a higher-level offense than the person intended. Transferred intent means that a person may be held criminally responsible for committing an offense he did not intend if he intended to commit a different offense instead.[4] If a person intended to commit one crime but instead committed another—or if he intended to commit a crime against one person but instead committed it someone else—then his intent can transfer from one offense to the other. This idea applies even if the crime actually committed is a higher-level offense than the one intended.[5]

But the Court went farther and held that when a transferred intent instruction is given, the defendant is entitled to raise the mistake-of-fact defense.[6] Mistake of fact is a defense where a person formed a reasonable belief about a fact *if* his mistaken belief negated the culpability required for commission of the offense.[7] The two key factors for mistake of fact are: 1) that the mistake was reasonable and 2) that the mistake negated the required mental state. If the mistake was regarding a tangential fact that doesn't affect the *mens rea* of the offense, then it does not raise the mistake of fact defense.

Therefore, Thompson's intent to commit bodily injury could transfer to committing serious bodily injury. *But* if Thompson reasonably but mistakenly believed that his actions would cause only simple (not serious) bodily injury, then he would be acquitted.[8] The lower courts generally read *Thompson* as a requirement that a mistake-of-fact instruction must accompany a transferred intent instruction in all circumstances.

Rodriguez v. State

Robert Rodriguez and his brother attacked the victim in a nightclub parking lot, in what was believed to be a carjacking gone wrong.[9] During the attack,

the victim's knee was badly damaged, requiring surgery and a long recovery period. Both sides agreed during trial that this was an unusually serious injury for the type of attack. Usually it would be seen more often in car accidents or falls from a great height.

At trial, the jury charge included an instruction on transferred intent, informing the jury that if it believed Rodriguez had intentionally or knowingly inflicted only bodily injury, that intent transferred to the offense of aggravated assault causing *serious* bodily injury. Rodriguez requested a mistake of fact instruction to tell the jury that if he reasonably believed he intended to cause only simple bodily injury, he should be acquitted. The trial court denied the instruction, and Rodriguez was convicted. The Fourth Court of Appeals reversed, finding—per *Thompson*—that the mistake of fact instruction was required if the transferred intent instruction was given.

The State appealed to the CCA, hoping to overrule *Thompson*'s broad requirement of a mistake-of-fact instruction in all transferred intent cases.

Intent in aggravated assault cases

Rather than overrule *Thompson*, the CCA took a different track. *Thompson* involved injury to a child. That is a first-degree offense if the person intentionally or knowingly causes serious bodily injury and a third-degree if he intentionally or knowingly causes bodily injury. But Rodriguez was charged with aggravated assault by causing serious bodily injury, and the *mens rea* in that offense is not quite so clear.

A defendant does not need to intend to cause serious bodily injury to commit aggravated assault. The law holds him accountable if he merely intends to cause any bodily injury but causes a serious one instead.

A person commits "simple" assault if he intentionally, knowingly, or recklessly causes bodily injury.[10] He commits aggravated assault if he commits a simple assault and, among other things, causes serious bodily injury.[11] The wording is different from injury to a child, and it is significant as far as *mens rea* is concerned. There is no additional mental state required in aggravated assault—just that the person committed simple assault and also caused serious bodily injury.

This means that "the line between lawful and unlawful conduct is crossed when one goes from accidentally caused bodily injury to culpably causing bodily injury."[12] Once that line has been crossed, the defendant may be held accountable for a more serious offense if he causes a more serious injury. This is in line with the CCA's earlier decision in *Landrian v. State*. There, the defendant was charged with aggravated assault both by using a deadly weapon and by causing serious bodily injury.[13] The CCA concluded that the gravamen of aggravated assault was "causing bodily injury." Accordingly, the jury was not required to be unanimous as to whether the defendant used a deadly weapon or caused serious bodily injury. The culpable mental conduct in an aggravated assault is causing the simple bodily injury. After that, the defendant can be held culpable for a higher-level offense if he caused more injury than he intended or if he used a deadly weapon.

But what does this mean for transferred intent?

Applying *Thompson* to *Rodriguez*

Ultimately, transferred intent is applicable only if the defendant intended to commit one offense and instead committed another. Thus, in *Thompson*, the intent to commit third-degree injury to a child transferred to committing first-degree injury to a child. But in *Rodriguez*, with an aggravated assault charge, there is no intent to transfer. The only intent applicable was causing bodily injury. Rodriguez did not have to intend to commit *serious* bodily injury. Thus, the CCA held that transferred intent was inapplicable. "Rodriguez's intent did not 'transfer' at all, because there was no element beyond causing 'simple' bodily injury that required any proof of intent."[14] Thus, the instruction on transferred intent was unnecessary in Rodriguez's case.

The CCA went one step further to address mistake of fact and concluded it could not have been an issue in this aggravated assault case. If the intent to commit serious bodily injury was required and Rodriguez had reasonably but mistakenly believed he was not going to cause serious injury, then he could have received a mistake-of-fact instruction and perhaps been convicted only of the lesser offense he intended. But the only intent required was to commit bodily injury. Rodriguez's mistake did not affect the culpability required to commit the offense with which he was charged.[15]

Therefore, the mistake of fact instruction was not required, and the CCA upheld Rodriguez's conviction for aggravated assault.[16]

The takeaway

Both the State and the defense asked the CCA to overrule *Thompson* for different reasons, and noted legal scholar Professor George Dix also joined their request.[17] The CCA side-stepped that request, but its opinion still provides valuable tools for the State going forward.

First, the decision of *mens rea* for an aggravated assault. While *Landrian* helped, *Rodriguez* spells it out definitively. A defendant does not need to intend to cause *serious* bodily injury to commit aggravated assault. The law holds him accountable if he merely intends to cause *any* bodily injury but causes a serious one instead.

Second, the rule of mistake of fact in transferred intent cases has been clarified. A mistake-of-fact instruction is not a blanket requirement in every case where a transferred intent instruction is given. Instead, the particular mistake that the defendant claims must, in addition to being reasonable, directly impact his intent to commit the offense. Where, as in *Rodriguez*, the defendant may have genuinely mistaken a fact but that fact does not negate his intent to commit the offense, then the mistake-of-fact instruction is not applicable. ❇

Endnotes

[1] *Rodriguez v. State*, No. PD-0439-16, slip op. (Tex. Crim. App. Jan. 10, 2018).

[2] *Thompson v. State*, 236 S.W.3d 787 (Tex. Crim. App. 2007).

[3] Thompson was also charged with aggravated assault, but the appeal was regarding only the injury to a child case.

[4] Tex. Penal Code §6.04(b)(1).

[5] *Thompson v. State*, 236 S.W.3d 787, 800 (Tex. Crim. App. 2007).

[6] *Thompson*, 236 S.W.3d at 800.

[7] *Thompson*, 236 S.W.3d at 793.

[8] *Thompson*, 236 S.W.3d at 800.

[9] *Rodriguez v. State*, slip op. at 2.

[10] Tex. Penal Code §22.01(a)(1).

[11] Tex. Penal Code §22.02(a)(1).

[12] *Rodriguez*, slip op. at 12.

[13] *Landrian v. State*, 268 S.W.3d 532, 534 (Tex. Crim. App. 2008).

[14] *Rodriguez*, slip op. at 14.

[15] *Rodriguez*, slip op. at 14.

[16] *Rodriguez*, slip op. at 15-16.

[17] *Rodriguez*, slip op. at 15.

A mistake-of-fact instruction is not a blanket requirement in every case where a transferred intent instruction is given. Instead, the particular mistake that the defendant claims must, in addition to being reasonable, directly impact his intent to commit the offense.

Proving failure to register as a sex offender

Failure to register as a sex offender is a deceptively difficult charge to plead and prove.

By Clinton Morgan
Assistant District Attorney in Harris County

In the abstract, it seems easy: *Dude didn't register!* But criminal law is never that simple.

One difficulty is always figuring out which way to charge the offense. Chapter 62 of the Code of Criminal Procedure provides a lot of requirements for sex offender registration. In a typical case, a defendant might appear to violate multiple requirements: If he just up and moves, he may have failed to give seven days' notice before moving, then failed to register within seven days of moving, but because each one is a different offense, the State must pick one and get a unanimous verdict on it.

Further complicating matters is the question of a mental state: The State must show that the defendant acted intentionally, knowingly, or recklessly. But historically it has been an open question as to which element that mental state attached. If the State has to prove the mental state for the specific failure to register—i.e., that the defendant intentionally failed to register seven days before a move—these cases would become much harder to win.

In two cases, one in 2015 and one this February, the Court of Criminal Appeals has resolved most of the ambiguity regarding the mental state for this offense, and it did so in a way that should make prosecutors happy.

Robinson v. State

In 2015, the Court of Criminal Appeals seemed to solve the problem with *Robinson v. State*.[1] In that case, the Court held that the evidence must show that the defendant acted intentionally, knowingly, or recklessly, but *only* regarding the defendant's duty to register. That is, the State had to prove the defendant's awareness of his duty to register. The Court held there was no requirement to show a mental state regarding a particular failure to register.

You'll notice I said *seemed* to solve the problem. The majority opinion in *Robinson* got only five votes. The other four judges were concerned that the majority had set up a strict liability offense.[2] Those four would have required the State to prove a mental state for the actual omission for which the defendant was charged (for instance, failing to provide seven days' notice prior to a move). Considering that the State often cannot show why a defendant doesn't properly register, this requirement would make it much harder to get convictions for this offense.

After this narrow win for the State, it looked bad when, a mere seven months later, the Court granted review of a case that presented nearly the same question as *Robinson*. Was the Court re-evaluating its position?

Febus v. State

Albert Febus was a sex offender who was registered as living at 6110 Glenmont Drive, Apartment 57, in Houston.[3] In 2013 he changed his registration to 6110 Glenmont, Apartment 45, but when officers did a compliance check at that location, he was not to be found. The State charged him with intentionally or knowingly failing to notify police of an address change.

At trial, Febus claimed that he had moved to a neighboring building in the same complex, 6100 Glenmont Dr., Apartment 45. Febus's defense was that he had told the registration officer that he was moving to 6100, but through some clerical error that was not his fault, the documents came out 6110. The manager who handled both buildings testified she'd never seen Febus at the complex, but Febus called as a witness the individual listed on the lease at 6100 Glenmont Dr., Apartment 45, who testified that Febus informally subleased from him and was only ever at the apartment between 6 p.m. and 9 a.m. (when the manager was not there).

The jury found Febus guilty.

On direct appeal, in a brief written before *Robinson* was handed down, Febus argued that the State had failed to prove what it pleaded: that he intentionally or knowingly failed to give his new address to police. According to Febus, the evidence showed that perhaps some mistake had occurred, but at any rate the State had failed to show any intent to not register.

In a short, unpublished opinion handed down three months after *Robinson*, the First Court of Appeals did little more than point out that *Robinson* defeated Febus's claim.[4] Because the State had proven Febus was aware of his registration obligations, the evidence was sufficient to support the conviction, regardless of whether the State proved any intent or knowledge behind this specific failure to register. Febus petitioned for discretionary review.

After the Court of Criminal Appeals granted review, a six-judge majority affirmed the First Court's judgment while somewhat criticizing its opinion.[5] Writing for the Court, Judge Newell began by noting that, as a straightforward matter of sufficiency, *Robinson* controlled: The State had to prove Febus's awareness of his duty to register, not the particular way in which he failed to register. The Court did not back away from this holding.

But Judge Newell also went farther, noting that the court of appeals "did not fully address" Febus's argument because Febus's claim of a clerical error was actually a claim that he *had* complied with his registration requirements, and it was the authorities who had failed. Febus was claiming, in other words, that the State had not proven that his failure to register was a voluntary act on his part. The First Court had not addressed this claim.

In *Robinson*, Presiding Judge Keller had written a concurring opinion arguing that in cases where defendants claim they tried to register but were somehow rebuffed by authorities,[6] the correct defense was that the failure to register was involuntary.[7] Because the Penal Code requires proof of a voluntary act to prove a crime, such a defense would exempt the defendant from criminal liability.[8]

In *Febus*, Judge Newell adopted the reasoning of this concurrence. As part of the sufficiency claim, the Court had to review whether there was sufficient evidence to show that it was Febus who had given the wrong address, rather than a clerical error on the part of authorities. The Court held there was sufficient evidence. First, the registration officer testified that Febus had told her "6110 Glenmont"—Febus had signed the new forms with that address on them. Second, in light of the sketchy nature of the evidence, the jury was not even required to believe Febus's evidence of living at 6100 Glenmont. From the evidence, the jury could have concluded that when Febus changed his registration, he simply left the apartment complex altogether, living at neither 6100 nor 6110 but instead giving a fake address to police and making up this story when caught.

In a final section of the Court's opinion titled "Stare Decisis," Judge Newell noted, "It has also been suggested that this Court reconsider its holding in *Robinson*. …" Judge Newell characterized the losing argument in *Robinson* as wanting "a second culpable mental state that attaches to the act of failing to register." After briefly discussing policy reasons for not overturning precedent, the Court declined to revisit its holding from *Robinson*.

However, Judge Newell pointed out that the facts of *Febus* show that *Robinson* might not have been determinative of the case. In *Febus*, the State put on evidence showing that Febus was aware of his registration requirements and that he had successfully registered on several prior occasions. Because the State showed Febus knew the requirements and was capable of meeting them, the jury could have inferred any failure was intentional.

In a dissent joined by two other judges, Judge Richardson noted that he did not join *Robinson* because he believed it created a strict liability offense, and for the same reason he did not join this opinion.[9] Indeed, Judge Richardson spent much of his opinion attacking the theoretical underpinnings of *Robinson* and suggesting it should be overturned.

Takeaways

The most obvious takeaway here is that this issue seems to be settled. *Robinson* got five votes; three years and an election later,[10] the same proposition in *Febus* got six. Prosecutors can rest assured that, for the foreseeable future, the only mental state they will need to prove relates to the defendant's knowledge of his duty to register. So long as the State shows the defendant knew of this duty, the question of why he failed to register is, as a matter of sufficiency law, not the State's problem.

But *Febus* and *Robinson* also show that the Court of Criminal Appeals is concerned about the sort of defenses often raised in these cases. Febus's

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defense was that the registration officer made a typo; Robinson's defense was that the registration officer would not let him register. If such claims are believed, they are extremely sympathetic defenses. What *Febus* and *Robinson* make clear is that these defenses present questions of fact for the jury—did the defendant *actually* fail to register?—not legal questions for an appellate court. Even if the State does not have to show a mental state for the failure to register as a matter of legal sufficiency, it very well might need to show some reason for the failure to convince a jury to reject a defendant's defensive claims. ❇

Endnotes

[1] 466 S.W.3d 166 (2015).

[2] *Id*. at 175 (Alcala, J., concurring).

[3] *Febus v. State*, No. 01-14-00942-CR, 2015 WL 6081647, *1 (Tex. App.–Houston [1st Dist.] October 15, 2015), aff'd ___ S.W.3d ___, 2018 WL 850336 (Tex. Crim. App. 2018) (mem. op. not designated for publication).

[4] *Id*., at *3 ("The holding in *Robinson* is dispositive of this case").

[5] *Febus v. State*, ___ S.W.3d ___, 2018 WL 850336 (Tex. Crim. App. Feb. 14, 2018).

[6] Robinson had testified that he tried to register several times, but the officer just kept telling him to come back the next day. *Robinson*, 468 S.W.3d at 169.

[7] *Id*. at 175 (Keller, P.J., concurring).

[8] See Tex. Penal Code §6.01(a).

[9] *Febus*, 2018 WL 850336, at*6 (Richardson, J., dissenting).

[10] Of the four judges who did not join *Robinson*, two left the Court following the 2016 election.

TDCAA's upcoming seminar schedule

Forensic Evidence Seminar, June 13–15, at the Renaissance Hotel in Addison. Room rates are $141 plus tax for a single or double, $161 plus tax for a triple, and $181 plus tax for a quad. Call 800/235-4670 for reservations, and reference the TDCAA Forensic Evidence Seminar to get the group rate, which is available until May 24 or the block is sold out, whichever is first.

Prosecutor Trial Skills Course, July 8–13, at the Holiday Inn Riverwalk in San Antonio. Room rates are $119 plus tax and include high-speed Internet and self-parking. Call 888/465-4329 to make reservations; mention TDCAA to get the group rate, which is good until June 17 or the block is sold out, whichever is first.

Advanced Trial & Appellate Advocacy Course, July 23–27, in Waco.

Annual Criminal & Civil Law Update, September 19–21, at the Moody Gardens Hotel & Convention Center in Galveston. Because our room block is sold out, we contracted with other hotels for rooms:

- **Courtyard Galveston Island**; call 888/236-2427 for reservations.
- **TownePlace Suites Galveston Island**; call 888/236-2427 for reservations.
- **Holiday Inn Resort**; call 800/465-4329 to make reservations.
- **Springhill Suites**; call 409/740-9443 to make reservations.
- **Four Points Sheraton**; call 866/716-8133 to make reservations.

Key Personnel & Victim Assistance Coordinator Seminar, November 7–9, at Inn of the Hills in Kerrville. Room rates are $119 plus tax and include self-parking and guest-room Internet access. Call 800/292-5690 for reservations, and mention this seminar to get the group rate, which is good until October 16 or the block is sold out, whichever comes first.

Elected Prosecutor Conference, November 28–30, at the Embassy Suites in San Marcos. Room rates are $139 plus tax and include hot breakfast and daily happy hour. Call 800/362-2779 for reservations, and mention TDCAA to get the group rate, which is good until November 6 or the block is sold out, whichever is first. ❇

A roundup of notable quotables

"The people of Harris County are tired of this. I am tired of this, of standing over babies and dead people on the road."

—Sean Teare, head of the Vehicular Crimes Division of the Harris County District Attorney's Office, in a newspaper article detailing the county's new crackdown on intoxicated driving. After a drunk 20-year-old woman killed two people, including an infant, in a car crash, the DA's Office has charged three people, including an area bartender, with criminal negligence and knowingly purchasing and providing alcohol to a minor. *https://www.mysanantonio.com/neighborhood/bayarea/news/article/Four-charged-in-alleged-drunk-driving-crash-that-12808895.php*

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes a quote gets a free TDCAA ball cap!

"The fake IDs are getting harder to spot. They now include holograms and images that show up under black lights, just like the real ones do. Sometimes I can't tell the difference."

—a doorman at a Houston club, identified only as Mike, on his concerns after Webster bartenders allegedly served alcohol to a minor, who later caused a crash that killed two people. *http://abc13.com/bartenders-worried-about-fake-ids-after-duis-involving-minors/3317910/*

"I've been praying every second I could to be rescued."

—Rebecca (her last name withheld for privacy), who had been trafficked for sex by an older man, Johnathon Nathaniel Kelly, and was indeed rescued by Deputy Patrick Paquette of the Greene County (Georgia) Sheriff's Department. Deputy Paquette had just completed a class called Interdiction for the Protection of Children in Texas, which taught him to look for signs of sex-trafficking during roadside stops, and he saw several signs when he pulled over Kelly's car. *https://www.washingtonpost.com/lifestyle/magazine/police-are-trained-to-spot-drunken-driving-and-drug-trafficking-why-not-child-trafficking-too/2018/02/26/56937d02-082c-11e8-b48c-b07fea957bd5_story.html*

"Are they wearing the same clothes for three days? Have they been fed? Are they always hungry when they get here? Do they eat breakfast and lunch and they're starving and they say that's the only two meals they get? There's a lot you can tell about kids just from them showing up to school."

—Nicol Stolar-Peterson, LCSW and child abuse expert, in a CNN news story about the Harts, the California family whose SUV was found wrecked at the bottom of a cliff in March. The parents, Jennifer and Sara Hart, had been accused of withholding food from the kids, who had been knocking on neighbors' doors complaining of hunger. Stolar-Peterson noted that public and private schools can be a protection against mistreatment of children because teachers and other school personnel are mandatory reporters, and laws require them to report suspected abuse. The Hart children were homeschooled. *https://www.cnn.com/2018/04/13/us/hart-family-abuse-isolation/ index.html*

"Officers responded to a fight in progress in a trailer park. Turns out to have something to do with infidelity and jealousy. Suspect arrested for assault."

—Twitter feed of the College Station Police Department, which live-tweeted its patrol one night in April. Using the hashtag #tweetalong, police encountered everything from intoxicated college students and public urination to car crashes and fist fights.

An important new study on drugged driving

Just recently, I received a study and report from Washington state (which legalized the recreational use of marijuana in 2012) that Texas prosecutors who try DWI cases need to read.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

It serves as a warning of what is happening there—and what will happen here as marijuana use continues to rise. For example, in Washington, driver impairment due to alcohol and/or drugs is the No. 1 contributing factor in fatal crashes—alcohol and/or drug impairment is involved in nearly half of all traffic fatalities. Among drivers involved in fatal crashes between 2008 and 2016 who were blood-tested, *61 percent* tested positive for alcohol and/or drugs, and *44 percent* of those tested positive for two or more substances.

As of 2012, poly-drug impairment (intoxication by a combination of alcohol and drugs or multiple drugs) is now the most common type of impairment among drivers in fatal crashes—more common than alcohol alone or drugs alone! In fact, since 2012, the number of poly-drug drivers involved in fatal crashes has increased an average of *15 percent every year.* The most common substance in poly-drug drivers is alcohol, followed by THC (tetrahydrocannabinol, the chemical compound in cannabis responsible for the high). Alcohol plus THC is the most common poly-drug combination. (Not only are people smoking marijuana and getting behind the wheel, but they're drinking booze too.)

This study shows a trend that we in Texas are probably not identifying in our arrests and prosecutions. Look at your intoxication cases: How many involve only alcohol? Are we missing any other intoxicants? Why are we missing them, and how do we fix that? Do police in your jurisdiction treat every fatal crash as a potential crime? If not, how many people who are guilty of manslaughter are simply walking away from these crashes without arrests or criminal charges? How many intoxication manslaughter victims are denied justice because there is not even an investigation for prosecutors to review? Sure, we can blame police for this lack of investigation, but at some point, are prosecutors not complicit?

When I started in prosecution in 1987, Texas peace officers and prosecutors were pretty bad at detecting and prosecuting alcohol-impaired drivers. We got better, though—a whole lot better. We secured search warrants for blood, and officers learned and administered SFSTs (Standardized Field Sobriety Tests). We got better at selecting juries, using dash-cam videos, and countering defense strategies. But while we caught up with drinkers, we remain way behind in how people become impaired in 2018. This study should open our eyes to these new norms.

What else can we do? First, read the report, which is here: www.tdcaa.com/announcements/important-new-study-marijuana-use-alcohol-use-and-driving-washington-state. Start a dialogue with local law enforcement agencies: Do they have DREs (Drug Recognition Experts) on staff? If they don't, how can prosecutors get the agencies to prioritize the need for them? Are officers getting ARIDE (Advanced Roadside Impaired Driving Enforcement) training? DREs and ARIDE training are essential for officers who are stopping impaired drivers on Texas roads.

We are not Washington—yet. The number of marijuana-impaired drivers in Texas is probably lower than in Washington, but the trends there will be seen here soon enough. (Ask anybody in the Panhandle: There's plenty of Colorado pot coming into Texas.) We will get better at detecting drug-impaired drivers. The first step in solving any problem is recognizing that we have one, and this study tells us we have a problem. Now let's get to work solving it. ❇

Changes to the attorney grievance process (cont'd)

The latest changes, set to go into effect June 1, continue this trend.

Return of the investigatory hearing and subpoena power

One of the new changes (shown in purple in the chart on the next page) gives the CDC the option to set an investigatory hearing before the local grievance committee or subpoena documents and witnesses at the investigatory phase.[8] This new procedure is actually a return to an old idea. Before January 2004, there was an investigatory hearing stage between the complaint and the "just cause" stages,[9] but it was eliminated because it was thought too cumbersome.[10] At that time, there was no way to dismiss a complaint. So even when there was no evidence of a violation, a grievance committee still had to conduct an investigatory hearing. The 2003 amendments eliminated the investigatory hearing, added the summary disposition setting, and moved the subpoena rules into the rules for evidentiary hearings.[11]

There must have been some nostalgia for the pre-2004 days and their investigative tools because the latest rule changes restore the CDC's ability to subpoena bank records and client files (and other documents) and examine witnesses at an investigatory hearing—all before the "just-cause" determination.[12] The goal is to resolve some cases earlier in the process, before the more adversarial, evidentiary hearing phase.[13] Adding another stage to the process will inevitably lengthen the resolution time for some grievances (and perhaps permit prosecution of cases that might otherwise have been dismissed). Before these amendments, the CDC had 60 days to investigate a complaint and determine if there was just cause. Now, if there is an investigative hearing or subpoena issued, the CDC's 60 days will not begin to run until the hearing is over or the subpoena complied with.

The amendment does *not* restore the attorney's ability to subpoena records or witnesses at the investigation stage, an ability the old rules once afforded him or her. The attorney can still argue to the grievance committee chair that records that the CDC subpoenas are not "material" to resolving the complaint, but there is no requirement that the CDC notify the attorney of subpoenas sent to third parties, so the opportunity to object will not always exist.

Grievance Referral Program

The new rules also set out eligibility requirements for a diversion program—called the Grievance Referral Program—for minor misconduct cases. Minor misconduct would generally exclude misappropriation of funds, breach of fiduciary duties, dishonesty, fraud, or cases involving substantial harm or prejudice to a client. The attorney also must not have been disciplined at all within the last three years or within the last five years for similar misconduct. Attorneys admitted into the program at various stages of the process can have their cases dismissed in exchange for successfully completing conditions such as substance abuse treatment or law practice management.[14]

Sanction guidelines

New sanction guidelines replace the prior discretionary system[15] and promote punishment consistency among the local grievance committees and between those grievance committees and district courts.[16] The guidelines list the kind of conduct that would generally warrant disbarment, suspension, public reprimand, or private reprimand. The guidelines also list aggravating factors (such as prior disciplinary history and misconduct during disciplinary proceedings) and mitigating factors (such as inexperience, paying restitution, and remorse) but provide no formula to apply these factors, only that they "may be considered."[17] Disbarment is generally reserved for specified intentional or knowing mental states and serious or potentially serious injury to another. Prosecutors will be accustomed to these mental states as the definitions of "intent" and "knowledge" are similar to the Penal Code definitions. An appendix to the rules specifies which guideline applies to each Rule of Professional Conduct.

As examples, consider the following ethics rules violations:

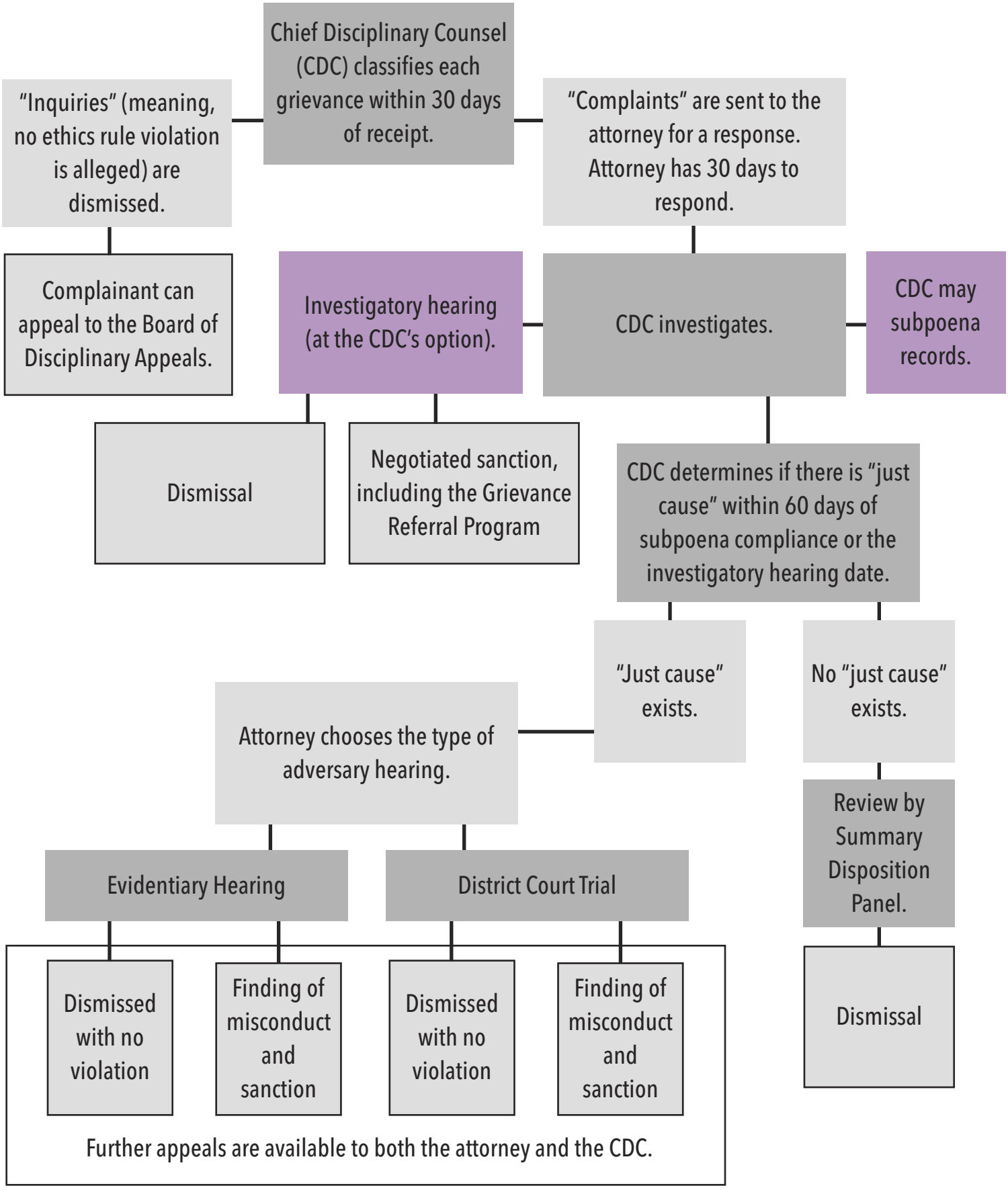
- prosecuting a case that the prosecutor knows lacks probable cause (Rule 3.09)
- failing to disclose all known information tending to exculpate the defendant or mitigate the offense (Rule 3.09)
- telling a newspaper reporter that the defendant in an upcoming trial has confessed (Rule 3.07).

These violations fall under the guidelines category for Violations of Duties Owed to the Legal System. Violations of Rule of Professional Responsibility 3.09 can also be categorized as a Duty Owed to the Public, which applies to misuse of an official or governmental position or when a person in an official or governmental position fails to follow applicable procedures with injury to the integrity of the legal process. Disbarment is generally appropriate for these violations when a prosecutor

After reading this article, you'll be more up-to-date on the process. You also may be just the sort of person your local grievance committee needs to help implement a just and fair grievance system.

Overview of the grievance process

(New investigative procedures are shown in purple.)



"knowingly engages in an abuse of the legal process with the intent to obtain a benefit for the [attorney] or another … and causes serious or potentially serious inference with a legal proceeding."[18] Suspension is generally appropriate when the prosecutor acts knowingly but without intent to benefit himself, herself, or another and where there is only interference, rather than serious interference, with a legal proceeding. Any reprimand for a violation of our ethical duty to disclose exculpatory and mitigating information, which would generally be appropriate when a prosecutor acted negligently, must be public.[19]

Conclusion

All of us as prosecutors should have a working knowledge of how the bar regulates our profession. After reading this article, you'll be more up-to-date on the process. You also may be just the sort of person your local grievance committee needs to help implement a just and fair grievance system. Consider expressing interest to your district's state bar director. Their contact information is on the state bar's website.[20] ❇

Endnotes

[1] SB 302, 85th Leg., R.S., Ch. 531 (2017). Senate Bill 302 mandated a change to Tex. Disciplinary R. of Professional Conduct 8.03, requiring attorneys to provide the State Bar with documentation (within 30 days) of a conviction or deferred for certain criminal offenses or out-of-state disciplinary action. Also, disciplinary judgments will now be posted to attorneys' online State Bar profiles (Tex. Gov't Code §81.115(b)), and a new committee will review and oversee amendments to the disciplinary rules and procedures (Tex. Gov't Code §81.0871, et seq.). See page 5 of this journal for more on this committee.

[2] Tex. S. Ct., Misc. Docket No. 18-9031, "Order Adopting Amendments to the Texas Rules of Disciplinary Procedure," Mar. 1, 2018 (Disciplinary Rule 2.12) (available online at http://www.txcourts.gov/supreme/administrative-orders/2018/).

[3] *Id*. (at new Tex. R. Disciplinary P. 2.12); Tex. Gov't Code §§81.080 & 81.082.

[4] Tex. S. Ct., Misc. Docket No. 18-9031 (2018) (at new Tex. R. Disciplinary P. 16.01-16.04); Tex. S.B. 302, 85th Leg., R.S., ch. 531, §15 (2017).

[5] *Id*. (at new Tex. R. Disciplinary P. 15.01, *et seq.*); Tex. Gov't Code §81.083.

[6] Tex. S. Ct., Misc. Docket No. 18-9031 (2018) (at new Tex. R. Disciplinary P. 1.06.Z).

[7] See State Bar of Texas, "Staff Report to the Sunset Advisory Commission," July 1990, at p. 35-37 (available online at https://www.sunset.texas.gov/reviews-and-reports/agencies/state-bar-texas).

[8] Tex. S. Ct., Misc. Docket No. 18-9031 (2018) (at new Tex. R. Disciplinary P. 2.12).

[9] Tex. S. Ct., Misc. Docket No. 03-9209, "Amendments to the Texas Rules of Disciplinary Procedure," Dec. 29, 2003 (Disciplinary Rule 2.12) (available online at http://www.txcourts.gov/supreme/administrative-orders/2003/).

[10] See interview with former Chief Disciplinary Counsel Dawn Miller, Robert P. Schuwerk, 48A *Tex. Prac., Handbook of Tex. Lawyer & Jud. Ethics* §17:2 (2018 ed.).

[11] Tex. S. Ct., Misc. Docket No. 03-9209 (2003) (current Tex. R. Disciplinary P. 2.17.H), reprinted in Tex. Gov't Code, tit. 2, subtit. G, Appendix A-1.

[12] New Tex. R. Disciplinary P. 2.12.B & C.

[13] State Bar Self-Evaluation Report to the Sunset Advisory Commission, at p. 282 (Sept. 1, 2015) (available online at https://www.sunset.texas.gov/reviews-and-reports/agencies/state-bar-texas).

[14] *Id*.

[15] Under the former rule, evidentiary panels were required to consider various factors in setting an appropriate sanction, including the nature and degree of misconduct, surrounding circumstances, loss or damage to the client and the profession, specific and general deterrence, and maintaining the respect of the legal profession. See Tex. S. Ct. Misc. Docket No. 03-9209 (2003) (former Tex. R. Disciplinary P. 2.18).

[16] New Tex. R. Disciplinary P. 15.01.B.

[17] New Tex. R. Disciplinary P. 15.09.A.

[18] New Tex. R. Disciplinary P. 15.05.B.1.

[19] Tex. Gov't Code §81.072(b)(11)(B)(ii); New Tex. R. Disciplinary P. 15.08.5(c).

[20] Each elected State Bar director nominates members to the committees within his or her district, who must be appointed by the State Bar President. Tex. R. Disciplinary P. 2.02. (A map of State Bar districts and director contact information is available at https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/VolunteerandStaffGuide/BoardofDirectors.pdf).

Specialty courts for juvenile offenders

As the treatment of juveniles in the criminal justice system shifts from a methodical and uniform practice toward an individualized, tailored approach, we have seen an exciting new option emerge: specialty courts for juvenile offenders.

By Sarah Bruchmiller
Assistant District Attorney in Williamson County, and
Hans Nielsen
Assistant District Attorney in Harris County (retired)

While some would characterize these courts as a current "trend" of the legal system, we prefer to think of them as an impactful new option destined to play a sustaining role in juvenile law. This change in mindset could alter the path of generations of juvenile offenders whose futures would otherwise take a much different, possibly even deadly, course.

In this article, we discuss how specialty courts are redirecting the focus of the juvenile system to address the genesis of youths' behavior while also holding them responsible for criminal activity. These programs acknowledge the reason the youth got to this point—recognizing the root—then redirect and educate the child to achieve real behavior modification. It's a tall order, but what better place than Texas to achieve such a monumental task?

Across Texas

Throughout the state, specialty courts are popping up in both small and large jurisdictions.[1] In Harris County, there are now four such courts specifically for youth struggling with drugs, human trafficking, mental health, and gang membership. (More on each one soon.)

Do not assume that only a large county with vast resources can launch a specialty court for juvenile offenders. It can work in any county where parties are willing. (Read the story from Guadalupe County on page 25 for a view into how a juvenile drug court works in a smaller jurisdiction.) Funds from state grants and nonprofit donations can help launch such a court. One great starting point is the Office of the Governor's website,[2] which lists specialty court programs, allows people to register a court, and connects visitors with other programs throughout the state. Funding opportunities are also on the site.

It does not require a large group of juveniles to run a specialty docket—in fact, participants in specialty courts should be few so the services are not diluted and the programs remain manageable for the team members (judge, defense counsel, prosecutor, etc.). That's because running such a court takes more time and oversight than a conventional docket, and prosecutors should know from the outset that they are both high-investment and high-reward endeavors. Juvenile offenders are provided a myriad of resources to address and correct the conduct that brought them to the attention of the juvenile justice system.

All of the Harris County specialty courts are directed at high-risk youth who may not normally be successful on regular community supervision and who need closer, personalized oversight. Recidivism for the specialty courts ranges from 14 to 25 percent, depending on the court (more specifics on those numbers below), which is considerably lower than for all juvenile offenders in the system, which is 33 percent across the board.[3] Tom Hough, administrator in the Harris County Juvenile Probation Department's (HCJPD) Office of Public Affairs, stresses that youth in the specialty courts benefit greatly from the custom-tailored approach that specialty courts provide. "If you can take the kids who are most in need and get them personalized help," he says, "you can do some good work."[4]

Harris County courts use a multidisciplinary team (MDT) consisting of a judge, defense counsel, prosecutor, psychologist, probation officer, parent partner (more on this in a moment),

Department of Family and Protective Services (DFPS) representative, education specialist, and possibly others, depending on the juvenile's needs. A prosecutor's role will vary per court, but for each program, we are involved from the beginning. The prosecutor determines whether an offender is the right candidate for the court, participates in staff meetings on each juvenile, and gives input on how to handle a youth who violates program rules.

One unusual aspect that plays an important role in the specialty court is the direct contact between the youth and the judge during monthly review hearings. When the juvenile comes in for his status hearing with the team, he interacts directly with the judge presiding over the court, and the hearings are conducted not at the bench but rather in a more informal setting with all team members, including the judge, seated around counsel table. The hearings are non-adversarial in nature, with the shared goal being the child's successful completion of the program.

Resources for specialty court participants are vast and are intended to have far-reaching effects. In addition to conditions that include substance abuse evaluation and treatment and individual counseling—all of which may be provided routinely as needed in a typical juvenile probation—the child receives an education specialist to assist him with any needs. Many high-risk juveniles have fallen way behind in school, and having the assistance of someone to get them back on the right track with their education provides more academic prospects than if they had not joined the program. Specialty courts also extend further into the juveniles' lives by working with their parents and family. The court can provide a "parent partner" who connects the family with parenting classes, transportation, housing assistance, and even financial help. Additionally, several specialty courts work with businesses or non-profits to provide employment for juvenile participants to help them learn job skills, earn money, and gain work experience. This opportunity redirects how the children spend their time (in productive pursuits rather than criminal activity).

Now we'll go into some details about each specialty court.

Drug court

Prosecutors who'd like to wade into a specialty court for juveniles might start with a drug court. There are grant resources to assist with funding and various existing drug courts in both juvenile and adult systems for guidance in launching and running one. (Indeed, Guadalupe County's one specialty court for juveniles is a drug court.)

Harris County's version is called SOAR, which stands for Sobriety Over Addiction and Relapse. Like adult drug courts, it is an intensive program aimed at helping juveniles overcome substance abuse, which is common among youthful offenders. More specifically, it accomplishes this feat by focusing on addressing maladaptive family patterns and dynamics. This specialty court goes beyond providing drug treatment and requires intensive supervision with random drug testing once or twice a week. It also recognizes and rewards the juvenile each step of the way toward sobriety.

Entry into the program often starts with probation officers looking in detention centers for youth with drug addiction issues. They need not have committed drug crimes to be eligible, though any violent criminal history is an automatic disqualifier. It is a post-adjudication program created under the auspices of the drug court programs authorized under Texas Government Code Chapter 123.

The process of identifying eligible youth includes a clinical assessment aimed at determining the needs and risks of each youth. Once candidates are identified and admitted, juveniles and their families begin to engage with the agreed-upon treatment plan. There, the drug court utilizes a cognitive behavioral approach for addiction treatment. The goal is to change patterns of thinking and behavior resulting in a change in the way the juvenile feels. Avoiding people and places that trigger thoughts of using drugs or alcohol is one tool in the therapy toolbox, as is finding methods to reduce the ways that substance abuse is reinforced and identifying methods of positively reinforcing sobriety. In addition, dealing with an addict's thoughts and feelings when faced with situations that can lead to relapse is also an important part of the therapy, as one cannot always avoid the triggers that lead to drug use.

The SOAR drug court uses multi-systemic therapy (or MST) for drug court participants and their families. MST is an intense, family- and community-based treatment that helps the whole family deal with the juvenile's drug use and behavior. Therapists come into the home for several hours to observe and then make recommendations to improve parenting skills and enrich family relation-

One unusual aspect that plays an important role in the specialty court is the direct contact between the youth and the judge during monthly review hearings. When the juvenile comes in for his status hearing with the team, he interacts directly with the judge presiding over the court, and the hearings are conducted not at the bench but rather in a more informal setting with all team members.

ships. Intensive follow-up with several weeks of in-home sessions renders this treatment extremely effective. An extra benefit is that the youth often has better grades and exhibits improved behavior at school after completing the program. MST has been adopted by the juvenile probation department as an effective treatment method and is used exclusively by the department for family therapy needs. Other specialty courts also utilize this impactful method.

Harris County Juvenile Judge Mike Schneider of the 315th District Court oversees the drug court in Harris County, and his graduation ceremonies include the graduate tearing up a copy of the juvenile judgment as a symbolic gesture of completing the program and sealing the adjudication. Per the HCJPD's 2016 Annual Report, 75 percent of SOAR participants successfully completed the program.[5] Statistics from the probation department show that re-adjudication for a greater offense (recidivism) for drug court is about 14 percent (two youth out of 14 participants were re-adjudicated for a greater offense within a year of their supervision end date in 2015, the most recent year for which statistics are available).[6]

As we know, mental illness frequently runs through generations of a family. The youth may be presenting behaviors indicative of a mental illness that bring him to the attention of the criminal system, only to have the team learn that not only does the child suffer from mental illness, but so does a parent.

Mental health court

Another specialty court is the mental health court, which addresses a juvenile's diagnosed mental health issues that result in behavioral problems. In the criminal justice system, there are numerous instances where the symptoms (bad behavior) are addressed through punishment, but the genesis of that behavior is never examined or contemplated. The mental health court takes another approach.

This court differs from the others in that juveniles participate pre-adjudication while their cases remain pending. Successful completion earns the juvenile the ultimate legal benefit of having the pending juvenile case dismissed and his record sealed. The 2016 HCJPD Annual Report notes that 78 percent of participants successfully completed the program.[7]

As we know, mental illness frequently runs through generations of a family. The youth may be presenting behaviors indicative of a mental illness that bring him to the attention of the criminal system, only to have the team learn that not only does the child suffer from mental illness, but so does a parent. That parent may have never been diagnosed before. As with all of the juvenile specialty courts, the team members form a partnership between the team and the parent to connect the family with various agencies and resources to improve the juvenile's home life and ultimately his future. In situations where the team has learned that a parent or guardian also suffers from mental illness, the team provides medical assistance and resources to them as well. Many times, juveniles aided by this program have never received mental-health treatment and are not cognizant of their condition and the means of addressing it. Once a youth acknowledges, accepts, and addresses his illness, his behavior may be vastly altered via behavioral therapy, counseling, and mental health treatment. This is yet another way a specialty court is changing the lives of its juvenile participants.

Statistics from the probation department show that re-adjudication (recidivism) for mental health court is about 7 percent—two participants out of 29 were re-adjudicated on a greater offense within a year after their supervision end date in 2015, the most recent year for which statistics are available.[8]

Human trafficking court

Known as CARE Court, which stands for Creating Advocacy, Recovery, and Empowerment, this specialty court works with youth engaged in or at risk of sex trafficking. At any given time, this court works with 15–25 participants to provide a tailor-made approach to each youth.

Many envision "human trafficking" as occurring only in larger communities like Houston or Dallas, but it is a sad reality that sexual exploitation of children happens anywhere and everywhere. The CARE Court works with juveniles who are adjudicated on various offenses (often theft, failure to identify, or drugs) but have also been victims of sexual abuse, and such a program can be implemented in any county, large or small, with youths who have been prostitutes or who have endured sexual abuse at home. Identifying a victim of human trafficking or sexual exploitation can be a difficult endeavor, as it is not a topic that juveniles easily disclose. Sarah recalls a girl who had previous criminal cases but had not disclosed her history of sexual exploitation. It was only through careful observation and her defense counsel's in-depth questioning that she was identified as an ideal candidate for this specialty court.

Potential candidates are considered to participate pre- and post-adjudication, and the court team reviews each to see if the program is a good fit. Reasons for denial into the program include severe cognitive impairment, significant and active

gang involvement, and being current recruiters for trafficking. As a whole, juveniles who are admitted into the program have layers of issues including sexual abuse, drug addiction, and mental illness, to name a few. The goal of CARE Court is to help them rebuild their lives physically and emotionally. Sadly, not all youths with a history of trafficking are ready to participate in this program. The court requires that all participants have the desire to stop this behavior and are ready to accept help to better their lives.

Many of them start the program in a residential placement facility designed specifically for victims of trauma. A common characteristic of these juveniles is the propensity to run away from home or from the treatment facility and live on the streets. CARE Court recognizes this inclination and places restrictions to combat that tendency. Rather than punishing the youth for this proclivity, the program tries to prevent and address it before it happens. Youth have been placed in different treatment centers, including the Mingus Mountain Academy in Arizona, a highly structured residential treatment center, as well as at Freedom Place in Houston, a comprehensive care facility for victims of sex trafficking. Private placement allows the youths to disconnect from their current environments and work on their own recovery to change their mindsets and ultimately change their futures. In Harris County, the CARE Court is funded entirely by the Juvenile Probation Department.[9]

Sarah recalls one girl who frequently ran away from home and from unsecured juvenile facilities. Her probation officer and the team were very concerned that they would lose her back to the streets. Eventually, she was brought back into custody and sent to a secured rehabilitative facility that specialized in sexual trauma. Removing her from her environment—from her bad connections and social media—and allowing her to focus on healing provided clarity and inspired her desire to change. She ultimately emerged from the facility with a new, healthier, positive future. She faced her issues, worked on herself, and even was able to help others who had experienced the life she had been living. Had she not received the attention, guidance, and resources from CARE Court, we hate to imagine where she would be now.

This girl is just one of many examples of lives transformed by the program. According to the Harris County Juvenile Probation Department 2016 Annual Report, 11 youth participated in CARE Court in 2016, with a successful completion rate of 69 percent.[10] Once someone graduates from court, the child's criminal record is eligible for sealing at no cost to the family.[11] Statistics from the probation department show that the re-adjudication rate (recidivism) for human-trafficking court is about 18 percent—two participants out of 11 reoffended in 2015, the most recent year for which statistics are available.[12]

When Sarah was with the Harris County District Attorney's Office, she was the juvenile prosecutor assigned to CARE Court. By far, it was one of the most rewarding experiences she ever had as a prosecutor. Seeing the dedication and tireless drive of the team to help these juveniles was inspiring. Even though participants would experience setbacks, the team never lost faith in them or the program. The impact they made on the lives of those children was immeasurable. To see a girl join the program at her lowest point, filled with memories of trauma and feelings of worthlessness, and then later witness her graduate from the court with not only a new outlook and tools to make better life decisions but also an awareness of her own self-worth, was incredibly fulfilling.

Gang court

The final specialty court for juveniles in Harris County is gang court, also known as the Youth Empowerment Services and Supervision (YESS) program. Its goal is to reduce the juvenile's gang participation by redirecting his energy to healthier alternatives. Candidates participate in the court post-adjudication and must submit to a formal gang evaluation to determine if they realize that they need to make changes and are willing to fully participate in the program, as well as undergo a psychological evaluation.

A key consideration when evaluating a candidate for this program is whether he is committed to changing his lifestyle. Willingness and buy-in from the individual is a must for him to be successful. All these programs require much more from the juvenile than what is required in a regular probation, so it is definitely not an easy path. The attention and additional resources (treatment, classes, etc.) involve a higher level of commitment from the child and in many cases, from his family too.

Similar to the other specialty courts, a heavy rehabilitation component is key to the gang program. Once a youth is accepted, an outreach worker assists him with school, finding employment, and locating pro-social activities, such as

To see a girl join the human-trafficking court's program at her lowest point, filled with memories of trauma and feelings of worthlessness, and then later witness her graduate from the court with not only a new outlook and tools to make better life decisions but also an awareness of her own self-worth, was incredibly fulfilling.

sports or other hobbies, to direct his attention and time to pursuits safer than gang life. Also similar is that the program works through a multidisciplinary team to support the gang member with making positive changes in his life. The team can even provide access to resources for tattoo removal if the youth so requests. While the program is intense and closely monitored, the HCJPD reported in its 2016 Annual Report an 80-percent successful completion rate for gang court participants.[13] Statistics from the probation department show that re-referral (recidivism) for gang court is about 25 percent—two participants out of eight reoffended in 2015, the most recent year for which statistics are available.[14]

If we want to facilitate change in today's juveniles, we must look at the genesis of their criminal behavior. Working to redirect their focus, provide resources for treatment, and educate and aid their families to support and guide them results in a lasting imprint.

Conclusion

As the methodology of the juvenile justice system continues to evolve with the recognition that one-size punishment does not fit all juvenile offenders, specialty courts play a vital role in handling juvenile cases and addressing the needs of society's youth in crisis. If we want to facilitate change in today's juveniles, we must look at the genesis of their criminal behavior. Working to redirect their focus, provide resources for treatment, and educate and aid their families to support and guide them changes the individual and ultimately our communities for the better. We must remain cognizant of the goals of the juvenile system: protection of the public and treatment, training, and rehabilitation of the child.[15] ❇

Endnotes

[1] https://gov.texas.gov/uploads/files/organization/criminal-justice/Specialty_Courts_By_County_December_2016.pdf.

[2] https://gov.texas.gov/organization/cjd/specialty_courts

[3] According to information from the Harris County Juvenile Probation Department (on file with the editor).

[4] From an interview with the editor. Major thanks to Tom Hough, Flor Munoz, and Desirae T. Gonzalez with the HCJPD for their help in compiling statistics for this article.

[5] HCJPD Annual Report, 2016, p. 14 (available at https://hcjpd.harriscountytx.gov/Published%20Reports/Annual%20Report%202016.pdf).

[6] According to information from the Harris County Juvenile Probation Department (on file with the editor).

[7] HCJPD Annual Report, 2016, p. 14.

[8] According to information from the Harris County Juvenile Probation Department (on file with the editor).

[9] http://www.ckwluxe.com/innovative-court-in-houston-helps-victim.

[10] HCJPD Annual Report, 2016, p. 14.

[11] Tex. Fam. Code §54.0326.

[12] According to information from the Harris County Juvenile Probation Department (on file with the editor).

[13] HCJPD Annual Report, p. 14.

[14] According to information from the Harris County Juvenile Probation Department (on file with the editor).

[15] Tex. Fam. Code §51.01(1)–(2).

Juvenile drug courts are not just for big counties

Dean (not his real name) entered Guadalupe County's juvenile drug court when he was 16 because he was caught with marijuana.

By Kristy Armstrong
(at left) Guadalupe County Juvenile Probation Officer, Drug Court Unit, and
Tracy Franklin Squires
(at right) Assistant County Attorney in Guadalupe County

He was first placed into the deferred prosecution program (DPP for short), which usually lasts six months, but from the beginning he showed significant resistance to changing his behaviors or making improvements to his life. He continued non-compliance with his DPP written agreement and kept using drugs.

The drug court team (made up of a judge, a prosecutor, a defense attorney, a probation officer, a mental health professional, an administrative assistant, a school district representative, and community members) determined that Dean was not being successful in the DPP and should be terminated from the program. The team recommended that Dean be referred to court for adjudication and that he would be a good candidate for the Post Adjudication Drug Court (PADC) program instead, so he was adjudicated for marijuana possession and at the disposition hearing ordered into PADC until his 18th birthday.

Dean's first three months of the program were positive and successful. He stayed clean, attended school, and was cooperative at home. Then things changed: For the next eight months Dean struggled and could not stay away from drugs on his own. He had tried medication for depression and anxiety in the past but never stuck with it. He believed smoking marijuana was an easier fix. He continued to test positive for tetrahydrocannabinol (THC), the chemical compound in cannabis that causes a euphoric high. He started giving up on himself and was causing strain in his family too.

Then one day, something finally clicked, and Dean realized that this was not the life that he wanted for himself or his family. He knew he needed help. Dean was facing the choice of either substance abuse treatment or termination from the drug court. If he was unsuccessfully terminated, the Guadalupe County Attorney's Office would proceed with his case through the regular juvenile court system. If that happened, Dean would have been looking at a juvenile record.

At his next appointment, Dean asked the drug court probation officer to get him into a treatment program, and the drug court team supported this decision. He spent the next 90 days in a residential substance-abuse treatment program outside of our community, where he learned his triggers, as well as tools to fight these temptations and coping mechanisms. While in treatment, Dean graduated from high school early, and he made plans to go to heating, ventilation, and air conditioning (HVAC) school, work on his family connections, and build stronger positive relationships in his life. Upon completing the 90-day program, he returned home to his family and stayed off of drugs. He also completed a 30-day aftercare program with counseling. During that month, Dean was required to meet with his probation officer once a week and was also given a weekly drug test. He went on to graduate from the program exactly one month after his return from treatment (which happened to be his 18th birthday).

Dean is an example for our county's drug court team, his family, other juveniles in the drug court, and even himself that a person can get clean, stay clean, and focus on the things that really matter. He turned his life around with the help of the Guadalupe County Specialized Treatment Options Program (STOP) Juvenile Drug Court, and he is now on track for a successful, crime-free, drug-free life.

The STOP Juvenile Drug Court

The Guadalupe County Juvenile Board established the STOP Juvenile Drug Court in 2005 with the approval of a grant from the Office of the Governor's Criminal Justice Division. The idea for the program came from now-retired County Court-at-Law and

Juvenile Court Judge Linda Jones. Judge Jones identified juveniles who appeared before her with substance abuse problems and wanted to provide services to them through an alternative venue (that is, drug court). Judge Jones was the Juvenile Board Chair at the time and instructed juvenile services staff to research and apply for the original grant, which the juvenile board and commissioners court supported.

What we look for is whether a juvenile's offense is alcohol- or drug-related or if the juvenile was under the influence of drugs or alcohol at the time of the offense. If he was, he is automatically assigned to the drug court's probation officer to determine eligibility.

The court is meant for juveniles who are recommended for the program by either the prosecutor or probation officer. Juveniles charged with violent offenses or drug manufacturing or delivery are barred from participation in the court. What we look for is whether an offense is alcohol- or drug-related or if the juvenile was under the influence of drugs or alcohol at the time of the offense. If he was, he is automatically assigned to the drug court's probation officer to determine eligibility. The juvenile is then given a Substance Abuse Subtle Screening Inventory (SASSI) assessment, which identifies individuals with a high probability of substance abuse. The referred juveniles who score high on the SASSI and are willing to participate in the drug court qualify for the program. The juvenile is then staffed by the entire juvenile drug court team to determine if he is appropriate. The court has two tracks, a pre-adjudication deferred prosecution program (DPP) and a post-adjudication drug court (PADC).

A major difference between drug court and the regular juvenile docket is that the entire team participates in the process for drug court. The team meets monthly to staff the juvenile drug court cases, which means that the entire team discusses each child's progress as well as his home life and grades, attendance, and behavior in school. Then the team decides whether the juvenile needs help in any of these areas and what the help should be. For example, if the juvenile is doing poorly in school, do we need to secure a tutor? Or if he is having trouble concentrating, does he need an evaluation to see if medication would help? If the juvenile is not attending school, we find out why. If it's because the juvenile isn't getting enough sleep, do we need to work with the parents to create a sleep schedule or a specific bedtime? Does the juvenile need extra help at school (such as a special needs program, a limited schedule, a work-school combination, or even a GED program)?

Most juveniles in the drug court also participate in individual and family counseling and have psychiatric evaluations and medication management. The team works with the juveniles in every aspect of their lives, helping them learn social and other skills to improve their lives and their overall well-being so that they will not to go back to using drugs. Following each staffing, the juvenile and his parents are required to attend review hearings to discuss their status with the team members throughout all phases of the program.

Another big difference is that upon successful completion of drug court, the court used to pay the defense attorney to apply for sealing, the two-year waiting period for misdemeanors was waived, and waiting until the age of 19 for felonies was waived. These benefits no longer exist under the latest legislation, and the defense attorney on the team files the paperwork to seal the original charge and represents the juvenile at the hearing to seal. An additional difference is that the drug court follows the recommended guidelines and best practices based on the research by the National Drug Court Institute and the National Association of Drug Court Professionals, focusing on strength-based services that consider a balance of rewards and sanctions for compliance with the program's expectations.

Small-county challenges

We experience challenges in different areas of the program because we're a smaller county. For example, as far as the administration of the program, there are limitations on the numbers of drug court team members who can come from our community. While urban centers have infrastructures within the community that fully support all aspects of juvenile justice, small and medium-size cities often rely on the same people to wear multiple hats—there simply aren't many others wanting to work on the project. Some defense attorneys support the program by serving juveniles in the drug court, but they are also representing other youth so they cannot dedicate themselves full-time to the specialty court.

Likewise, our mental health providers end up playing multiple roles while serving our juveniles. As in many Texas communities, we don't have enough people to provide substance-abuse services to the juvenile offenders who need them. Our county, for example, does not have access to a child psychiatrist, whereas nearby Bexar County (home of San Antonio) does. We also experience economies of scale different from larger communities. While our population may be smaller than an urban or large county, families still need services to participate in the drug court.

There is no shortage of juveniles with drug or alcohol problems, and there hasn't been since the inception of the juvenile drug court. The population of the program varies: We have had as many as 20 and as few as six youth in drug court at a time. Currently, we have eight in the court. Our disqualifiers—mainly that we don't accept juveniles who have committed violent offenses—have limited whom we can accept into the juvenile drug court.

Initially the program was fully funded by a grant from the Governor's Office. That grant requires a 10-percent local match, and our county's juvenile board has always included this match in its budget, and with support of both the juvenile board and commissioners court, the grant has been submitted for renewal year after year. Funding cuts over the 12 years of the program's existence have reduced the number of placements paid out of the grant annually. These cuts will also reduce the grant-funded staff from two to one in the near future. Functions of the lost staffer will have to be absorbed by other people, giving everyone more work without additional compensation. If grant funding ever falls through, the plan would likely be to approach the commissioners court or juvenile board for continued funding.

Benefits of the court

One of the benefits of the court is it allows the drug court team to provide services to juveniles without criminalizing substance-abuse behaviors. This level of intervention reduces recidivism based on substance abuse without advancing a juvenile farther into the justice system. Research indicates that the farther a juvenile enters into the juvenile justice system, the higher the financial cost and the higher the recidivism rate.[1] This alternative court has the authority to address the juvenile's risks and needs and move him out of our system as soon as possible so that he can return to being (or become) a productive citizen.

When the late Professor Robert Dawson first authored the Juvenile Justice Code in the early 1990s, he helped to create an alternative to the Penal Code to treat juveniles differently from adults and remove the "taint of criminality"[2] from the juvenile justice system. Juvenile drug courts are a progression of that ideal, through which many more alternative courts have been implemented to include veterans courts, mental health courts, and family courts. All of these specialty courts serve populations with cost-effective strategies to allow citizens to remain in their counties and become successful without the involvement of law enforcement. Guadalupe County's STOP program boasts over 200 successful graduates since its inception, with only 38 re-offending since 2005. Of those re-offenders, 14 were new juvenile cases, and 24 were new adult cases.[3]

Anyone interested in starting a drug court in your own county should first talk to the local community (the defense bar, judiciary, juvenile probation, mental health professionals, and school district representatives) to determine if this type of alternative juvenile court would receive the support that it needs from all of the key players. We would also recommend going to the National Association of Drug Court Professionals website, www.nadcp.org, for free technical assistance in starting and developing a juvenile drug court. We truly see that juvenile justice is cost-effective—funding for it (and for juvenile drug courts in particular) is an investment, not an expense. With that as a starting block, support for this investment will not only save juveniles' lives but also save money in the long term by keeping these youngsters out of the adult criminal justice system.

Conclusion

In summation, juvenile drug courts offer treatment and support that juveniles require in all areas of their lives, including substance-abuse treatment, mental health, family relationships, dealing with stress, anger management, encouragement, mentorship, and coping with life's difficulties. With this much-needed guidance, many juveniles are diverted from the criminal justice system for life. ❇

There is no shortage of juveniles with drug or alcohol problems, and there hasn't been since the inception of the juvenile drug court.

Endnotes

[1] "Improving the Effectiveness of Juvenile Justice Programs: A new Perspective on Evidence-Based Practice." Center for Juvenile Justice Reform, Working Across Systems of Care, Georgetown University.

[2] "[T]o remove, where appropriate, the taint of criminality from children committing certain unlawful acts." Tex. Fam. Code §51.01 (2)(B).

[3] We don't have statistics on recidivism on juveniles with substance abuse who went through a regular docket. They simply don't exist.

Paying attention to jury charges

Please raise your right hand and repeat after me:

> "I [state your name] do solemnly swear that, in all of my jury trials, I will read the jury charge at least three times. I will read it once to make objections to its contents. I will read it a second time to be certain no necessary law is omitted. I will read it a third time to make notes about how I can use its contents to strengthen my jury argument.
>
> "I vow to stay informed about developments to the law concerning jury charges. I will not let an ill-prepared defense attorney or judge jeopardize the justice that I work so hard to achieve. I will not put myself in the position of calling a victim and telling him that his case must be re-tried because of an errant sentence that a jury may or may not have given any attention.
>
> "These things I swear, under penalty of death."[1]

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

When I was a baby prosecutor, I used to think of the jury charge as nothing more than a 20-minute monologue given by the judge prior to closing arguments. Time seemed to stand still as the judge read definitions from the Penal Code and gave the jury instructions on how to deliberate. Admittedly, I rarely paid attention during this time; instead of listening attentively, I would read over my notes for closing argument.

If I could go back in time to the early part of my career, I would have *a lot* of advice to give myself. One of the first things I would say is, "Jury charges are important. Put your notes away and pay attention." The jury charge (often called the jury instructions or charge of court) is a direct communication from the judge to the jury that explains all the law applicable to the case. Essentially, the jury charge is the very official way the court explains to the jurors what their job is and how they are supposed to do it. Isn't that worth paying attention to?

The second thing I would tell myself is to take the time to learn about the charge. Everything in it is there for a reason. I didn't realize just how little I knew about the law governing jury charges until I had the pleasure of serving on the State Bar's Criminal Pattern Jury Charge Committee. My experience on the committee has been enlightening to say the least. Understanding what is (and what is not) supposed to be in the jury charge is critical knowledge for prosecutors. Whether you are preparing the charge of the court yourself or are living the dream and the court is doing it herself, a basic understanding of its purpose and its construction will aid you immensely.

What is the purpose of a jury charge?

"The jury charge is the means by which a judge instructs the jurors on the applicable law."[2] The charge "must contain an accurate statement of the law and must set out all the essential elements of the offense."[3] The jury charge is supposed to do more than just avoid misleading or confusing the jury.[4] In fact, the Court of Criminal Appeals has stated that the function of the jury charge is to lead the jury and prevent confusion.[5]

Surprisingly, the Code of Criminal Procedure is light on details when it comes to the jury charge. The code discusses the jury charge and procedures for offering special charges and making objections in just two sections. The legislature spends more time discussing procedures for handling the jury once deliberations have begun than on the charge that governs them. At least the legislature made it clear that the court is not to provide any liquor to the jury once deliberations have begun.[6]

Texas Code of Criminal Procedure Art. 36.14 requires that in all jury trials, whether misdemeanor or felony, the court must prepare a written charge distinctly setting forward the law applicable to the case. The charge of the court is prohibited from 1) expressing an opinion on the weight of the evidence, 2) summarizing any testimony, or 3) men-

tioning any fact or argument that is designed to evoke an emotional response from the jury.

Art. 36.14 provides for defense objections to the charge only; these objections must be made in writing or dictated to the court reporter in the presence of the State's counsel. Defense counsel must distinctly specify each objection to the charge, including errors committed in the charge as well as errors committed by omissions from the charge. A defendant does not have to present a special or requested jury instruction to preserve an alleged jury charge error on appeal.

If we looked at the CCP alone, it would appear as if the State has no ability to object to the charge of the court. However, an examination of relevant caselaw makes it clear that the State can make objections or exceptions to the charge. Examples are surprisingly few and far between, but they exist.[7]

The CCP provides for both the State and defense to propose special charges to the court. As with objections and exceptions to the charge, these proposals for special charges must be made in writing or dictated into the record.[8] Special charges are to be incorporated into the main charge of the court, and the jury is not allowed to know that any special charge accepted into the main charge was requested by one of the parties.[9] If the court fails to respond to a requested special charge (or an objection to the charge), the requested charge or objection won't be deemed waived and can still be raised on appeal.[10]

Placed in the hands of lawyers, those two little sections in Chapter 36 of the Code of Criminal Procedure, predictably, have gone a long way. There are a few different series of pattern jury charge books available to prosecutors, defense attorneys, and judges that can guide us as to what should be in specific charges for specific offenses. If we compare these pattern charge books to each other, at first glance they appear to be pretty different. However, a closer comparison will reveal that they are remarkably similar in terms of content. The biggest difference between them is how they are organized. Whatever differences the series have, they tend to all contain the following:

- general statements of criminal law,
- the accusation paragraph,
- law applicable to the case,
- definitions,
- special charges,
- application of law to facts (application paragraph), and
- rules governing deliberation.

Let's look at each element in depth.

General statements of criminal law

Baby prosecutors get tons of advice as they are coming along. Like a lot of other new prosecutors, I was told early on in my career to not make a big deal about making some kind of courtroom faux pas or otherwise let my inexperience reveal itself. "Don't worry. The jury doesn't know better," they would tell me, and they were right. Most of the time, jurors will not have any experience with criminal law and courtroom procedure.

Most pattern charges recognize this fact and, consequently, a few paragraphs are dedicated to the more important principles of criminal law, many of which will have been covered in voir dire. For example, the presumption of innocence, the burden of proof, and the defendant's right not to testify are all principles typically discussed.[11] In this section of the charge, jurors are also instructed by the court about the need for a unanimous verdict as well as their ability to request that admitted exhibits be brought to the jury room during deliberation or have disputed testimony read back by the court reporter.

During closing argument, this part of the charge is not typically worth spending significant time explaining to jurors. Most of the principles will have been previously explained to them, and repeating the information yet again is going to detract from closing argument much more than that it will add anything. If there is a particular exhibit that a prosecutor feels is important and you really want to stress that importance to the jury, consider telling the jury in closing that the court's charge allows them to request that particular exhibit be sent back to them.

Understanding what is (and what is not) supposed to be in the jury charge is critical knowledge for prosecutors. Whether you are preparing the charge of the court yourself or are living the dream and the court is doing it herself, a basic understanding of its purpose and its construction will aide you immensely.

Accusation paragraph

Every jury charge must contain an accusation paragraph that states the offense to which the defendant has pleaded not guilty. The accusation paragraph must track the language of the indictment. Play close attention to this paragraph, especially if you are not drafting the charge of the court yourself.

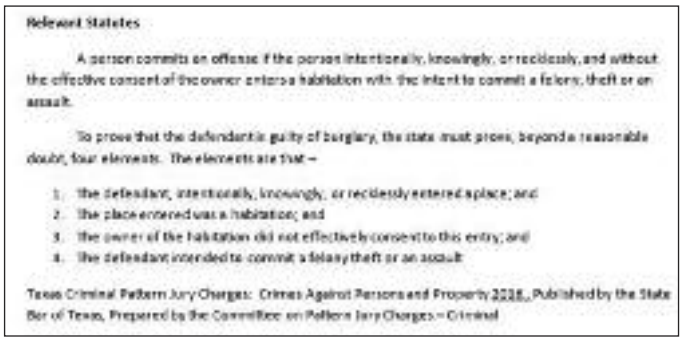
Law applicable to the case

The charge of court should have a section that discusses the statutory provisions applicable to the charged offense. The Penal Code provision that is the basis for the offense charged will always be one

of these statutes. If there is sufficient evidence to suggest that there is a defense applicable to the case, it should also be mentioned here.

There are differing opinions between the various charge books about how to present the relevant statutes in the jury charge. The State Bar's Pattern Jury Charge book will start with a description of the conduct required to commit the offense and then break the relevant statute into individual elements through the use of numbered points. Other charge books merely recite the elements of the offense as a single sentence.

Let's look at Burglary of Habitation for an example. The State Bar Pattern Jury Charge looks like the box, below.



Relevant Statutes

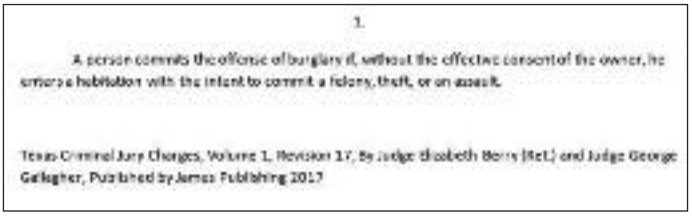
A person commits an offense if the person intentionally, knowingly, or recklessly, and without the effective consent of the owner enters a habitation with the intent to commit a felony, theft or an assault.

To prove that the defendant is guilty of burglary, the state must prove, beyond a reasonable doubt, four elements. The elements are that –

1. the defendant, intentionally, knowingly, or recklessly entered a place; and
2. the place entered was a habitation; and
3. the owner of the habitation did not effectively consent to this entry; and
4. the defendant intended to commit a felony theft or an assault

Texas Criminal Pattern Jury Charges: Crimes Against Persons and Property 2018, Published by the State Bar of Texas, Prepared by the Committee on Pattern Jury Charges – Criminal

The alternative, single sentence approach looks like the box below.



1.

A person commits the offense of burglary if, without the effective consent of the owner, he enters a habitation with the intent to commit a felony, theft, or an assault.

Texas Criminal Jury Charges, Volume 1, Revision 17, By Judge Elizabeth Berry (Ret.) and Judge George Gallagher, Published by James Publishing 2017

Whether to use a numbered breakdown of the elements or a single sentence is a matter of style, not substance. I have heard a handful of prosecutors and judges complain that the way certain pattern jury charge books break the offenses down into elements is arbitrary and amounts to a comment on the weight of the evidence, but I am unaware of any appellate court discussing a jury charge breaking down the relevant statutes in this manner. For anyone who might be concerned, the Court of Criminal Appeals has not-so-subtly endorsed the State Bar's Pattern Jury Charge books, which use the numbered approach.[12] Whatever style you end up choosing, make sure to format the application paragraph similarly. There isn't an appellate court case that says it's error to take the numbered approach in the law applicable to the case section and a single-sentence approach in the application paragraph, but arguing the charge to the jury is going to be a lot easier when there is parallelism between these two sections.

Definitions

The "law applicable to the case" includes the statutory definitions that affect the meaning of the elements of the offense.[13] Every statutory definition applicable to the case *must* be included in the jury charge.[14] The court has a duty to give these statutory definitions even when the defendant does not request them.

It can be tempting to include non-statutory definitions into the charge. Special, non-statutory instructions, even when they relate to statutory offenses or defenses, generally have no place in the jury charge.[15] If you include a non-statutory definition, it *will be error* even if the definition provided is a correct statement of the law.[16] If a non-statutory definition is included in the jury charge, the only question will be if the erroneous inclusion was harmful or not.

Special charges

Sometimes special charges will need to be submitted to the jury. Special charges are unusual—you won't see a special charge in every case you try. Common special charges include the instruction on the defendant's prior bad acts, the accomplice witness rule, and the use or exhibition of a deadly weapon.

When the evidence necessitates the inclusion of special charges, prosecutors should pay close attention to their contents. I strongly encourage prosecutors to spend time arguing special charges to the jury. Every special charge is given to the jury for a reason. If you don't spend at least a couple minutes of your closing to explain the special charge, you risk a jury trying to figure it out on their own and potentially reaching the wrong conclusion about the evidence. If you were able to admit evidence about the defendant's prior bad acts at trial to show an absence of mistake or motive, don't you want the jury to consider it for that reason? Use the special charge as a tool to bolster your argument. Show the jury why the evidence should be considered as evidence of motive and then point to the charge and remind them that the charge of the court gives them express permission to do exactly that.

Application of law to facts (application paragraph)

When it comes to jury charges, the application paragraph is really where the rubber meets the road. The application paragraph accompanies the abstract portion of the charge, applying the law and the specific charges alleged against the defendant to the evidence presented at trial.[17] The application paragraph must 1) specify "all of the conditions to be met before a conviction under such theory is authorized"; 2) authorize "a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers"; or 3) contain some logically consistent combination of such paragraphs.[18]

Dealing with indictment errors in the application paragraph. To no one's surprise, indictments may occasionally contain substantive errors. From time to time, an indictment containing a substantive error will be brought to trial. Luckily, caselaw pretty clearly states that the purpose of an indictment is to provide notice to the defendant. Because the indictment exists to provide notice, substantive errors contained therein can be cured by properly charging the jury in the application paragraph.

If the indictment alleges more than is required by statute, it may be possible to omit the extra language (called surplusage) from the application paragraph. Surplusage is defined as unnecessary words or allegations in an indictment that are not descriptive of what is legally essential to constitute the offense.[19] The deletion of surplusage is not considered an amendment of the indictment and does not implicate CCP Art. 28.10.[20] Some of you may remember that there used to be an exception to this rule of surplusage that said when an unnecessary allegation "is descriptive of that which is legally essential to charge a crime, the State must prove it as alleged though needlessly pleaded."[21] This exception has been overruled, and the test to determine whether the State must prove the needlessly pleaded term is one of materiality.[22]

Alternate manner and means within the application paragraph. Occasionally, you may try a case where alternate methods of committing a single offense have been alleged in the indictment. The Court of Criminal Appeals has held that it is proper for the jury to be charged in the disjunctive.[23] It is appropriate, where the alternate theories of committing the same offense are submitted to the jury in the disjunctive, for the jury to return a general verdict if the evidence is sufficient to support a finding under any of the theories submitted.[24] Do not submit alternate theories of committing the offense unless they are both charged in the indictment and supported by the evidence presented at trial.

Because the application paragraph is what authorizes a jury to convict, it is imperative that prosecutors pay close attention to it. The language of the application paragraph needs to track the language of the indictment. It also must be worded in such a way that the jury is not allowed to return a guilty verdict without finding every element of the offense beyond a reasonable doubt.

Review *Uddin v. State* to see a cautionary tale. In *Uddin*, the defendant was charged with and convicted of aggravated kidnapping. The application paragraph in *Uddin* set out the two elements of aggravated kidnapping disjunctively rather than conjunctively,[25] thus allowing the jury to find the defendant guilty if they believed beyond a reasonable doubt that he had "unlawfully, intentionally, or knowingly abduct[ed] [the complainant], without her consent, with intent to prevent her liberation by secreting or holding [the complainant] in a place where she was not likely to be found *or* with intent to violate or abuse [the complainant] sexually" (emphasis added).[26] To properly find the defendant guilty of aggravated kidnapping, the State was required to prove *both* 1) abduction—that the appellant intentionally or knowingly restrained the complainant with the intent to prevent her liberation by secreting or holding her in a place where she was not likely to be found—*and* 2) aggravation—that the appellant did so with the intent to violate or abuse her sexually. However, because the application paragraph charged in the disjunctive ("or") instead of the conjunctive ("and"), it allowed the jury to erroneously convict the defendant of first-degree aggravated kidnapping by finding *only* intentional and knowing abduction, a third-degree felony kidnapping.

Error in the applicationparagraph itself. If there is error in the jury charge and the defendant objects to it, the appellate court will reverse if the defendant suffers any harm.[27] Jury charge error to which the defense does not object at trial can still be reviewed on appeal, but on appeal, the conviction will be reversed only if the harm is egregious. If

If I could go back in time to the early part of my career, I would have a lot of advice to give myself. One of the first things I would say is, "Jury charges are important. Put your notes away and pay attention."

there is error anywhere in the jury charge, but especially in the application paragraph, it should be un-objected error that slips by the trial counsel for both the State and the defendant. If the defense objects to a supposed error in the charge, take time to research the issue and get it right the first time.

Because the application paragraph has been described as the "heart and soul" of the jury charge,[28] prosecutors could be forgiven for panicking when confronted with an error within one. However, all is not necessarily doomed. In examining the record to determine whether the charge error is egregious, appellate courts will consider 1) the entirety of the jury charge itself, 2) the state of the evidence, 3) counsels' arguments, and 4) any other relevant information revealed by the entire trial record.[29] This broad approach to examining errors can save your bacon when it comes to errors.

Because the application paragraph has been described as the heart and soul of the jury charge, prosecutors could be forgiven for panicking when confronted with an error within one. However, all is not necessarily doomed.

In *Marshall v. State*, the defendant was on trial for the offense of Assault–Impeding Breath. In the abstract portion of the charge discussing the law applicable to the case and the definitions, the court properly discussed "bodily injury." The charge omitted, however, "bodily injury" from the application paragraph itself. In its application paragraph, the court said that "the defendant, Patrick James Marshall, … did then and there intentionally, knowingly, or recklessly impede the normal breathing or circulation of the blood of Shawne Marshall by blocking the nose or mouth of Shawne Marshall with a pillow, and the said Shawne Marshall was then and there a member of the defendant's family or household."

While this omission was error, the court held it was not egregious harm, and the conviction was upheld. The harm wasn't egregious because the application paragraph required the jury to find a specific type of bodily injury. The error didn't deprive the defendant of any valuable rights, nor did it vitally affect his defensive theory.

Jury unanimity and the application paragraph. The Texas Constitution requires jury unanimity in all felony cases.[30] The Code of Criminal Procedure establishes the requirement for unanimity in all criminal cases.[31] Unanimity within the context of a jury charge means that each and every juror agrees that the defendant committed the same, single, specific criminal act.[32] A jury charge that allows for a non-unanimous verdict concerning what specific criminal act the defendant committed is error.[33] When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts.[34]

A poorly worded application paragraph is not just confusing to the jury. It is possible to word an application paragraph in such a way that it allows a jury to return a verdict of guilty without being unanimous as to the actual crime the defendant committed. The general rule is that if the State is alleging a single *offense* to have been committed using different manner and means, the jury is not required to be unanimous as to the manner and means. However, if the indictment alleges the defendant committed one of two or more acts, the jury has to be unanimous as to *which* act was committed.

In *Ngo v. State*, the defendant was charged with credit card abuse after he presented a woman's stolen credit cards to the manager of a karaoke bar who just so happened to be the woman's ex-husband.[35] The indictment contained three paragraphs alleging three separate criminal acts: stealing a credit card, receiving a stolen credit card, and fraudulently presenting a credit card to pay for goods or services.[36] In *Ngo*, the application paragraphs read:

> "Now, if you find from the evidence beyond a reasonable doubt that [the appellant] on or about the 13th day of December, 2002, did then and there unlawfully, intentionally, or knowingly steal a credit card owned by the cardholder, Hong Truong, with intent to deprive the cardholder of the property and without the effective consent of the cardholder; *or*
>
> "If you find from the evidence beyond a reasonable doubt that [the appellant] on or about the 13th day of December, 2002, did then and there unlawfully and knowingly receive with intent to use a credit card owned by cardholder, Hong Truong, knowing the credit card had been stolen; *or*
>
> "If you find from the evidence beyond a reasonable doubt that [the appellant] on or about the 13th day of December, 2002, with intent to obtain a benefit fraudulently, did use or present to Hanh Nguyen a credit

card knowing the use was without the effective consent of the cardholder, Hong Truong, namely without consent of any kind, and knowing that the credit card had not been issued to the defendant, *then you will find [the appellant] guilty as charged in the indictment* (emphasis added)."

On appeal, the State argued that this application paragraph merely laid out alternate means of committing a single offense or, alternatively, the application paragraphs "merely showed repeated instances of commission of the offense of credit card abuse."[37] The Court of Criminal Appeals completely rejected this argument. The Court held that this application paragraph alleged three distinct criminal acts, namely 1) stealing a credit card, 2) receiving a credit card knowing that it was stolen and acting with the intent to use it, and 3) presenting a credit card with the intent to obtain a benefit fraudulently, knowing the use was without the effective consent of the cardholder.

Because three separate criminal acts were alleged, it was error not to instruct the jury that jurors must be unanimous as to which specific act the defendant committed. In fact, unanimity was mentioned only in the boiler-plate instructions dealing with the selection of the jury foreman. Ultimately, Ngo's conviction was reversed as the court found that this error in the charge was egregious under *Almanza*.

So, what can we do to prevent repeating the events of *Ngo*? If you have a single-count indictment, it's pretty easy. All you must do is make sure that the language of the application paragraph and the verdict form don't allow the jury the opportunity to find the defendant guilty of the offense charged and any lesser included.

If an indictment alleges multiple counts or contains multiple paragraphs, it can get a little bit trickier. Step One begins with the indictment. Compare it closely with the criminal statute on which it's based. If the indictment alleges merely different manner and means of committing the exact same offense, then the jury charge can have a disjunctive application paragraph without having to worry about a jury unanimity issue. However, if the indictment alleges different offenses, you must include language in the jury charge that says the jury must find each individual offense beyond a reasonable doubt.

Be extra wary if you are pursuing an indictment that alleges multiple violations under the same statute. Several different behaviors can all be criminalized under the same statute and be called the same offense, and it's not the same as alternate manner and means of committing the same offense. For example, in *Ngo*, the Court of Criminal Appeals said that "stealing a credit card on Monday is not the same specific criminal offense as receiving a stolen credit card on Tuesday or presenting a stolen credit card to a bartender on Wednesday. Indeed, stealing a credit card at 9:00 a.m. on Monday is not the same specific criminal offense as receiving a stolen credit card at 9:00 a.m. on Monday. These are all credit card abuse offenses, to be sure, but they are not the same, specific credit card abuse criminal acts committed at the same time or with the same *mens rea* and the same *actus reus*."[38]

Rules governing deliberation

The jury charge will typically wind down with a brief section on rules governing the jurors' deliberation. This section will instruct the jurors to elect a foreperson, advise them on how to communicate with the court, and tell them not to discuss the case unless all members of the jury are present, among other things.

Conclusion

The jury charge is the only source of information that jurors can consult when they hit a roadblock during deliberations. It's our duty as prosecutors to be informed about the legal requirements of the jury charge. Only when we fully understand the rhyme and reason of the jury instructions can we use it to strengthen our jury arguments and insure that our hard-won convictions are not overturned because of a charging error. ❇

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Endnotes

[1] I realize that death seems like a pretty steep penalty for a mistake in the jury charge. I've been reading *Game of Thrones* lately and George R. R. Martin has convinced me that there is no other appropriate punishment for oath-breakers.

[2] *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012).

[3] *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995).

[4] *Reeves v. State*, 420 S.W.3d 812, 817-19 (Tex. Crim. App. 2013).

[5] *Id*.

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[6] Tex. Code Crim. Proc. Art. 36.21.

[7] See *Davis v. State*, 268 S.W.3d 683, 710 (Tex. App.–Fort Worth 2008, pet. ref'd) (discussing the State's objections to the charge of the court at trial).

[8] Tex. Code Crim. Proc. Art. 36.15.

[9] *Id*.

[10] *Id*.

[11] If the defendant ends up taking the stand during the trial, be sure this paragraph is removed from the jury charge. It's unlikely an appellate court would find harmful error if it remains, but why leave anything unnecessary in the charge for the jury to needlessly confuse themselves with?

[12] See *Gelinas v. State*, 398 S.W.3d 703, 711 (Tex. Crim. App. 2013) (Cochran, J., concurring) (suggesting that a trial court "should 'chunk' information and give it to the jury in … short, digestible pieces as shown in the Texas Criminal Pattern Jury Charges volumes published by the Texas State Bar").

[13] *Ouellette v. State*, 353 S.W.3d 868, 870 (Tex. Crim. App. 2011).

[14] *Villarreal v. State*, 286 S.W.3d 321, 329 (Tex. Crim. App. 2009).

[15] *Walters v. State*, 247 S.W.3d 204, 211 (Tex. Crim. App. 2007).

[16] See *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012)(holding that the trial court erred in providing a definition of the term "operate" for purposes of driving while intoxicated). See also *Baggett v. State*, 367 S.W.3d 525, 527 (Tex. App.–Tyler 2012, pet. ref'd)(holding that the trial court erred in providing a definition for the term "normal use" for purposes of driving while intoxicated).

[17] *Reeves*, 420 S.W.3d at 817.

[18] *Vasquez*, 389 S.W.3d at 367.

[19] See *Brown v. State*, 843 S.W.2d 709, 713–14 (Tex. App.–Dallas 1992, pet. ref'd).

[20] *Hall v. State*, 62 S.W.3d 918, 919 (Tex. App.–Dallas 2001, pet. ref'd).

[21] *Eastep v. State*, 941 S.W.2d 130, 134 n. 7 (Tex. Crim. App. 1997), overruled on other grounds.

[22] See *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001).

[23] *Vasquez v. State*, 665 S.W.2d 484, 486-487 (Tex. Crim. App. 1984).

[24] *Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1987).

[25] *Uddin v. State*, 503 S.W.3d 710, 714 (Tex. App. – Houston [14th Dist.] 2016, no pet.).

[26] *Id*.

[27] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984).

[28] *Vasquez*, 389 S.W.3d at 367.

[29] *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016).

[30] Tex. Const. Art. V, §13.

[31] See *Francis v. State*, 36 S.W.3d 121, 126 (citing Tex. Code Crim. Proc. Arts. 36.29(a), 37.02, 37.03, 45.034-45.036).

[32] *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005).

[33] *Francis*, 36 S.W.3d at 125.

[34] *Id*. ("the unanimity requirement is undercut when a jury risks convicting the defendant of different acts, instead of agreeing on the same act for a conviction") (citing *United States v. Holley*, 942 F.2d 916, 925 (5th Cir. 1991)).

[35] Tex. Penal Code §32.31.

[36] *Ngo*, 175 S.W.3d at 741.

[37] *Id*. at 743.

[38] *Id*. at 745.

Management is downright hard!

As Rob Kepple, TDCAA's Executive Director, wrote in one of his past columns in this journal, prosecutors are often promoted because they have had success in the courtroom, not because they're great leaders.

By Laura Nodolf
District Attorney in Midland County

I remember accepting my promotion to trial team chief with enthusiasm and thinking more of the honor associated with my courtroom success than what the job entailed. I quickly discovered that I had absolutely no clue how to "manage" prosecutors. For years, all I had to do was manage my cases and schedule. Now, my time was split among three different caseloads and schedules. My time became my team's time. Soon, my team's time took up so much of my own that I felt like I was falling behind. I became a supervisor who managed the dockets and daily work of a team. In need of desperate help, I attended general management and civil practice courses. While I gained helpful knowledge, I never felt the training addressed the issues and pressures present in a prosecutor's office.

The reality is I was not alone. Prosecutors all over the state were expressing the need for training directed toward management in prosecutors' offices. When the announcement was made that the Prosecutor Management Institute (PMI) would launch in March 2016, I was ready to go! At the time, I had been promoted to First Assistant and was campaigning to serve as the next District Attorney in Midland County. After my 2016 swearing in, I came back to the office and found a note from my predecessor, Teresa Clingman. It simply read, "Laura, you earned it! Now—lead."

By that point, I had firsthand experience addressing conflict, personnel issues, and communication styles, but I knew I could do better. I knew my team could do better. For myself and my management team, it is not enough to be good at management—we also need to be leaders. Most people do not wake up one morning to find that they are a good manager or leader. Rather, they work on their skills to hone them one baby step at a time. For my team, the first step was to attend PMI's Fundamentals of Management course, which was graciously hosted by the Williamson County Attorney's Office in March.

When you first mention management training to people, they think of holding hands around a campfire, roasting marshmallows, trust falls, and touchy-feely topics. PMI is not like that. Instead, it is like getting a tool belt with *a lot* of tools. This journal does not have enough pages to cover all the topics in PMI. That said, here are the top three tools I took away from it:

1. My communication style.

In the Midland County District Attorney's Office, certain individuals manage the day-to-day work but also help collaborate and execute whatever newly conjured crazy idea I have. Additionally, the trial team chiefs manage daily work but also act as leaders because they are constantly teaching and role-modeling. Both managers and leaders require good communication skills. If you cannot communicate

Everyone from the Midland County DA's Office who attended the PMI training (left to right): Whitney Griffith, Laura Nodolf, Andrew Van der Hoeven, Jennifer Lively, Jana Anderson, and Tim Flathers.

your message to your management team and the office, you are failing.

When was the last time you stopped and thought about how you communicate? I am not introspective so I had not given much thought to how I communicate or how people hear me. The PMI training forced me to look at my communication style so I can communicate in a way that is the most productive for myself and the office. Additionally, PMI allowed me the opportunity to find out how the members of my team communicate. I realized that I may ask someone to complete a task that I think is simple, but that person needs more details to complete it. Some individuals routinely need verbal affirmation that what they are doing is right; for others, knowing that their continued loyalty to the organization and their ideas are valued are what encourage them to stay. While it may sound simple, managers and leaders need to actively work on their communication to make it effective.

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2. People want to be heard and want their managers to listen.

Has someone ever come into your office while you are in the middle of a project and started talking to you? Do you keep typing, or do you stop to listen? I am very guilty of claiming that I am listening but I continue typing at the same time.

Actively listening to a person takes time, time we may not feel we have. However, that person came to you for a reason, and leaders need to listen with our whole attention. After listening, we need to let the speaker know that she has been heard. Would you ever want someone to leave the office because she felt like you did not value what she had to say? The tool of listening may make the difference between retaining a valuable employee and watching her walk out the door.

3. It's OK to admit you don't know everything.

In one exercise, we were handed a stack of 15 cards containing a variety of topics and skills relevant to prosecutors' offices, and we were asked to honestly assess our own proficiency in those areas as either "beginner," "intermediate," or "advanced" level. As the elected—and with years of prosecution experience behind me—my initial thought was that I should have a tall stack of "advanced" cards. I studied them with brutal honesty and decided only three belonged in my advanced stack. Three! Actually, I am OK with three. It is OK to admit that you do not know everything or there are areas where you need improvement.

For my team and I, PMI was just the start. Fortunately, the Texas District and County Attorneys Foundation has recognized the need to work with offices on intermediate and advanced workshops, and my hope is that with the tools from PMI and future training, I can live up to the directive, "Now—lead." ❇

‘SLAPP’ back against frivolous suits from former employees

The public duties of county personnel now intersect with a relatively new statute in Texas: The Texas Citizens Participation Act, or TCPA.

By Andrew Wipke and Morgan Vaughan
Assistant Criminal District Attorneys in Lubbock County

This statute was intended to protect citizens from abusive lawsuits when they address certain activities considered key to democracy, but lately, employers are using it to dismiss suits from former employees. The next time your office receives notification of such a lawsuit, TCPA may be a potential defense.

The TCPA is an Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. As of January 2018, 28 states, including Texas, have such laws.[1] Anti-SLAPP laws are designed to provide early dismissal of lawsuits filed against citizens for exercise of their First Amendment rights. In Texas, the TCPA was enacted in 2011, codified in Chapter 27 of the Texas Civil Practice and Remedies Code, and intended to preserve citizen participation in democracy and reduce the filing of frivolous lawsuits aimed at silencing citizens who are participating in the free exchange of ideas.[2]

Why we should care

The TCPA is a vehicle for dismissing lawsuits where a citizen or the media is sued for making statements concerning a matter of “public concern,”[3] which is defined as an issue relating to:

1) health or safety;
2) environmental, economic, or community well-being;
3) the government;
4) a public official or public figure; or
5) a good, product, or service in the marketplace.[4]

The TCPA provides litigants with a mechanism for quickly dismissing these retaliatory lawsuits, staying discovery, and awarding these citizens attorney’s fees and costs upon dismissal of the suit.[5] Additionally, if the trial court overrules the litigant’s motion to dismiss pursuant to TCPA, the litigant is entitled to an interlocutory appeal. Further, the court may award sanctions against the party who brought the legal action.

The TCPA has been broadly and successfully used as a defense in a variety of cases not originally envisioned;[6] most important to those of us in prosecutor offices is the trend of employers using the TCPA as a defense against lawsuits brought by former employees whose job duties fall into the category of a public concern.

Recent developments

In *ExxonMobil Pipeline Company v. Coleman*, a former employee sued his employer and supervisors for defamation, civil conspiracy, and other torts alleging his supervisors made false statements to his employer about him.[7] ExxonMobil moved for dismissal of the lawsuit asserting the TCPA as a defense. The case went to the Supreme Court of Texas, which held that the TCPA defense applied to the statements by the supervisor and investigator about the employee’s failure to record the volume of petroleum products and additives in the storage tanks as the risk of an oil spill is a matter of public concern. Specifically, the Court held the recording of the oil volume is a process completed “to reduce the potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground.”[8] The Supreme Court further stated that communications made in connection with environmental, health, safety, and economic concerns fall under the TCPA.

In light of this developing caselaw, governmental practitioners defending against employment suits should consider using the TCPA when responding to defamation, libel, or slander suits by former employees.

The Supreme Court overruled the finding by the Dallas Court of Appeals that the communications among the ExxonMobil employees "had only a tangential relationship to health, safety, environmental, and economic concerns" and related to "only a personnel matter," as they were related to "job performance" and did not explicitly deal with health, safety, the environment, or Exxon's economic interests.[9] Indicating the TCPA's broad applications, the Supreme Court stated, "the court of appeals improperly narrowed the scope of the TCPA by ignoring the Act's plain language and inserting the requirement that communications involve more than a 'tangential relationship' to matter of public concern."[10]

Similarly, in two other employment law cases, plaintiffs in the healthcare field filed suit against their employers alleging that the employers made negative statements about the competency and skills of their employees.[11] In one of these cases from the First Court of Appeals, *Memorial Hermann Health System v. Khalil*, the court stated:

> "Whether a privately-employed person satisfactorily performs her job—while an important issue to the employer—is generally not a matter that would be considered a public concern for First Amendment purposes. But the TCPA defines '[m]atter of public concern' to include issues related to 'health or safety,' and statements concerning a healthcare professional's competence relate to matters of public concern under the TCPA."[12]

ExxonMobil and *Memorial Hermann* held that statements made by supervisors about their employees' performance of duties transform personnel matters into matters of "public concern." Consequently, these matters would be subject to similar dismissals in the event government employees filed suits based on statements made by their employers about them or their job performance.

Governmental employees are not immune from litigation involving matters of public concern. In *Brady v. Klentzman*,[13] the son of a chief deputy sheriff in Fort Bend County brought a libel action against a reporter and a newspaper for publishing an article detailing interactions between law enforcement and the deputy's son. In a review of the multi-year defamation and libel proceedings from lower courts, the Supreme Court of Texas noted public matters include "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions," and further, that "the disclosure of misbehavior by public officials is a matter of public interest." [14] While the court was not specifically applying TCPA in the *Brady v. Klentzman* case, as the TCPA was enacted after the publication of the newspaper article, the Court held the conduct of a government employee—as well as his children—falls into the definition of a public concern. [15] This decision has implications for government practitioners, especially in employment law contexts, because of the successful use of the TCPA as a defense by other employers whose employees also engage in duties which are of "public concern."

What this means for civil practitioners

It is clear public employees are treated differently from private employees, but private employers' ever-expanding use of the TCPA defense has implications for government employers who are sued by former employees. Almost every county employee's duties may fall into the category of a "public concern," including law enforcement officers, prosecutors, investigators, deputy district and county clerks, court coordinators, treasurers, and tax assessors. Also, the holding in *Brady v. Klentzman* that statements regarding the conduct of a deputy and his family fall into the definition of a "matter of public concern" may affect one's analysis of employment-related issues with deputies and other law enforcement categories of employees.

In light of this developing caselaw, governmental practitioners defending against employment suits should consider using the TCPA when responding to defamation, libel, or slander suits by former employees.[16]

Procedurally, the TCPA framework permits a defendant or a litigant facing a countersuit to file a motion to dismiss pursuant to TCPA no later than the 60th day after the date of service of the legal action. Upon the motion's filing, all discovery is suspended until the court has ruled on the motion. Generally, the court then has 60 days within which to hold a hearing. At the hearing, the party moving for dismissal under TCPA must show by a preponderance of the evidence the claim against it "is based on, relates to, or is in response to the defendant's exercise of the right of free speech, the right to petition, or the right of association."[17] The TCPA defines the "exercise of the right of free speech," as a "communication made in connection

with a matter of public concern" and "public servant" includes "an officer, employee, or agent of government."[18]

After the defendant has met his burden, the burden shifts to the plaintiff to establish by clear and specific evidence a *prima facie* case for each essential element of the claim in question.[19] According to the Texas Supreme Court, "even if the plaintiff satisfies the second step, the court will dismiss the action if the defendant establishes by a preponderance of the evidence each essential element of a valid defense" to the plaintiff's claim.[20]

Conclusion

While TCPA will not be applicable to every case, the potential for its use as a defense to suit from former employees is a trend governmental practitioners should recognize and consider when they are analyzing new litigation filed against them. ❇

Endnotes

[1] These 28 states include Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Tennessee, Utah, Vermont, Washington, District of Columbia and Guam. The Media Law Resource Center, Anti-SLAPP Statutes and Commentary, http://www.medialaw.org/topics-page/anti-slapp (last visited Apr. 4, 2018).

[2] *Id.*; House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2973, 82nd Leg., R.S. (2011).

[3] Tex. Civ. Prac. & Rem. Code §27.001(1) states that communication includes the making or submitting or a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

[4] Tex. Civ. Prac. & Rem. Code §27.001(7).

[5] Tex. Civ. Prac. & Rem. Code §§27.001–27.011.

[6] *Watson v. Hardman*, 497 S.W.3d 601, 603 (Tex. App.–Dallas 2016, no pet.) (defamation); *Pena v. Perel*, 417 S.W.3d 552 (Tex. App.–E l Paso 2013, no pet.) (slander and defamation); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 686 (Tex. App.–Houston [1st Dist.] 2013, pet. denied) (defamation); *Avila v. Larrea*, 394 S.W.3d 646, 649 (Tex. App.–Dallas 2012, pet. denied) (defamation); *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *1 (Tex. App.–Waco May 2, 2013, no pet.) (mem. op.) (defamation).

[7] *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017).

[8] *Id*. at 901.

[9] *ExxonMobil Pipeline Co. v. Coleman*, 464 S.W.3d 841, 846 (Tex. App.–Dallas 2015), rev'd, 512 S.W.3d 895 (Tex. 2017).

[10] *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017).

[11] *Mem'l Hermann Health Sys. V. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645, at *5 (Tex. App.–Houston [1st Dist.] Aug. 8, 2017, pet. denied) (anesthesiologist sued health care system for defamation, tortious interference with contract, conspiracy, intentional infliction of emotional distress, and age discrimination following corrective action employment plan and failure to recredential anesthesiologist); *Lippincott v. Whisenhunt*, 462 S.W. 3d 507 (Tex. 2015) (nurse anesthetist brought action against administers at medical facility for allegedly defamatory emails).

[12] *Mem'l Hermann Health Sys.*, 2017 WL 3389645, at *5 (internal citations omitted).

[13] *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017), reh'g denied (June 2, 2017).

[14] *Id.* at 884.

[15] *Id*. at 885.

[16] *Watson v. Hardman*, 497 S.W.3d 601, 603 (Tex. App.–Dallas 2016, no pet.) (defamation); *Pena v. Perel*, 417 S.W.3d 552 (Tex. App.–El Paso 2013, no pet.) (slander and defamation); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 686 (Tex. App.–Houston [1st Dist.] 2013, pet. denied) (defamation); *Avila v. Larrea*, 394 S.W.3d 646, 649 (Tex. App.–Dallas 2012, pet. denied) (defamation); *Ramsey v. Lynch*, No. 10-12-00198-CV, 2013 WL 1846886, at *1 (Tex. App.–Waco May 2, 2013, no pet.) (mem. op.) (defamation).

[17] Tex. Civ. Prac. & Rem. Code §27.005; *ExxonMobil Pipeline Co.*, 512 S.W.3d at 898; *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015).

[18] Tex. Civ. Prac. & Rem. Code §27.001.

[19] *Id*. §27.005(c); ExxonMobil Pipeline Co., 512 S.W.3d at 899.

[20] *Id*.

It is clear that public employees are treated differently from private employees, but private employers' ever-expanding use of the TCPA defense has implications for government employers who are sued by former employees.

Prosecutors and police

"In the criminal justice system, the people are represented by two separate yet equally important groups: the police, who investigate crime, and the district attorneys, who prosecute the offenders."
—opening credits of the TV show *Law & Order*

By Bill Wirskye
First Assistant Criminal District Attorney in Collin County

Sometimes it's easy for prosecutors to grow frustrated with law enforcement in their jurisdictions. I know this because it happened to me recently. On some level, this frustration on our part is understandable. After all, officers are involved in every case we handle, and frequently we do not see eye-to-eye with them on important issues, like whether they have brought us a "strong" case to prosecute. They second-guess our prosecutorial performance and decision-making, even as we "Monday-morning quarterback" their police work. These constant friction points will test any relationship we have with local law enforcement—whether it is at the agency level or on a personal basis. It can also try a prosecutor's patience and infect our attitude.

Recently, I found myself very frustrated while dealing with some of our local officers on several issues. Despite my best intentions, it seemed that every interaction we had was tense, negative, and counterproductive, and the more I tried to work cooperatively with the officers, the more I made matters worse. Ultimately, I felt that certain officers were questioning my motives and commitment. Even though I wanted to fight crime with them side-by-side like the fictional characters on *Law & Order*, I had lost my patience and developed a frustrated attitude that bled over into all my other interactions with law enforcement. I knew I had to do something because my "infected" bad attitude was simply unacceptable.

Then, just as I began to reset my thinking, something horrible happened. On February 7, 2018, Richardson Police Officer David Sherrard was murdered in the line of duty.[1] This outrageous crime immediately put things back into the proper perspective for me. At the very instant I heard that a local officer had been shot, I remembered the deep respect I have always had for the profession of policing and how proud I am to work with officers every day fighting the good fight. Even though I did not know Officer Sherrard personally, I was filled with the immense gratitude I have always felt for the brave men and women of law enforcement who put their lives on the line for us every day. I was also somewhat ashamed of myself. I had lost sight of several of my core beliefs about law enforcement, and I had allowed myself to get frustrated with officers over several issues that I could have easily backed down on, or at least backed away from.

I resolved to recommit to finding a mutually acceptable solution to the issues I had worried about. My relationship with law enforcement was simply too important to jeopardize. I reminded myself that even though prosecutors and officers are not part of the same team, we are almost always on the same side—the right side. The people we both represent are counting on us to work through any issues or disagreements and find solutions on their behalf.

Here are a few observations about prosecutors and police that I've been reflecting on these last few months.

It's all about relationships and reputations.

When it comes to getting along with law enforcement at either the agency level or the personal level, it's all about relationships. Nothing can turn difficult conversations or meetings into a productive collaboration like a solid, pre-existing relationship based on mutual trust and a belief that both parties are committed to the same goal: getting the bad

guys. If law enforcement trusts you and officers believe that you are committed to fighting crime, they will accept decisions and results they don't necessarily agree with. It is incumbent upon us as professional prosecutors to develop these relationships.

Building a good relationship with law enforcement is never an accident. Solid relationships and reputations can be built only through a sustained commitment to formal and informal interactions with agencies and officers. At an agency level, semi-regular meetings with local law enforcement leaders are useful to discuss items of mutual concern.[2] On a personal level, prosecutors can take advantage of formal interaction opportunities, such as pre-trial prep meetings, keeping officers informed on the status of cases (more about that below), or answering questions for law enforcement.[3] Informal opportunities are also plentiful for most prosecutors: police ride-alongs,[4] extending a simple courtesy (such as helping an officer get to the right court for his case), or taking a few extra minutes for a non-work conversation with an officer (such as asking about family, hobbies, pets, etc.). Regardless of the type of interaction, it's never a bad idea to simply thank an officer for his work. This type of unexpected and unsolicited gratitude will help a prosecutor build relationships with police officers.

Whether we like it or not, each prosecutor also has a reputation among local law enforcement. A good reputation is built one relationship at a time, so our reputation will largely be based on the quality of our individual relationships with the officers we know. A good reputation with these officers will help us in difficult conversations with officers we *don't* know. Conversely, if we have a bad reputation among law enforcement (i.e., "He doesn't care what we think"), those same conversations will be exponentially more difficult. That's the power of our reputation. And, good or bad, our reputation is almost always in the conversation with us whether we know it or not. Often, if I'm meeting with an officer whom I've never met, he will tell me that he asked around about me in preparation for our conversation. I know that if officers are telling me this, I passed my "reputation check" and we will likely have a productive conversation. That's a great feeling as a prosecutor—it tells me that at least some officers I know have vouched for me within the tight-knit world of police officers.

Always account for the officer's interest in his case.

As prosecutors, we are always too busy, and we always dread having yet another difficult conversation. However, this is no excuse to keep from contacting the officers involved in our cases, both to seek their input and to keep them informed. To their credit, most officers are interested in the outcomes of their cases, and you can bet that they find out what happened on a case even if we don't tell them, especially if it's a less than optimal outcome.

These input and update conversations are crucial to both the case and in building trust with officers, and we can often learn crucial information not reflected in a report if we just take the time to pick up the phone or send a quick email. I believe we also owe our officers the courtesy of an update on a case, especially if it's "bad news."[5] We can't avoid difficult conversations with officers because we think the news might upset them. On the contrary, it's exactly these types of hard conversations we *should* be having. Such conversations build trust, and sometimes they will offer the opportunity for a teachable moment.[6]

I also use these conversations as a way to express my gratitude to law enforcement for their willingness to do a difficult and dangerous job. I started this practice a few weeks after the July 2016 "Dallas Ambush" that claimed the lives of five local police officers.[7] I was presenting to a room full of officers, and wanting to acknowledge my gratitude to them, I started off my presentation by thanking those in the class on behalf of prosecutors everywhere. In response, I got several funny looks from the officers up front. When I asked about the funny looks, the officers told me that no prosecutor had ever thanked them before. Being somewhat surprised by this and not wanting to believe them, I then asked the entire class for a show of hands: "Who here has recently received thanks from a prosecutor?" Sadly, no hands went up. I decided then and there to take every opportunity I could to express my thanks to officers, and I encourage every Texas prosecutor to follow suit. These input and update conversations are a great chance to say "thanks."

Understand that officers and prosecutors live in different worlds.

Cops are from Mars and prosecutors are from Venus.[8] What I mean by that is that cops and prosecutors operate in two somewhat different environments. Officers live on Planet Probable Cause while we dwell on Planet Reasonable Doubt. While we

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Whether we like it or not, each prosecutor also has a reputation among local law enforcement. A good reputation is built one relationship at a time, so our reputation will largely be based on the quality of our individual relationships with the officers we know.

share a common goal (getting the bad guys), sometimes we are separated by our differing burdens of proof. Cops generally see probable cause (the arrest) as their finish line, while we generally see beyond a reasonable doubt (the conviction) as ours. Their *finish* line is our *starting* line. Having these two perspectives can cause friction if we are not careful. Add to the mix that prosecutors are addicted to evidence (we are always craving more), and I hope you can start to see the potential for misunderstandings and hard feelings in the everyday conversations we have with officers.

A common and problematic scenario goes something like this: The police file a case with us. They are (rightly) proud of the fact that their investigation thus far has led to probable cause and an arrest (they've crossed their finish line). When we (the "evidence addicts") discuss the case with them, we are focused more on *our* finish line (beyond a reasonable doubt) and start to ask questions about what can be done to generate more evidence. (Because we are addicts, more evidence is never enough! We will never be satisfied.) And because prosecutors are accustomed to courtroom battles with highly critical defense lawyers testing our case (rightly so), we question the officers about the evidence they've collected thus far and the decisions that they've already made (see "Second-guess police with great care," below). This conversation has huge potential for hard feelings: Highly critical evidence addicts (prosecutors) interrogating the usually assertive and often very proud heroes (the officers) who are not used to being interrogated—especially by people they thought were on their side!

While there is no single "preferred method" for a prosecutor to follow in these conversations, I always try to take the egos out of the interaction. It is never about me being right and the officer being wrong. Rather, it's always about what's best for the case. Although this is a sometimes subtle distinction, it is amazing how simple conversations can quickly turn in to a contest of egos. There should be no winners or losers in these conversations, so check yourself and your ego if you find you are just trying to win a point or gain a concession.

I'm also always on the lookout for strong emotions starting to surface or tempers starting to flare—either by the officer or me. When this happens, I know I'd better change the topic or cut short the conversation and re-approach it another day. Effective communication in such hot situations is nearly impossible. As prosecutors, we must be acutely self-aware during these interactions so we don't send an unwitting and inaccurate message. These are important conversations that happen every day in every jurisdiction, and the people we represent are entitled to expect that their police and prosecutors communicate in a respectful and productive fashion.

Second-guess police with great care.

By the very nature of our job, we are called upon to pass judgment on the quality of the police work in our jurisdiction. Our duty "to see that justice is done"[9] requires us to do more than merely adopt officers' conclusions without a skeptical, critical questioning of both methods and results. This is how our system is designed, and that's how it should be. Our role requires us to be independent of law enforcement. Most officers I know fully understand our role and recognize how essential independent prosecutors are to a healthy criminal justice system. But just because we must be critical of police work does not mean we have a license to be an *unfair* critic. Unfair second-guessing or Monday-morning-quarterbacking can quickly undercut our credibility as prosecutors and sour our relationships with officers.

What exactly is unfair criticism? It is criticism that enjoys the luxury of time and the benefit of hindsight that does not account for the important (often life or death) decisions that officers have to make in real time and often with incomplete, ambiguous, and contradictory information. In short, unfair criticism of police work and decisions will not account for these factors, whereas any fair (and thus helpful) criticism will. Unfair criticism is also frequently based on incorrect factual assumptions on our part. Because we are rarely with the police on a traffic stop or during an investigation, our view of that event is often incomplete. Remember: We don't know what we don't know, so ask enough questions to get a full understanding of the event before you critique it. Context is everything when it comes to reviewing another person's decision. Prosecutors simply must understand the type of environment and conditions officers operate in so we can usefully critique police decisions and independently and accurately review police actions.

The importance of this perspective was driven home to me early in my prosecutorial career when I was assigned to assist the Dallas Police Depart-

ment Homicide Unit. My job description was to support detectives from the crime scene to the courtroom. By tagging along with these experienced detectives, I saw the challenging decision-making environment they operated in. They had to make important investigative calls on the spot, in real time, in the middle of the night, going on very little sleep, with only incomplete and ambiguous information to rely on. After experiencing this environment first-hand, I was chagrined to think of several earlier instances where I had unfairly criticized their decisions. I recalled my frustration with one case where I thought an obvious person-of-interest hadn't been detained and questioned. I remembered another case where I thought a crime scene search had been too cursory and a chance to recover important physical evidence was missed. What had seemed obvious to me after a careful and long consideration of all the facts from the comfort and safety of my office now seemed like unfair second-guessing. I realized the huge benefit of hindsight we prosecutors enjoy when we review a case on paper. I hadn't fully comprehended the degree of difficulty inherent in the environment in which these detectives operated.

That experience with the DPD Homicide Unit informs me today, as I am frequently called on to pass judgment on police work. While we should never shirk our duty to ask hard questions about police methods, investigations, and results, we must also make an effort to be fair in our criticisms. Only fair criticism is useful criticism.

Final thoughts

I believe any issue or problem between prosecutors and police can be collaboratively solved when there is a solid, pre-existing relationship, based both on trust and shared commitment to the same goal. To return to the officers I mentioned early in this column, the ones with whom I was frustrated, I must note that I stopped trying to butt heads with them over our problems. In fact, what I saw as "problems" really weren't the problem. The real issue was that my relationship with these particular officers was not strong enough.[10] I am now working to solve the original problems indirectly—by strengthening my relationships with those officers.

I often think that we prosecutors and law enforcement are kind of like a family. We may squabble and disagree with one another from time to time, but we still share a bond that binds us together (whether we like it or not). That bond is our shared responsibility to represent the people and seek justice on their behalf. ❇

Endnotes

[1] For more information on the murder of Officer David Sherrard see https://www.dallasnews.com/news/crime/2018/03/01/hunting-us-richardson-police-say-man-accused-killing-veteran-officer.

[2] For example, Collin County Criminal District Attorney Greg Willis has frequent meetings with all local police chiefs to discuss emerging issues of interest to both police and prosecutors, such as body-worn cameras and officer-involved shootings.

[3] Prosecutors should be careful when called upon to answer hypothetical questions for law enforcement. Hypotheticals rarely mimic the complexity of actual situations and thus are of somewhat limited value. Also, sometimes an officer might try to get a prosecutor to answer a hypothetical question to prove a point to another officer (oftentimes a superior with whom he disagrees). This is a tricky area where a well-meaning prosecutor can do more harm than good, so proceed with caution.

[4] Always check your office policy to make sure that ride-alongs are authorized. The same goes for the police agency–make sure the police department authorizes ride-alongs.

[5] We somehow always seem to find the time to gloat with our officers when we get a "good result."

[6] Sometimes the officer did make a mistake or could have done better. It's up to us as prosecutors to try and have a respectful, teachable moment if the officer is open to feedback.

[7] For more information on the 2016 Dallas Ambush see https://en.wikipedia.org/wiki/2016_shooting_of_Dallas_police_officers.

[8] With apologies to John Gray, author of the classic guide to understanding the opposite sex, *Men are from Mars, Women are from Venus*. For more information see https://www.amazon.com/Men-Mars-Women-Venus-Understanding/dp/0060574216.

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

[10] The other problem was my bad attitude.

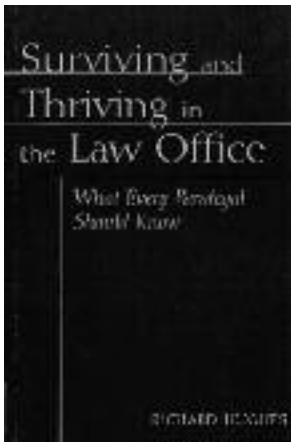
I realized the huge benefit of hindsight we prosecutors enjoy when we review a case on paper. I hadn't fully comprehended the degree of difficulty inherent in the environment in which these detectives operated.

Setting goals and aiming high

When I moved from a clerical position in our office to a paralegal position without formal paralegal education, it was terrifying (yet exhilarating).

By Shannon Jackson
Paralegal in the Montgomery County District Attorney's Office

The book *Surviving and Thriving in the Law Office: What Every Paralegal Should Know* by Richard L. Hughes smoothed that transition by providing insight on how common issues are handled in a law office. Hughes is a supervising attorney turned paralegal educator, and the book provides a unique perspective into the daily life of a paralegal. Hughes knows what qualities attorneys prefer in a paralegal, and he knows the capabilities and needs of paralegals too. The book contains a number of reference materials and end-of-chapter exercises, and the author focuses on three main themes throughout: goal-setting, professionalism, and communication, each with several take-aways for readers.



Surviving and Thriving in the Law Office: What Every Paralegal Should Know
By Richard L. Hughes; published by Delmar Cengage Learning, 2004

Goal-setting

Whether you're just starting your career or you're a seasoned professional, Hughes writes that we all ultimately succeed in the same way: by having goals. We fail from our fear of success, from our fear of failure, and from a lack of goal-setting. We all probably have similar goals—to get a raise, to earn a promotion, or to be the best paralegal in the office—but some are more successful than others because their goals are specific, and they are their *own* goals. When goals are more specific, they are easier to act on. For instance, instead of setting a goal to be the best paralegal in the office, why not set a goal to be president of the local paralegal association within the next five years? Narrowing goals down helps us know when a task is accomplished, and when we feel motivated by specific goals, we are more energized to act upon them.

Professionalism

Hughes addresses professionalism by discussing the connection between career and personal life. As Hughes explains, a person's career and personal life are inherently entangled. They affect each other. If you aren't happy at work, it's hard to be happy at home, and when you're not happy at home, it's hard to be happy at work. Your attitude reflects your work, and in order to succeed, you can never forget that you are a professional. Whether you hate your job or love it, you are held to a high standard to produce the best work that you can—you have invested too much to be unhappy and unmotivated. If your job isn't challenging you, you will get bored easily and lose motivation, and it will ultimately affect your work. Hughes recommends constantly learning new things and taking on new challenges to maintain a high standard of professionalism.

Communication

Good communication, Hughes tells us, is the key to success. Good communication creates positive relationships both inside and outside the office, which can strengthen both your professional and personal life. Hughes recommends that you never make assumptions about a person because doing so can impede good communication. The old adage, "Treat others how you want to be treated," helps in this regard. Not only is it applicable with people you know (clients, coworkers, family, and friends), but it also should be the way we treat everyone. Hughes correctly points out that a smile goes a long way!

Conclusion

I would highly recommend this book to those just starting their paralegal careers, as well as to those obtaining their paralegal certification. It might also be beneficial for attorneys who want to know more about the challenges their paralegals might face. ❇

The Ideal Team Player

While still in high school many years ago, I remember reading the "Great Man" theory of history.

By Mike Holley
First Assistant District Attorney in Montgomery County

This theory claimed that the big events in history were primarily due to the actions of various "Great Men." You know, Pericles, Caesar, Luther, Jefferson, Flavor Flav … I remember thinking how much that made Total Sense—until someone patiently explained to me that in fact it Did. Not. Make. Any. Sense.

I remember teachers demonstrating that what really drives important events are the actions of groups of people working together in concert. I finally realized that the individual's actions, though important, were very much secondary to those of the groups and all that they accomplished.

Still, the romanticism and appeal of the "Great Man" myth remains, particularly for Americans and even more so for Texans. Don't we all want to be the brave and bold hero in our own story rather than just an unsung cog in the uncaring machine? (Truthfully, we are probably somewhere in the middle.) And don't we all want to make the greatest possible difference? Of course we do. At some point, though, we all realize that the best mechanism to achieve the greatest possible difference is working together with others. None of us can really truly "do it on our own," and the secret to success is working on a team.

Though I am sure you've heard it before, I hope the realization that teams are the key to success truly resonates with you. Teams matter: The real work flows from teams. Teams are the key. Teams.

Now by "teams," I don't necessarily mean the office in its entirety. Instead, I mean the smaller teams of all sorts—the trial court team that works a docket, the trio of administrative assistants who input new cases into the system, the pair of investigators tasked with serving grand jury subpoenas, the solo DA and her trusted receptionist laboring to keep the county running smoothly, and so on. Anywhere and everywhere you look, you find teams. All of those teams matter—they matter a great deal.

It makes sense, then, to think intently about teams—how they are formulated, how they work, and how we work within them. This is a challenging subject to be sure. To this end, a friend[1] and fellow professional has provided me with a great help, and I, in turn, hope to pass that help on to you. That help comes in the form of a book recommendation: *The Ideal Team Player* by Patrick Lencioni.[2]

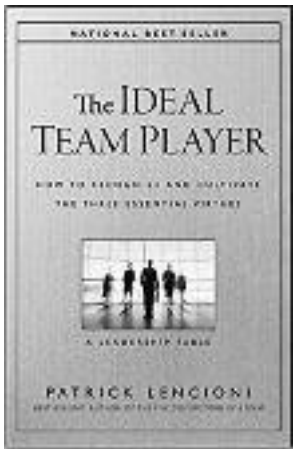
The Ideal Team Player

The Ideal Team Player is divided into two parts. Part One presents a "business fable" of a man thrust into a faltering family business and charged to make it all work. (Spoiler: He succeeds.)

The fable portion moves along briskly and takes up about two-thirds of the short length of the book. Our hero, Jeff, ultimately has to decide what essential qualities are needed to create and maintain his successful team. Through some trial and error and, most significantly, vigorous intellectual exchanges with his coworkers, Jeff and his fellow leaders decide on three foundational virtues that an ideal team player must have—she must be humble, hungry, and smart. Part Two of the book explicitly explains those virtues. Here is a brief overview:[3]

Humble: Humble people lack excessive ego or concerns about status. They point out the contributions of others and are slow to seek attention for their own—rather they seek the success of the team over self. They are aware of their own strengths and weaknesses. They neither put themselves above all others nor discount their own talents and contributions. Lencioni believes this to be the most important of the three virtues.

Hungry: The hungry person wants to do more, learn more, and take on more responsibility. Hungry people are driven, diligent, and self-motivated. They are forward-thinking pursuers of excellence,



The Ideal Team Player: How to Recognize and Cultivate the Three Essential Virtues
By Patrick Lencion; published by Jossey-Bass, 2016

Smart team members have a common sense about people. They pay attention to others. They ask good questions, listen to what others are saying, and stay engaged in conversations intently. These people don't say and do things–or fail to say and do things–without knowing the likely responses of their colleagues.

and they hate to be thought of as slackers. They have a "manageable and sustainable commitment to doing a job well and going above and beyond when it is truly required," as Lencioni puts it. As you can imagine, these are great people to have on a team, assuming the other virtues are also present. Lencioni thinks this virtue is the hardest to change.

Smart: This term does not mean "intellectual" or "excessively intelligent," but instead really means "people-smart." Smart team members have a common sense about others. They pay attention to people. They ask good questions, listen to what others are saying, and stay engaged in conversations intently. Lencioni likens smarts to "emotional intelligence" but says that this virtue is a little simpler than that. These people "don't say and do things—or fail to say and do things—without knowing the likely responses of their colleagues." Lencioni contends that this virtue can be directly improved through coaching.

So that's the model. The operating assumption is that for any given job, you should look for the most competent individual who also possesses these qualities. Hire or assign people on the basis of these qualities, encourage and develop them in your employees, and, if absolutely necessary, use them as the standard to know when to invite people to "seek excellence elsewhere."[4]

Truth in the model

The model is simple, logical, and just *feels* right. By way of authenticating the model, consider how these virtues operate in the negative. Here are some of Lencioni's examples in that regard:

Humble only: The Pawn. These people are nice, sure, but they don't feel a need to get things done, nor are they able to work effectively with others. They lend very little to the team.

Smart only: The Charmer. These people can "play the game" and generally don't raise others' ire, but they lack the humility to really care about people or about the team, and they don't have hunger to really contribute (unless it makes them look good).

Hungry only: The Bulldozer. These people cannot and will not get along with others, nor are they humble. But they sure get things done! Unfortunately, they also create plenty of problems for others in the process: They rub people the wrong way, they drive people off, they damage or weaken important relationships, and they burn themselves—and others—out.

(Important aside: I think this may be the most common area of concern for trial lawyers. Trial lawyers, especially prosecutors, *absolutely* need hunger, but it can work against them if not properly channeled. Let me explain with a tortured and esoteric analogy:

Sometimes we put up with a "great" trial lawyer—or investigator, legal assistant, receptionist, etc.—because he is so effective and knowledgeable in his area of responsibility. Unfortunately, some of these great trial lawyers are very, very difficult to be around. Think of them—and stay with me—like the war elephants of ancient times. The Carthaginians, rascals that they were, would line up these gigantic, armored beasts and send them trumpeting toward the lines of trembling Roman soldiers[5] causing tremendous destruction and mayhem. Cheers and victories often followed. Not infrequently, though, those same elephants would turn and rampage along friendly lines, tearing formations (and bodies) apart. Chaos and tears would follow. Carthaginian privates would no doubt exclaim, "Fat lot of good that did us, lugging those elephants all the way to Italy!" and "Did you see how that elephant stomped our pal Doug into the mud?" and, of course, "Man, elephants produce *a lot* of crap." Anyway, you see my point. Possibly.)

Lencioni lays out other telling variants too: humble and hungry but not smart (the Accidental Mess-Maker); humble and smart, but not hungry (the Lovable Slacker); and hungry and smart but not humble (the Skillful Politician). All people we have known, currently know, and maybe have been ourselves.

Applications for the model

This is all interesting, perhaps, but what value is this model to the county or district attorney employee? Much in every way! For starters, the model helps with these important functions:

Self-assessment: Regardless of our position in the office, each of us has an obligation to be the best possible team member we can be. This model provides a valuable tool to pursue that objective. As I read the book, I had to pause several times to say "ouch" and "I really need to work on that issue." Others in our office had the same reaction and were (begrudgingly) appreciative. As you assess yourself against the model, you can identify areas where improvement is most needed and understand where your strengths and weakness lie.

Hiring: "Humble, Hungry, Smart" provides a good framework to know whom to look for in the essential process of hiring. As I'm writing this, we are interviewing for a misdemeanor attorney. Should we hire the guy from Yale[6] who has already tried a capital murder with his third-year bar card, clerked for every member of the United States Supreme Court, and will be posing later for the State Bar as they commission a statue of him on horseback to honor his extensive *pro bono* work?[7] Yes? We should? Even if he's not humble? Even if he is not smart? Well, we can certainly hire this guy, but at what costs long-term?

Evaluation: The model gives us a clear standard to promulgate and a common language to use among leaders. For example, has Doug (an old Carthaginian name, as you know) demonstrated that he has the "smarts" to be in a supervisory position, or does he need additional training to learn how to better deal with people? If he's not smart enough to supervise others, how can I communicate that to his next boss so that the right development occurs? Is Diane really "hungry," or is she just coasting? If Jose resists coaching, is it because he is not "humble?"

Coaching: The model allows us to identify and reinforce those behaviors that make our folks better team players. It also clarifies where we want to go and how to get there, benefits that are immensely helpful. The model is particularly useful to: 1) prepare junior members of the office to be leaders in the future, 2) identify and solve conflicts between coworkers, and 3) help earnest employees reach their full potential.

Warnings and uses for the model

As you work through the model, it would be completely reasonable to ask some questions. Can you really have an office filled with ideal team players? Can you personally meet the model's expectations? Most importantly, does this model help us on a very practical, day-to-day basis?

To the above questions: Yes—with some caveats.

First, we must be realistic. The "ideal" team player is just that: ideal. We are all on a continuum on the spectrum of humble, hungry, and smart. The model gives us a target to shoot for, a standard to reach toward. None of us will ever meet that standard perfectly, and that is OK.

Second, we have to be cautious and gracious. People are complicated. Life is complicated. The model shouldn't be used simply to reduce others to a simplistic label,[8] to force an artificial conformity, to induce "group-think," nor as a basis for gossip or division. The model should help build up people and teams, not tear them down.

With those warnings in mind, we can certainly use the model to improve ourselves and to help others to improve. As an example of the latter, consider the prosecutor who wins an important and difficult trial. That prosecutor, if he is humble, can and should give fair and full credit to everyone else who lent a shoulder to the wheel to move the case to a successful resolution. If he does, that humility ought to be recognized, reinforced, and repeated by others. If he doesn't share the credit, his failure of humility should also be addressed directly and professionally.

When an investigator sends an angry email—one that has exactly the opposite effect intended, one that is not very "smart"—then an educational conversation needs to occur. Some coaching as to how the email was received, how it could have been worded, how the recipients understood the message, or how an in-person conversation might have been more effective would be appropriate.

When an attorney seems to be lacking in hunger (which certainly ebbs and flows), some inquiry needs to happen. Is the attorney temporarily burned out? Is there something going on in his personal life that is sapping his focus at work? Is there a particular new area of the law that he could get behind, learn about, and champion? Is there an available leader or peer who could catalyze the attorney's professional development? Or maybe is it time to hang up the spurs and do something else?

The model is simple, and the application is challenging—but working with others will always be as challenging as it is necessary. The "Humble, Hungry, Smart" model helps on that front. It is one tool among many, not a magic wand to make everything and everyone perfect.

So there it is—*The Ideal Team Player*. Given to me by a friend, and I now give it to you. I sincerely hope it will be helpful! ❇

Regardless of our position in the office, each of us has an obligation to be the best possible team member we can be. This model provides a valuable tool to pursue that objective. As I read the book, I had to pause several times to say "ouch" and "I really need to work on that issue."

Endnotes

[1] This friend, unlike some of my other friends, is not imaginary. His name is Chief Deputy Sheriff Kenneth Culbreath of the Montgomery County Sheriff's Office. I'm grateful for him for his help here and for many other reasons as well.

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[2] *The Ideal Team Player: How to Recognize and Cultivate the Three Essential Virtues: A Leadership Fable*. Patrick Lencioni, Jossey-Bass, a Wiley Brand, 2016.

[3] We have had about two dozen or so people read the book in our office–all of the senior leadership and hiring committee members. Most appreciated the use of the story before the explanation, but a few–our more "let's get to it" personalities–found the story a distraction and needless delay. I personally thought it breathed life into the explanation in a very helpful way. Also, those other people are wrong. So wrong.

[4] You could distill the message of the book into: No jackasses.

[5] Likely "hastati," essentially the "cannon (or elephant) fodder" of the Roman army during the time of Punic wars.

[6] Or, as I like to think of it, the "Texas Tech of New Haven."

[7] This character is fictional. We've actually never had a Yale guy apply. We do have a Harvard Law graduate, however, and he's both the ideal team player and an amazing attorney. His name is Joel Daniels.

[8] One of the dangers to the model Lencioni discusses is that of labeling people too quickly or unfairly. This is a legitimate concern. No model can ever capture all the wild complexities of a human being. Labels can unnecessarily limit people, and they can certainly sting. I for one already bear the label "bald old guy with bad goatee." I don't know that my ego could stand to have another label added. But seriously, be very careful here.