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

Combatting crimes against elders

By Brandon Jackson
Assistant Criminal District Attorney in Bexar County

Jane, an 82-year-old widow, came into our office begrudgingly, and only because her family desperately needed help.

The plan was for prosecutors at the DA's office to talk some sense into her, to help her realize it had all been a scam, a trick to part her from her hard-earned and long-saved nest egg.

I am not using her real name here, but the story is all too real and all too frequent. Jane had "won" the Jamaican lottery. It was the big one, the cure to all of her financial woes. No longer would she have to live on that dreaded fixed income or watch the spending of every penny. The windfall was coming in, but to get it she had to come up with the upfront fees.

Of course, you know where this is going.

More than $100,000 later, there Jane sat in the Bexar County District Attorney's Office, listening to (and ignoring) our explanations as to why the Jamaican lottery was a scam. Her family had changed her phone number and email address and even taken her phone to prevent contact between Jane and the scammers, but nothing worked. The scammers had an inside man, er, woman, and it was Jane. Every time her phone number changed, Jane promptly called the scammers when she was alone; if her phone was taken, Jane contacted them online, and they would send her a new phone. (Jane had to protect her winnings, right?) She took the word of a couple of never-seen criminals on the phone over the word of virtually anyone else.

Without knowing exactly who the scammers were or where they were, law enforcement could not be of much help. Jane's family already had executed a power of attorney, but Jane still had access to her accounts, and it was, after all, her money. Jane did have onset dementia, and the possibility of a guardianship was discussed, but there was not enough money left in the account to cover the legal fight that would accompany getting a guardianship if Jane decided to challenge the power of attorney. The scammers were the real winners of the Jamaican lotto.

I write about this case not to illustrate the hopelessness of elder fraud, of which there is far too much, but more to point out the seriousness of it. It's actually far from hopeless—there really is plenty we can do as a community to combat this issue. Elder fraud is not simply online, on the phone, or in the mail from far-off countries, but it happens every day in our backyards and at our front doors.

Continued on page 29

How to join a ‘secret’ Prosecutors Society

I am a proud member of the Texas Prosecutors Society.

By Kenda Culpepper
Criminal District Attorney in Rockwall County and Texas Prosecutors Society member

Last November at TDCAA’s Elected Prosecutor Conference, several people asked me about the TPS—“What is this secret, mysterious society?” So I set out on a quest to provide the answers. (Well, actually, I just asked *Texas Prosecutor* editor Sarah Wolf, but we were out of town at the time, so I’m calling it a quest.)

1 **Membership is by invitation only.** For one, the Texas Prosecutors Society isn’t a secret mysterious society, but it *is* a prestigious one. You must be nominated by a member of the TDCAA Board or the Texas District and County Attorneys Foundation (TDCAF) Board. And only a limited number of nominees (which include current and former prosecutors) are invited to join every year. TPS started with a freshman “founding” class of 106 (one to commemorate each year that TDCAA had been in existence when the TPS was created in 2011), and to this day, there are only 179 members.

2 **It has an honorable mission.** TPS is a group of supporters whose mission is to raise money for an endowment, which is run through the nonprofit TDCAF, that will support Texas prosecutors far into the future. Our hope is that the endowment will substantially grow over time and eventually fund TDCAA programs as government grant money becomes scarce and prosecutor ranks outgrow current funding. When a member is accepted into the Society, he or she pledges $250 per year for 10 years or $2,500 up front. (By the way, that pledge is tax-deductible.)

3 **Membership has its perks.** All Society members are invited to a wonderful reception held annually at the Elected Prosecutor Conference. At that reception, new members are formally presented, *and* they receive a beautiful sterling silver keepsake pin that they can proudly wear. (There’s a photo of it at right.) Up to this point, only TPS members have really known the significance of the pin, but now everyone can see it and know that you are a member of the prestigious Texas Prosecutors Society.

4 **Membership is a “who’s who” of current and former prosecutors.** Some of the very best trial lawyers in this state are or have been prosecutors, and many of them belong to the Texas Prosecutors Society. The TPS reception is an opportunity to meet, catch up with, and reminisce with some of the best of the best—and have fun doing it! I truly look forward to the TPS reception every year.

5 **Invitations go out this summer.** The Texas Prosecutors Society really is something special. Membership highlights your selection as someone who has been respected and appreciated in our world. Plus, it is an opportunity to give back to a profession that continues to give back to us and our communities.

If you are interested in becoming a member of the Texas Prosecutors Society, let a TDCAA or TDCAF Board member know about it (lists of members of both boards are at right in the gray box and on the opposite page). We want to continue to grow the endowment and are looking for good men and women to join our ranks. We would love to get you on that potential nominee list! ❄

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Legislative Updates coming to a town near you!

As the 86th Legislative Session ramps up in the spring, we have been planning our summer Legislative Update tour.

By Rob Kepple
TDCAA Executive Director in Austin

If you have been following the weekly (and sometimes semi-weekly) legislative updates that TDCAA's own **Shannon Edmonds** pens, then you know there is a lot in the mix, from marijuana to human trafficking to the death penalty. We have not officially named the tour yet because we have to get to the end and look back to get a feel for how it played out, but some names are already off the table because we have used them in the past: the "Flying Rage" Tour and the "Session from Hell" Tour.

I recently discovered the early historical roots of our tour in some research done by former Bell County Attorney **Rick Miller**. He found an article in the *Dallas Morning News* from August 1895 describing a meeting of the District, County, and City Attorneys Association at which attendees listened to a presentation of significant changes to criminal law made by the 24th Legislature. Some notables: enhancing the mandatory minimums for assault with intent to rape and robbery with a firearm or deadly weapon; creating an offense for throwing stones or shooting a firearm at a train, schoolhouse, courthouse, whorehouse (yes, you read that right), hotel, or steamboat; criminalizing stealing a ride on a train however short the distance; raising the age of consent from 13 to 15 years; knowingly spreading Johnson grass or Russian thistle; creating mortgage fraud crimes; and creating standardized theft punishments for theft of livestock. How some things change—and how others stay the same!

Please join us at the city of your choice—our schedule will be posted on the TDCAA website very soon. As usual there will be significant changes that impact your work at the courthouse.

Prosecutor ethics lesson, circa 1895

Minutes from the meeting of the District, County, and City Attorneys Association (mentioned above) also recorded an address made to the members by **W.P. Gibb**, a former Palo Pinto County Attorney. In his talk, he cautioned against allowing the law to be used by people with a grudge. He did not believe it was the duty of a prosecutor to nose around and spy out petty violations of the law. "In every community … there are fellows who want their neighbors prosecuted, but you never can get them to swear out the warrants. They know where there is gaming going on, they know what their neighbors are doing, and they want their neighbors roasted in the courts, but they never want to appear as prosecuting witnesses themselves. Now, an attorney should give the cold shoulder to these fellows. He should be a prosecutor, never a persecutor. … The prosecuting attorney should speak his mind plainly and refuse to assist the consequential busy-bodies who wish to strike men whom they dislike over the shoulders of the officers of the law." Some advice is timeless.

Congratulations to Bill Torrey, top cattle theft prosecutor

Congratulations to **Bill Torrey**, Milam County and District Attorney, who has been awarded the 2019 District Attorney of the Year by the Texas and Southwest Cattle Raisers Association. Bill was honored at the Association's annual meeting in March for going above and beyond in the prosecution of livestock and agriculture crimes. Well done!

New TDCAA website

It was with great anticipation that we rolled out the newly redesigned TDCAA website, www.tdcaa.com, at the end of March. The site still delivers access to TDCAA training, books, services, and information that you need, but it's now in a format that is optimized for any device (phone, tablet, laptop, and desktop). It took a week to shake out the bugs, and I apologize for any inconvenience during the transition. One of the features of the site is increased ability for the TDCAA staff to quickly post information and get that info out to you. In the coming months, we would greatly appreciate your feedback and input. Just email me at Robert.Kepple@tdcaa.com.

Welcome to our newest prosecutors

I'd like to welcome some of our newest members to move into the corner office: **Angela Albers**, Criminal District Attorney in Wood County; **Ryan Sinclair**, District Attorney in Hood County; and **B.D. Griffin**, County Attorney in Montgomery County. Good luck, and let us know what you need from your association. ❇

Photos from Train the Trainer

Four Cs of being a good leader

When I became a prosecutor, I had no idea what life would be like.

By Jarvis Parsons
District Attorney in Brazos County & TDCAA President

Looking back on it, I am glad that someone took a chance on me and I took a chance on being a prosecutor. While I have had ups and downs, I wouldn't trade it for the world—but if I had the chance to do it all again, there is one thing I would focus on: being a leader no matter where I was in the office.

As prosecutors in the beginning of our careers, many of us are just trying to understand the lingo of criminal law and figure out where to stand in the courtroom. But very quickly we are thrust into a role of leading others. As a misdemeanor attorney in a large office, you may move courts every few months. You may have new court partners, various chiefs, and different judges. In a small office, you may be thrust into having a large caseload and immediately prosecuting cases. Whether it's in misdemeanors, felonies, juvenile, CPS, or civil practice, leadership is always necessary and good leadership is valued.

But what makes a good leader? While there are many examples of leadership generally, I want to focus on the leadership qualities that translate well in a prosecutor's office. Whether you work in a one- or two-person shop, a large urban office, or somewhere in between, these principles will serve well in any of these environments.

Conviction

Conviction is defined as a having a firmly held belief or opinion. As prosecutors, we should have a firm belief in "the why" of our profession. Why are you a prosecutor? What drives you? What moves you? What stirs your passion? Prosecution is one of the best jobs in the world, but I have to admit it can become a grind. There are lots of nights and weekends when we are working on trials and hearings. While it is normal to suffer a little burnout from time to time, understanding the question of "why" will sustain us for years to come.

Personally, I am a prosecutor because I want to make a difference in the lives of people who have been hurt by others. Whether they have been physically injured or their businesses have been harmed, I feel like I can use my voice and my efforts to bring a small amount of peace to the person in pain. When I leave this world, I want to be able to say that I used my gifts and talents to make it a better place and to help people find their purpose. That's why I do this job, and it has sustained me for 16½ years.

Additionally, having conviction as a prosecutor is contagious! In the words of the great Jarvis Landry, "It's contagious, bruh!"[1] Simon Sinek, author of the book *Start With Why*, says that "people don't buy what you do—they buy why you do it." Understanding the why creates buy-in from the people around you. When people see you doing what you believe you were born to do, it makes them want to work harder. People work for a "what," but they will give their lives for the "why."

Consistency

Being a leader wherever you are in an organization means being consistent. Ask yourselves these questions: Are you reliable? Steady? Stable? Do people know that you are going to do what you say you're going to do?

Jack Welch, one-time CEO of General Electric and prolific author, has said that great leaders are "relentless and boring": relentless in that they fight for the mission in front of them, and boring in the sense that their people know exactly what to expect from them. Consistent leaders give their best every time. Consistent actions create consistent results. Showing up on time isn't flashy, but it matters to the people around you. Making sure your 404(b) notice is done and that you have called the victims on your cases (even when you don't have to) isn't flashy, but it

matters to your community. It matters that *they* know you care.

Consistency doesn't mean you will succeed every time you go to court or that everything will go your way. If your goal is to be perfect, you will never get there. The good news is that the people around you aren't looking for perfection. People would rather follow a leader who's always real than a leader who's always right.[2] They are looking for honest people on whom they can depend, and that is when success happens. Remember that it's not what you do occasionally that makes you great. It's what you do *consistently* that makes you—and your organization—great.

Confidence

To be a leader,regardless of your place in an office, you need to be confident in who you are. The truth is that many times we struggle with this concept. It doesn't matter if we are young or not-so-young—most of us are insecure about our place in an organization, and we wonder, "Am I respected? Do I deserve to be here? Where am I in the pecking order?" All of those things are ancillary issues you can't control, and they make us come off as controlling, domineering, or arrogant.

What other people think of you is none of your business. Our job is to not worry about our reputation (what others think about you) but rather to build our character (who you are when no one is looking), and the rest will work itself out.

It doesn't mean that we don't make mistakes. In fact, some of the most confident people I know have a keen understanding of their own strengths and weaknesses. They know what they are good at and what they need to work on. They also know what tasks they should never, ever do.[3] Those individuals hire and delegate around their weaknesses and allow others to use their strengths to build great teams. You don't have to do it all. In fact, you shouldn't. People will admire your strengths, but they will connect with your weaknesses.

Criticism

While this may not seem like a quality of leadership, the ability to take and learn from criticism is one of the most valuable leadership traits. If you're a leader, you have either been criticized, are being criticized, or are going to be criticized. Understand that criticism is part of the job. If you're going to be a leader, you need to decide to forgive the critic before you're ever criticized.[4] If we choose to be hard-hearted every time we are criticized, we will miss the chance to learn from the criticism, even if it's unfair. I understand doing so is easier said than done because many times criticism is not constructive and it can be hard to forgive. But unforgiveness only weighs *you* down and stops you from being the leader you were born to be. We can demonstrate that the greatest leadership moments don't come from the carefully planned things we say—they come from when our team is watching us react to things that are said about us and done to us. When others see that we take criticism with grace and dignity, it's better than any speech we could ever give.

Conclusion

Being a leader wherever you are in an organization should be the goal of every Texas prosecutor. It adds value to the whole office, whether you have been prosecuting for 25 years or 25 minutes. We have all been given an opportunity to make our corner of the world a better place. Whether it's by trying a Class C misdemeanor or a capital murder, we are entrusted by our communities to do what is right. If we have conviction, consistency, and confidence and we are open to criticism, we are well on our way to administering justice to our communities. ❇

Endnotes

[1] If you ever want to have a good laugh, please watch Jarvis Landry's speech to the Cleveland Browns' wide receiver group during a film session. You will laugh and be inspired all at the same time. However, it's not for the faint of heart!

[2] Craig Groeschel, the author of this quote, has a great leadership podcast (www.life.church/leadershippodcast/) with many tips for leading organizations.

[3] For instance, I know that if my life depended on being a waiter or a mechanic I would die. See? Recognize your own weaknesses and move on.

[4] Craig Groeschel's podcast Episode No. 43: Q&A with Lysa TerKeurst, *How To Lead Through Pain*.

What other people think of you is none of your business. Our job is to not worry about our reputation (what others think about you) but rather to build our character (who we are when no one is looking), and the rest will work itself out.

Martinez v. State is narrower than you may think

If you handle DWIs, you've probably had a defense lawyer explain that the Court of Criminal Appeals's recent case of *Martinez v. State*[1] is an important, far-reaching, pro-defense case.

By Clinton Morgan
Assistant District Attorney in Harris County

At first glance, *Martinez* could seem as much. I'm going to suggest, though, that the holding is so specific and the facts so peculiar that the actual effects will not be much. Unless a case involves a warrantless seizure of blood from a hospital and then a warrantless test of the blood, *Martinez* is probably off-point.

The facts

Mr. Martinez was involved in a wreck and transported to the hospital. He was not entirely coherent when he arrived, but as he came to, he became uncooperative with medical staff. A nurse drew blood, but when asked to provide a urine sample, Martinez said he could not afford any tests, including a blood test. He removed an IV and various monitors and left the hospital.

A DPS trooper arrived at the hospital around the time Martinez left but was unable to make contact with him. Hospital staff told the trooper they had Martinez's blood. The trooper obtained a grand jury subpoena for the blood, and then it was tested in a government lab. The opinions don't say what the test result was, but they probably weren't good for Martinez, who was indicted for intoxication assault.

Martinez moved to suppress the results. The trial court granted the motion, holding that while the seizure of the blood using a grand jury subpoena was lawful, testing the blood required a search warrant. The State appealed.

The appeal

The appeal revolved around three cases: *Comeaux*,[2] *Hardy*,[3] and *Huse*.[4] *Comeaux*, decided in 1991, was factually similar to *Martinez*: Comeaux was taken to the hospital after a wreck, and police obtained a sample of blood the hospital had drawn for medical purposes and tested it in a government lab, all without a warrant. A plurality of the Court of Criminal Appeals held that an individual who gives blood for medical testing retains a reasonable expectation that the blood will not be given to law enforcement; thus, government testing of the blood is a search requiring a warrant.

In *Hardy*, a 1997 case, the hospital took and tested the defendant's blood for medical purposes, and police obtained a grand jury subpoena for "alcohol or drug information" from his records. The Court of Criminal Appeals recognized that there were three stages of the blood test that "could potentially" implicate an expectation of privacy:

1) the physical intrusion of the needle;
2) the testing of the blood; and
3) viewing the results.

The court held that because a private party had performed Stages 1 and 2, only Stage 3 was implicated in that case. Because there was no socially recognized expectation of privacy in the results of a blood-alcohol test, obtaining the results of the test did not require a warrant.

In *Huse*, a 2016 case, the Court of Criminal Appeals revisited *Hardy* in light of HIPAA, the

federal medical privacy law. *Huse* held that while HIPAA shows that there might be a legitimate expectation of privacy for medical records generally, HIPAA did not undermine (and in many ways supported) *Hardy*'s holding that there was no legitimate expectation of privacy for alcohol and drug test results.

On direct appeal in *Martinez*, the State argued that, under *Hardy* and *Huse*, there was no warrant required for the police to test Martinez's blood. The Thirteenth Court disagreed, holding that *Hardy* and *Huse* applied only to test results, but under *Comeaux*, when a hospital drew the blood but did not test it, police needed a warrant to test the blood.[5]

The holding

On discretionary review, Judge Walker, writing for five other judges, saw the case as offering the opportunity to affirm or reject the plurality opinion in *Comeaux*.[6] The Court adopted *Comeaux*'s holding. Three judges—Presiding Judge Keller and Judges Yeary and Newell—concurred without opinion.

Under the privacy theory of what constitutes a search, a search is a government action that violates a "reasonable expectation of privacy." There are two parts to determining whether an individual had a reasonable expectation of privacy: Did the individual, subjectively, have an actual expectation of privacy? And is that expectation one that, objectively, society is prepared to recognize as reasonable?

The State argued that Martinez could not have had an actual expectation of privacy because he abandoned his blood at the hospital when he left. The court rejected this notion on a couple of grounds. First, under the extremely peculiar facts of this case, the trial court found that Martinez did not voluntarily give the hospital his blood.[7] Second, based on *Comeaux*, the Court seems to have held that there is a general presumption that giving blood to a hospital does not create a presumption that the individual consents to the hospital giving it away to others "for a purpose other than that for which it was given."[8]

The Court turned to whether Martinez's expectation of privacy was reasonable. The first issue was the third party doctrine. Under the third party doctrine, when someone voluntarily reveals private information to another, he loses any privacy interest he has in that information if the third party turns it over to police.[9] The Court held the third party doctrine did not apply to this case because of the "distinct lack of voluntariness" on Martinez's part: He was taken to the hospital by ambulance after a wreck, and he was uncooperative with the blood draw itself.

The second part of whether an expectation of privacy was reasonable was determining whether blood contained "private facts." For this part the Court relied on *Birchfield v. North Dakota*,[10] where the United States Supreme Court held it was permissible to perform warrantless breath tests on DWI suspects, but blood tests required a warrant. The Supreme Court had reasoned that breath tests "are capable of revealing only one bit of information, the amount of alcohol in the subject's breath," but a blood sample can be preserved and "it is possible to extract information beyond a simple BAC reading."[11]

After analyzing several other Supreme Court cases, the Court held the amount of information that can be derived from blood means that conducting a blood test is a search that requires a warrant. This will prevail even if a hospital drew the blood: "There is an expectation of privacy in blood that is drawn for medical purposes." The trial court, therefore, was correct to suppress the results obtained from a test of hospital-drawn blood conducted without a warrant.

What's a prosecutor to make of this?

Martinez seems like a pro-defense holding, but, given modern Texas practice and the peculiar facts of this case, it's a holding that will not affect many cases.

First, *Hardy* and *Huse* remain good law. If a hospital conducts a blood draw for medical purposes and conducts drug and alcohol tests for medical purposes, police can obtain those test results without a warrant.

Second, if a suspect consents to a blood sample, no warrant would be needed to test it because the suspect cannot possibly have a subjective expectation of privacy in blood he freely gave to police as part of a DWI investigation.

Third, if police obtain a blood-draw warrant, there should be no need for a second warrant. That is because, unlike in a medical situation, when blood is drawn pursuant to a warrant there is no remaining expectation of privacy in the blood.

I'm going to suggest that the holding in Martinez *is so specific and the facts so peculiar that the actual effects will not be much. Unless a case involves a warrantless seizure of blood from a hospital and then a warrantless test of the blood,* Martinez *is probably off-point.*

Martinez *seems like a pro-defense holding, but, given modern Texas practice and the peculiar facts of this case, it's a holding that will not affect many cases.*

Martinez's effect will be limited to cases in which:

1) there is a medical blood draw but no medical test; and

2) there is no probable cause to obtain a warrant.

Even in that small subset of cases, police may still obtain the blood with a grand jury subpoena[12] and conduct additional investigation that may provide probable cause. ❇

Endnotes

[1] ___ S.W.3d ___, No. PD-0878-17, 2019 WL 1271173 (Tex. Crim. App. March 20, 2019).

[2] *State v. Comeaux*, 818 S.W.2d 46 (Tex. Crim. App. 1991).

[3] *State v. Hardy*, 963 S.W.2d 516 (Tex. Crim. App. 1997).

[4] *State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016).

[5] *State v. Martinez*, 534 S.W.3d 97 (Tex. App.—Corpus Christi 2017)

[6] *Martinez*, 2019 WL 1271173, at *5.

[7] The Court focuses on Martinez's statement to the nurse that he could not afford tests as constituting an affirmative statement that he opposed any testing on his blood. Id. at *6. That seems like a questionable inference to me. There are any number of things I can't afford but which I wouldn't oppose if someone did them at no cost to me. In his brief, though, Martinez characterized the testimony as showing that the IV he removed from his arm was being used to take blood. If true, that is compelling evidence he opposed the hospital taking his blood.

[8] *Martinez*, 2019 WL 1271173, at *6. Given this last reason, I think the focus on whether Martinez did or did not consent to the blood draw is a red herring. Even if Martinez *had* consented to testing by the hospital, adopting *Comeaux*'s reasoning here would lead to holding that Martinez maintained a subjective expectation of privacy in the contents of the blood. Though it gets only a paragraph, this holding—which seems to be a judicial presumption of a subjective expectation of privacy—is the most novel of the opinion.

[9] *Ibid*. (discussing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

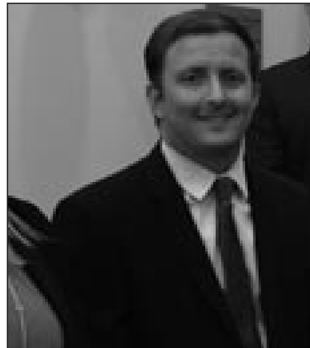
[10] ___ U.S. ___, 136 S.Ct. 2160 (2016).

[11] Id. at 2177-78.

[12] Martinez never questions that the police seizure of the blood was lawful.

TDCAA's Advanced Course: a lot of work, but fun too

In February 2018, the prosecutors in our office received our bimonthly copies of this journal, *The Texas Prosecutor*.



By Jeff Janes
Assistant County & District Attorney in Limestone County

As we all do when we receive this awesome publication that keeps us connected with our fellow prosecutors, we read it. In his column, Brian Klas, TDCAA's very classy training director—have you noticed that he faces backward in his photo as if he is a movie director (below), and have you heard him introduce speakers at conferences as if he is doing a TV infomercial?—wrote about TDCAA's Advanced Trial Advocacy Course, which is held every year in July or August at Baylor Law School.

Brian Klas

Shortly after I finished perusing *The Prosecutor*, Beth Toben, who offices next to me, walked in and pointed out Brian's article. Beth was involved in getting the Advanced School started and has tried hundreds of jury trials. "You should think about applying," she told me.

I immediately took evasive maneuvers to dodge the suggestion: "I don't have enough trials under my belt, and I have never tried an intoxication manslaughter before"—that's the type of case 2018's Advanced Course would be working up. But what I was really thinking was, "Can my ego handle being critiqued? Do I really want to work that hard for a training exercise?" And then I rationalized, "I can't be gone that week because other people are already scheduled to be on vacation."

Just as I had successfully talked myself out of applying, my boss, the elected County & District Attorney Roy DeFriend, walked into my office and said, "Hey dude, you ought to consider applying for this Advanced school."

The more I thought about it, the more I heard the words of a wiser man than myself playing in my mind—Jocko! (You know, Jocko Willink, the Navy SEAL and best-selling author.) In one of his books, Jocko wrote, "We are afraid of what we don't know, and there is only one way to learn and to know, and that is to confront that fear, that is to step, that is to go, and that simple action, that simple attitude, answers so many questions."[1]

The author, second from left, with his courtroom group at TDCAA's Advanced Trial Advocacy Course in 2018.

The truth is, I had recently started trying more felony cases and knew I had a lot of growing to do. If I was going to continue getting better, I needed to get out of my comfort zone. So, I reread Brian Klas's advice from his column in the journal: "The bottom line is, if you want to go and your elected thinks you are ready for the chal-

"We are afraid of what we don't know, and there is only one way to learn and to know, and that is to confront that fear, that is to step, that is to go, and that simple action, that simple attitude, answers so many questions."
–Navy SEAL and best-selling author Jocko Willink

lenge, 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."

So, with fear and trepidation, I filled out the application. I must say, once it was submitted, I was at peace, and the weight of the decision came off my shoulders. The hardest part had been being open to the challenge.

Once I had applied, I began hoping that I would get in. I actually got excited at the prospect of testing and honing my trial skills at a more advanced level. So when I received the email confirmation from Dayatra Rogers, TDCAA's Registrar, stating I had been accepted into the course, I was pumped!

The casefile materials arrived a few weeks before the training was to begin. We were going to try an intoxication manslaughter involving a child victim who was thrown from a vehicle and died. (It was based on a real case, sad to say.) The defendant was the child's father; his blood analysis showed that he was intoxicated on alprazolam at the time of the ~~accident~~ crash (one of the many corrections I learned at the school—car wrecks where intoxication is involved are not accidents). I prepared the case for trial from top to bottom, head to toe, voir dire through closing.

As the date for the class got closer, I sent a self-conscious email to Brian Klas explaining that I was worried I did not have all the materials I needed to properly prepare the case. I also asked if the preparation I had done so far was on par with what was expected. In hindsight, Brian's response was spot-on. He replied:

> "Don't worry about getting outside information for the case. The biggest thing for you is to come in Monday morning with a solid understanding of the facts we have provided. You will have an opportunity to meet with witnesses briefly before we do testimony exercises. FYI—it sounds like you have looked at this pretty closely and will be coming in prepared. Don't get so focused that you aren't able to flex when needed. Yes, this is a lot of work, but it should be kind of fun too."

When I was preparing for the school, one prior attendee told me that I should spend the week trying new things. Another person told me that I should do what I usually do, so I could get feedback on my normal courtroom techniques. In the end, Brian's advice to "be prepared but be flexible" was the right approach.

When I showed up the first day, I thought it was going to be tense, that people would be guarded and that I was going to feel like I was being sized up by every prosecutor in the room. In reality, everyone was friendly, outgoing, and a bit nervous—just like me. Every day we had various "performance exercises" which were conducted in small courtrooms in front of our groups of eight prosecutors and three faculty advisors (FAs). Immediately after each performance, we received feedback from two FAs in front of the whole group. Then, because the exercises were recorded, we met individually with the third faculty advisor to review our video and receive further critique.

Watching the other prosecutors perform the exercises in my small group was inspiring, and listening to the feedback on my performances, as well as the others' performances, was an unexpected benefit. There were times that I realized I needed to step up my game, and other times I felt confident that I was doing a good job. I can only assume the other attendees were secretly competing with me as hard as I was with them, but outwardly everybody was supportive and encouraging to each other. It was like metal sharpening metal.

I had three wonderful faculty advisors: Lisa Stewart from Montgomery County, Ray Duke from El Paso County, and Sean Teare in Harris County. They were never mean with their feedback, but they were direct and honest. Oftentimes they gave very specific suggestions on how to better handle a line of questioning, or they pointed out a trait that was distracting or ineffective. Sometimes the faculty advisors demonstrated different techniques during the critiques, which was extremely helpful. Having the undivided attention of some of the best trial lawyers in Texas to offer suggestions and share trade secrets was priceless—and I was actually being paid to be there!

The highlight of the class for me was cross examination of the defense crash reconstruction expert. Even though I had worked on that part of the trial, I felt unprepared. When it came time to do it, I did some of what I planned but also incorporated a few ideas we had heard during the lecture. When I went to the video review, my FA

Sean Teare, who had given the lecture on expert cross examination, simply said, "Great job, man." Preparation and flexibility—it was working!

As I was writing this article, Beth (Toben, the longtime prosecutor in my office) asked me how I thought the Advanced Course had impacted my practice. That is a tough one. For sure it improved my knowledge of the law and specific information on how to try an intoxication manslaughter case. Fortunately, I have not been called upon to use that expertise, but if (when) that time comes, I definitely will feel more confident in knowing how to advise law enforcement and in presenting the case in court.

Additionally, my biggest takeaway was gaining confidence in my trial skills. Limestone County is not a large jurisdiction, so even though I had been a prosecutor for six years when I attended the course, I had not had as much trial experience as prosecutors in larger offices. After attending Advanced, though, I feel more confident and comfortable in my own trial skin. That is not something you can be taught. It can only be developed from within—with experience.

Bottom line: If you are reading this article and wondering, "Should I apply to TDCAA's Advanced Trial Skills Course?" or if you are trying to dogfight your way out of it, as I did, may I offer this suggestion? Lower your head, fill out the application, and let TDCAA decide if you can attend. Step into the challenge. Yes, it is a lot of work, but it's kinda fun too! ✻

Editor's Note: Brochures for TDCAA's Advanced Trial Skills Course were mailed to all prosecutors in late April (they're also available at www.tdcaa.com/training), and applications are due to TDCAA by June 28. Fill yours out today!

Endnote

[1] *Extreme Ownership: How U.S. Navy SEALs Lead and Win*, Jocko Willink (Willink, J., & Babin, L., 2015).

It's time to pre-order TDCAA code books

It is almost time to order your copies of the 2019–'21 Penal Code, Code of Criminal Procedure, and annotated Criminal Laws of Texas, the only criminal code books you'll need!

Online pre-ordering for these new editions begins May 6, 2019. Visit www.tdcaa.com/publications to place your order, or print out the PDF order form (also at our website), fill it out, and fax it to 512/478-4112.

New features for code books

This year, for the first time, TDCAA's 2019–'21 spiral-bound Penal Code and Code of Criminal Procedure will also include annotations. To accommodate this addition, the Texas Rules of Evidence will be moved to the Penal Code book, and the Texas Rules of Appellate Procedure will be available only as PDF file. The spiral-bound Code of Criminal Procedure will be a stand-alone book, including only the (ever-growing) Texas Code of Criminal Procedure.

The annotated Criminal Laws of Texas will remain in its current form (with case cites, practice tips, and charts) and will include the Penal Code, CCP, Controlled Substances Act, juvenile and protective order portions of the Family Code, and Rules of Evidence in a single volume. Because of the continued growth of the Code of Criminal Procedure and limits on the number of pages that can be bound sturdily, the Rules of Appellate Procedure will be available separately as a PDF file free of charge. ✻

Countering defense attacks on the NHTSA manual

Stop me if you think you have heard this one before:[1]

By Luis Baez
Assistant District Attorney in Montgomery County

You just finished the direct examination of the investigating officer in a driving while intoxicated (DWI) trial. You were able to qualify her as an expert on the standardized field sobriety tests (SFSTs) researched and developed by the National Highway Traffic Safety Administration (NHTSA). During your direct, the officer walked through the SFST instructions she was taught to administer in the academy, she detailed how she gave them on the night of the arrest, and you concluded with the number of clues she observed. You pass the witness, and the very first words out of the defense attorney's mouth are something to the effect of, "Now, officer: Isn't it true that the NHSTA manual says …"[2]

Nine times out of 10, the manual the defense attorney has in his lap is not the same as the one on which the officer trained. Sometimes, defense is reading from a PDF or notes on a laptop. Other times, he has the manual printed out in a binder or bound in a notebook. The defense does not bother to mention which version of the manual he's referring to, and he won't ask if the officer was trained on the same version or if he is referring to the instructor guide, participant guide, or even one of the "refresher" guides available online. Instead, the defense immediately (and selectively) jumps into portions of the NHTSA manual in an effort to score some quick points and pretend the value of the research and training contained in the manual supports his side of events regarding the offense.

As prosecutors, we are responsible for seeing that justice is done.[3] Part of that process is making defense counsel follow the Rules of Evidence to make sure the jury is not left with a false or misleading impression. A defense attorney's misuse of a NHTSA manual in trial creates opportunities for such a false impression if the prosecutor is not prepared. This article will briefly discuss some of the common issues that arise when the contents of a NHTSA manual become an issue during trial and how to deal with them.

Hearsay and lack-of-foundation objections

Hearsay is a proper objection when opposing counsel fails to provide the appropriate foundation for the "learned treatise" hearsay exception.[4] The foundation should be laid before defense attempts to cross-examine the officer on the contents of the manual. Texas Rule of Evidence 803(18) provides an exception to the rule against hearsay for statements contained in a treatise, periodical, or pamphlet if "the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination and the publication is established as reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice."

If the foundation to establish this rule is not laid, the defense should not be allowed to get into statements in the manual (but the judge might let him anyway). The officer is being presented as an expert witness on intoxication; she can therefore be questioned with learned treatises in the area of her expertise. If the officer says that she was not trained, is not familiar with, or does not rely on the document the defense presents, then defense counsel will arguably not have established the hearsay exception. There is room for disagreement when it comes to making this objection because a prosecutor does not want the jury to believe the State is hiding something after just having asked the officer to talk about the

manual (generally) on direct. Following the proper procedure at this phase will help ensure that the right version of the manual is used, and it will give the officer a fair shot at answering defense questions correctly.

One way to do this is by objecting and requesting to see what version of the manual defense counsel has with him in trial. If necessary, ask the court to let you take the witness on voir dire so that you both have the opportunity to examine and review the document that is being used on cross-examination. If it turns out that the defense is using the proper manual, withdraw the objection. If he isn't, ask the court to exclude references to it, or remember to remind the jury during closing that the defense attorney's questions are not evidence (especially when they are questions based off the wrong manual). The real danger you are trying to avoid is that the officer gets confused by the formatting of an unfamiliar version of the NHTSA manual. A defense attorney may try to confuse an officer with rapid-fire questioning, which leads to admissions that the officer doesn't fully understand. For example, I have seen an officer admit that potassium from too many bananas may cause HGN when under cross-examination from an outdated manual.

Even if the defense lays the proper foundation, the rule does not allow for the statements or portions read from the manual to be received as an exhibit, though the rule does allow the defense to read these portions into evidence.[5] More likely than not, defense counsel is going to cross-examine the officer only on material in the manual he believes the officer did not comply with and ignore the portions that show the officer did follow the manual's guidelines. The defense will almost certainly avoid portions establishing the validity of the SFSTs, which intends to set up a defense argument during closing that the officer's failure to comply with certain portions of the manual invalidates the SFST results and that the manual says the same.

In the context of the "learned treatise" rule, it is important to remember that a learned treatise can be used only "in conjunction with testimony by an expert witness, either on direct or cross-examination."[6] It is the prosecutor's responsibility to make sure that the jury receives every bit of material from the manual it can to combat this argument and re-affirm the reliability of the SFSTs in the case as soon as possible.[7] One way to do that after a prosecutor has used the "lack of foundation" objection to his or her benefit is through the rule of "optional completeness."

Optional completeness

If there comes a point during trial where the defense attorney is able to read a portion of the manual into evidence, the prosecutor should be able to invoke the rule of optional completeness. Texas Rule of Evidence 107 allows a prosecutor to inquire about and introduce other parts of the NHTSA manual that the jury should in fairness be able to consider along with the part offered by defense. The rule provides that if "a party introduces part of a … writing,[8] an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other … statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent."

If there comes a point during trial where the defense attorney is able to read a portion of the manual into evidence, the prosecutor should be able to invoke the rule of optional completeness.

A Tenth Court of Criminal Appeals case illustrates how this rule has applied to the NHTSA manual during trial. In *Wisdom v. State*, defense counsel asked the trial court if he could read a portion of the NHTSA manual to the jury and into evidence that stated the SFSTs are valid "only when the tests are administered in the prescribed, standardized manner."[9] In response, the prosecution asked under Rule 107 that several paragraphs of text before that portion also be read. This additional portion included the part where the three standardized tests were found to be highly reliable in identifying subjects whose BACs were 0.10 or more. Considered independently, the nystagmus test was 77 percent accurate, the Walk-and Turn 68 percent accurate, and the One–Leg Stand 65 percent accurate. However, Horizontal Gaze Nystagmus used in combination with Walk–and–Turn was 80 percent accurate. The Tenth Court of Appeals stated that the defense "offered only the portions of the DWI Detection Manual emphasizing that following the correct procedure was critical to the validity of the tests which left the jury with only *part of the information needed* to make a fair assessment of the officer's reliance on the test results."[10] It also stated that "the jury was entitled to know all of the relevant information regarding the validity of the tests, both as to factors that could invalidate the results as well as the reliability of the tests if done correctly."[11] The Court went on to cite the rule of optional completeness, holding that the trial court did not commit error by allow-

A word of caution: Just because you can do something doesn't mean you should, so use the rule of optional completeness intentionally. Prosecutors want to adequately respond to defense arguments about the NHTSA manual without letting the manual become the center of the trial.

ing the prosecution to read the additional part from the manual. (The Third Court of Appeals also discussed and analyzed a similar issue in *Howell v. State*.[12]) Sharing these cases with the judge will combat a defense attorney who wants to cherry-pick out of the manual.

A word of caution: Just because you *can* do something doesn't mean you should, so use the rule of optional completeness intentionally. Prosecutors want to adequately respond to defense arguments about the NHTSA manual without letting the manual become the center of the trial.[13] Knowing these rules in advance will help you decide which battles to pick in trial and avoid getting into the weeds of the NHTSA manual. Shutting down defense gimmicks can also help maintain jurors' trust and re-focus them on the defendant's behavior. Remember that the rule of optional completeness can be invoked in the middle of the defense cross-examination.[14]

Opening the door

Questions from defense that lead into the issues discussed above could also allow a prosecutor to rely on the traditional "opening the door" rule to get into evidence or testimony that would generally not be admissible. A "party opens the door to otherwise inadmissible evidence by leaving a false impression with the jury that invites the other side to respond."[15]

This rule applied to a Second Court of Appeals DWI case, *Jordy v. State*.[16] In *Jordy*, the defense cross-examined an arresting officer and elicited evidence that "the NHTSA manual showed no correlation between a certain number of clues observed on the HGN and one of the [Texas] penal code definitions of intoxication."[17] In response, the prosecution argued that this questioning "opened the door" to allow questioning on what the manual *does* say about intoxication. The Second Court of Appeals held that "it was within the trial court's discretion to allow the State to present evidence to clear up the erroneous impression by admitting evidence that the manual did have something to say about the other definition of intoxication—an alcohol concentration greater than 0.08—specifically, that four clues correlates to a BAC of 0.10 or higher."[18]

The earlier point about adequately responding to defense arguments about the NHTSA manual without letting the manual become the center of the trial is also applicable here, and having an officer clear up false impressions by defense counsel will go a long way in reinforcing the officer's credibility.

Weight vs. admissibility

Another common defense tactic in a driving while intoxicated trial is requesting a last-minute, pre-trial motion to suppress the results of the defendant's performance on the horizontal gaze nystagmus (HGN) test. The defense argument will be that the HGN results are inadmissible and should be suppressed because the officer's administration of the HGN test was more than a "slight deviation" from the instructions in the NHTSA manual. The defense often relies on is *McRae v. State*.[19] In *McRae*, the First Court of Appeals suppressed the defendant's HGN test results because the officer did not administer all three parts of the test, made only one pass on each eye instead of two, and admitted that other portions of his administration of the test were not "valid."[20]

In the context of a motion to suppress, the rules of evidence do not apply (except for privilege), and both sides should have significant leeway in directing and crossing the arresting officer while referencing or asking about the instructions in the NHTSA manual.[21] On one hand, the hearing will give the defense attorney free discovery and a preview of what the officer will say on direct in the presence of the jury. On the other, it will give prosecutors a roadmap of what the defense will ask the officer on cross.

In this hearing, the State must elicit testimony from the officer on her training and experience in giving the HGN instructions, whether those were the instructions she gave during her investigation, and whether she administered the HGN test in compliance with the manual. (Let's hope this will all be confirmed by the dash-cam footage too.) Afterward, the prosecutor will have to argue that any variations go to the weight of the evidence and not the admissibility. The following are good starting points to reference in the motion to suppress:

- *Plouff v. State*[22] (stating that slight "variations in the administration of the HGN test do not render the evidence inadmissible or unreliable but may affect the weight to be given the testimony");
- *Gomez v. State*[23]; and
- *Winstead v. State*[24] (stating that slight "variations from the NHTSA's testing protocol do not

render HGN test results inadmissible but may affect the weight to be given the testimony").

In this setting, refer to judicially noticed definitions of terms in the manual (such as "nystagmus" and "horizontal gaze nystagmus") instead of letting the defense define them.[25]

Prepping the officer

One of the best ways to deal with the problems that can occur during a trial involving the NHTSA manual is meeting with the officer beforehand and explaining how these issues may come up. If this meeting involves only advising the officer to tell the truth, you're off to a good start—but you need to also give her an idea of what's going to happen in court. Remind the officer that she should never agree to the contents of a writing until she has had a chance to review that writing. She should also understand that it is OK to say no or that she doesn't agree with something. This is true even if the defense attorney's tone is dripping with disdain because the officer won't agree that the cold air surrounding the defendant's eyes was rapidly heated by the officer's flashlight and therefore caused HGN.[26] A prosecutor who regularly handles DWIs (a.k.a., "any prosecutor") should also prepare himself by becoming intimately familiar with the contents of the SFST manual. It is available for download at www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst-curricula-and-powerpoints-for-download.pdf. When trial is approaching, it is always a good idea to email the officer this link or a copy of the manual and ask him to review it, a request made more effective if you hand him a copy as you ask.

A pre-trial meeting is also a good time to ask the officer to review her own training record. If she has had a chance to do this prior to trial, then she can announce with confidence that she was trained in the academy, recently took a refresher course, and has instructed others on how to administer the tests. The more confidence the officer displays in her abilities, the more confidence the jury will have in her conclusions.

In summary

In an ideal driving while intoxicated trial, discussion and reference to the NHTSA *DWI Detection Manual* is limited to its general authority and reliability, the instructions for the SFSTs, and the purpose of the tests. The rest of the case should be tried within the confines of the officer's credibility in administering those tests and identifying the clues based on the defendant's performance. But as we all know, trials would not be trials if things ran as smoothly as that. Having a firm grasp of the rules discussed above and a plan for how to control things is necessary in your next DWI trial so that you can keep the jury focused on the issues that matter, rather than conducting a "trial within a trial" on what's in the NHTSA manual. ❄

Endnotes

[1] See The Smiths, *Stop Me If You Think You've Heard This One Before,* (Rough Trade Records 1987).

[2] This question comes in many similar forms like "Doesn't the manual say …"; "Aren't you trained to know that …"; and "Don't you know that the manual …," to name a few.

[3] It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. Tex. Code Crim. Proc. Art. 2.01.

[4] Tex. R. Evid. 803(18), "Statements in Learned Treatises, Periodicals, or Pamphlets" (stating that a "statement contained in a treatise, periodical, or pamphlet if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit."). To read about a case discussing the NHTSA manual and 803(18) see *Amberson v. State*, 552 S.W.3d 321, 330 (Tex. App.—Corpus Christi 2018, pet. ref'd).

[5] *Id.*

[6] *Zwack v. State*, 757 S.W. 2d 66, 67-69 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

[7] Remember that the State is allowed to "refresh" the witness's memory if necessary under Tex. R. Evid. 612.

[8] Under Texas Rule of Evidence 801(a), a statement "means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression."

One of the best ways to deal with the problems that can occur during trial involving the NHTSA manual is meeting with the officer prior to trial and explaining how these issues may come up. If this meeting involves only advising the officer to tell the truth, you're off to a good start—but you need to also give her an idea of what's going to happen at trial.

[9] 39 S.W.3d 320, 321 (Tex. App.—Waco 2001, no pet.).

[10] *Id*. at 323 (emphasis added).

[11] *Id*.

[12] *Howell v. State*, 03-03-00158-CR, 2006 WL 2450920, at *2 (Tex. App.—Austin Aug. 25, 2006, no pet.).

[13] Be cautious about admitting a learned treatise into evidence. The Tenth Court of Appeals described the risks that come along with admitting a learned treatise into evidence: "disallowing the admission of the treatise itself prevent[s] a jury from rifling through a learned treatise and drawing improper inferences from technical language it might not be able properly to understand without expert guidance." *Godsey v. State*, 989 S.W.2d 482, 492 (Tex. App.—Waco 1999, pet. ref'd) (internal citations and quotations omitted).

[14] Tex. R. Evid. 106 (stating that if "a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part—or any other writing or recorded statement—that in fairness ought to be considered *at the same time*) (emphasis added)).

[15] *Daggett v. State*, 187 S.W.3d 444, 452 (Tex. Crim. App. 2005).

[16] 413 S.W.3d 227 (Tex. App.—Fort Worth 2013, no pet.).

[17] *Id*. at 232.

[18] *Id*.; see also *Sedeno v. State*, 14-07-00327-CR, 2008 WL 5104169, at *4 (Tex. App.—Houston [14th Dist.] Nov. 25, 2008, no pet.) (stating that after the officer "testified he did not know the accuracy rate of the HGN test, the trial court refused to allow [the] appellant to delve into the specific statistics provided by the NHTSA manual. During the conference outside the jury's presence, the trial judge expressed her concern about opening the door for the percentages of all the tests, how different studies result in different statistics, and how she was unsure whether the NHTSA edition [the] appellant had was the same edition [the officer] used in training. After reviewing the record, we conclude the trial court was concerned with the effective presentation of the evidence, confusion of the issues, and undue delay, so it restricted [the] appellant's cross-examination into the specific statistics. Thus, we cannot say the trial court abused its discretion in excluding evidence from the NHTSA manual that the HGN test was only 77 percent accurate in predicting intoxication").

[19] 152 S.W.3d 739, 743–44 (Tex.App.—Houston [1st Dist.] 2004, pet. ref'd).

[20] *Id*.

[21] For additional guidance on the applicable rules in a motion to suppress, see "I Object to His Objection," by Brian Foley, *The Texas Prosecutor* journal, September-October 2013, Volume 43, No. 5.

[22] 192 S.W.3d 213, 219 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[23] 01-17-00245-CR, 2018 WL 3431737, at *4 (Tex. App.—Houston [1st Dist.] July 17, 2018, no pet.).

[24] 11-13-00053-CR, 2014 WL 4536379, at *5 (Tex. App.—Eastland Sept. 11, 2014, no pet.).

[25] *Plouff v. State*, 192 S.W.3d 213, 218 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[26] As you may have guessed by now, this scenario is made up.

You don't have to wait for cross to bring up SFST issues

Rather than letting defense counsel beat up an officer during cross-examination for not administering the Standardized Field Sobriety Tests (SFSTs) to the letter of the NHTSA manual,

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

prosecutors have the option of going on the offensive, of bringing up the manual (and the officer's performance) on direct. Here are some ways to do just that.

Describe the 'field'

When it comes to SFSTs, the defense loves to dwell on the word "standardized," as Luis Baez so rightly discusses in the article on page 14. But because the prosecution gets to go first, we could focus on the word "field" instead. Give the jury a real sense of where this officer performed the SFSTs on the defendant. SFSTs are typically administered by a lone officer who is in the dark, standing near traffic, and listening to the police radio chirping in his ear. At the same time, he's also trying to ensure the safety of an impaired driver who's standing outside his car, watch out for any passengers, and be aware of his own safety—all while reciting instructions to the driver and counting clues as he performs the tests. Whew! Make sure the jury understands where, how, and under what conditions the officer must perform one of the most complicated investigative procedures ever created.

Go into the length of his training (a minimum of 24 hours of class time), course refreshers he's taken, and how often the officer uses SFSTs. Also note that the SFSTs are *taught* in a classroom, but they are *performed* on the side of a treacherous road at a dangerous time of day. The tests are fraught with difficulty, to be sure, but they are important for identifying intoxicated drivers, so officers faithfully administer them. Make sure the jury hears this.

Address errors

If the officer makes mistakes in giving the tests, beat the defense attorney to the punch and address those errors with the officer. But first set the scene, as outlined above, so jurors might understand why the officer veered from the manual. Then pose one question the defense will never ask: "Does your mistake change what you saw or change your opinion as to the defendant's intoxication?" (The officer's answer will inevitably be "no.") Follow up with the real killer question: "Why not?"

Let the officer explain

Defense attorneys, like all humans, are creatures of habit. If you know the defense has a favorite SFST attack, consider doing the cross yourself—but remember to let the officer explain himself and his choices. Leaving the defense with no chance for an "a-ha" moment on cross is great advocacy—and deeply satisfying.

A warning, though: Not every officer can explain himself well. During pre-trial discussions with the officer, try having him answer defense attorney-style questions, and make the decision early if you plan to do it in court or not.

Call in another expert

One last issue: Not all officers are equal. If an arresting officer is just not good at administering or educating the jury on SFSTs, consider calling a second officer: an SFST instructor, a DRE, or a

Continued in the yellow box on page 21

Establishing trust with crime victims

By Bill Wirskye
First Assistant Criminal District Attorney in Collin County

Establishing a bond of trust with a crime victim is an essential job skill for a prosecutor.

When victims trust the prosecutors on their cases, they sense that they have an advocate in their corner and that they've gotten a fair shake in the criminal justice system—even if there's disappointment at the end of a trial or case. When a prosecutor has a victim's trust, that prosecutor develops confidence and forward-looking focus that will often lead to a positive result in the courtroom. This type of mutual trust benefits both prosecutors *and* victims.

Developing this type of bond is the product of intentional communication between a prosecutor and crime victim. Although some offices may have broad policies governing communication practices with victims,[1] these policies generally don't address specific interpersonal communication principles unique to our job. Most of us have to learn through the painful trial-and-error process of on-the-job training.

For me, a victim in one of my first felony cases taught me the most about communication and trust. It was a serial sexual assault early in my career, and that victim, Amy (not her real name), could not have been more unlike me. I am a white man, and she is an African-American woman. I am from North Dallas and Amy is from South Dallas. I have a law degree, and she didn't have a high school diploma. Really the only thing we had in common was that we lived in the same county.

But in the course of preparing and prosecuting that case, we developed a bond of trust. This wasn't an accident. Because of the seriousness of the case, I was very intentional in trying to develop a relationship of trust with the victims. Somewhere between my initial phone call to her, our first in-person meeting at her modest apartment, numerous phone calls, several pretrial prep meetings filled with awkward personal questions, and her two trips to the witness stand, we had developed that bond of mutual trust. Amy trusted that I cared about *her*, not just the result of her case. She trusted that I was not judging her or her life circumstances, and she believed that she had someone in her corner. And I took confidence from her confidence in me. I was able to focus on the trial with clarity and a fresh resolve, and I knew that I didn't have to worry about her "no-showing" at the trial due to apathy or fear. I also knew that I had to give my best on her behalf.

I still remember the strength Amy showed when she testified. When I asked her later how she was able to hold it together during her testimony, she said, "Bill, I knew you were always on my side no matter what happened in there, good or bad." Her answer left me speechless and deeply moved. I was so proud to have been the prosecutor on her case.

As I reflect on that case now, I realize just how important that trust is to both victim and prosecutor, and I've outlined four principles of communication that I rely on to establish that bond in every major case[2] I prosecute. These principles may not be applicable to every situation or appropriate for every prosecutor. However, they are based on basic principles taught to me by experienced prosecutors and lessons I've learned the hard way over the years. I believe every prosecutor who reads this will walk away with some nugget of practical knowledge.

Principle No. 1: Communicate with compassion.

We all know the law prohibits prosecutors from putting the jury in the victim's shoes. That doesn't mean, however, that we shouldn't put *ourselves* in a victim's shoes. In fact, I try to imagine what I would be thinking if I were the victim before each conversation or meeting we have. This simple practice tunes my mindset so that my actions will be in accord with my genuine concern for the victim.

This practice also counteracts the common mistake we make by focusing too much on our own agenda for a particular conversation or meeting. When we get locked in this mode, we don't listen empathetically or communicate with compassion. We appear to be simply going through the motions, devoid of concern. A simple reset of asking yourself, "What would I be thinking and feeling if I were in this person's shoes?" can prevent this sort of misperception.

One of prosecutors' biggest challenges is communicating with victims who are angry. They might be mad about a decision we've made or a decision we didn't make. Sometimes they are not really mad at *us*, they are just feeling helpless and lost in the criminal justice system. Wherever their anger is coming from, we mustn't take it personally, and we must not respond with emotion. Once again, having the proper mindset is key: Remember who the victim is. (Hint: It's not you!)

Sometimes, tense conversations and meetings can become too angry or emotionally charged. In these situations, I try to remember that it's impossible to be rational with people who are responding with emotion. The compassionate thing to do is to end this particular interaction and hope the next meeting or conversation can be less emotional and more productive. Never be afraid to end a difficult meeting by acknowledging the obvious. You might say something like, "We seem to be having a hard time communicating right now. If it's OK with you, can I have some time to reflect on the issues you've raised? I need time to think. Maybe we can meet again next week?" In some cases, it may take multiple meetings and conversations with an angry victim or victim's family to get past the anger and have the conversation we both need to have.

Prosecutors must also be careful in responding to angry voicemails or emails from victims (or anyone else for that matter). My rule of thumb is to wait until the next day to respond if possible—that way I can guarantee that I'm not responding with unnecessary emotion. Oftentimes this short delay allows the intensity of the emotion on the other end to subside as well.

Principle No. 2: Communicate courageously and with candor.

We owe crime victims complete candor, even if the news is bad. Being candid can require courage on our part. For example, it can be hard to discuss with a victim the lack of evidence in a case or the

DWI specialist—ideally, an officer from another agency. Qualify this second officer as an expert, and have her untangle the mess the defense made of the arresting officer. This witness should be able to navigate the NHTSA manual far more adeptly. Let *her* explain. Remember that the rule of optional completeness and "opening the door" may also apply to this second witness (Mr. Baez goes into more detail about these in his article). Also consider asking the judge that this expert officer be excused from the rule so she can hear the defense cross the arresting officer.

Conclusion

A favorite defense tactic in a DWI trial is to attack the SFSTs themselves and how the officer administered them during cross-examination of the officer. Prosecutors can certainly counter these claims on redirect, but we can also head off defense attacks on direct by addressing certain issues—where the officer gave the tests, any mistakes he made, and the like—ourselves. Let's not gloss over weakness in our case and leave those weaknesses for the defense to exploit—sometimes, we must address them directly rather than play defense. ✻

potential defenses that may be raised at trial. It is even harder to tell a victim why you are dismissing a case. These are difficult conversations. As a young prosecutor, I thought I was being kind by holding back bad news. In reality, I didn't yet have the courage and experience to compassionately deliver a hard truth. Our victims deserve to know the truth no matter how hard the conversation. Prosecutors must never shy away from this difficult duty.

But our candor must always be tempered by compassion. Admittedly, it is a delicate balancing act that never gets easier no matter how much experience you have. I still dread meetings where I know I will have to walk this fine line. Unfortunately, there is no magic formula for how to have an honest and difficult talk with a victim. Our goal should be, at the very least, that victims walk away understanding our position, even if they don't agree with it. Many times the best we can hope for is that both sides leave a conversation agreeing to disagree, with everyone respecting each other's position.

Hard conversations should always be in-person, if possible. (See Principle No. 4 below.) I always find it helpful to have at least one other prosecutor in these meetings. That second person not only gives me courage, but he or she can also add a different and valuable perspective to the discussion. During longer meetings, I frequently will suggest taking a short break. This enables everyone to take a deep breath and gather their thoughts and questions before ending the conversation.

I still remember the strength Amy showed when she testified. When I asked her later how she was able to hold it together during her testimony, she said, "Bill, I knew you were always on my side no matter what happened in there, good or bad." Her answer left me speechless and deeply moved.

Sometimes we are faced with a victim or family who will want to know detailed information that we don't want to divulge. Prosecutors must balance victims' legitimate desire to know everything about their case with our legitimate concern to keep some information out of the public realm before trial. It's not that we don't trust these victims, necessarily—rather, we don't want detailed and sensitive information to seep out to those who don't need to know it (i.e., defense witnesses, the media, or jailhouse snitches).

My rule of thumb has always been to share everything about the investigation and the case as long as it doesn't compromise the prosecution. It can be difficult to remain firm in this position, as our natural tendency is to want to answer victims' questions, but I emphasize that a prosecutor who cannot control the information cannot control the case. I tell victims and family upfront that they might ask me questions that I won't answer even though I know the answers. Keeping secrets from them is not cruel—I just need to protect the integrity of the prosecution. I promise that once the trial is over, I will answer each and every question that I wouldn't answer before trial, and I promise to show them every report and every piece of evidence. Being disciplined on this point with a victim requires us to have the courage to say "no" temporarily and to be candid with victims about our reasons for saying no.

Principle No. 3: Communicate consistently.

It is common for prosecutors to have long gaps without communication with our victims, either because there are no new updates in a case, we get busy, or both. This is not optimal. In my experience, most victims think about their case quite a bit, and they assume something is happening with it on an almost-daily basis. While we know this is often not true, only consistent and proactive communication can bridge the gap between their perception and our reality. A quick email or phone call to tell them there are no new updates or to simply ask how they are doing can help put their minds at ease. Our goal should be that victims have enough trust in us that if anything important happens on their case, they know that they will hear about it from us first.

Prosecutors who work in offices where it is common to take over another prosecutor's major cases should reach out to the victims on these newly assigned cases to tell them that there has been a change of prosecutors. This is big news to victims, and they should hear about it from us first. I know it can be hard to proactively carve out time from our busy schedules to stay in consistent contact with all our victims, but that is the price we pay for prosecuting major cases. These cases are time-intensive if done correctly.

Principle No. 4: Consider the mode of communication.

In my opinion, there is a hierarchy for prosecutors to follow when it comes to our preferred mode of communication with victims. I prefer face-to-face meetings over phone calls, and I prefer phone calls over emails and text messages. Some victims prefer to be contacted via text these days, but be sure to ask their preference before

you send that first message, and never text a victim from your personal phone. Of course, busy schedules, the nature of the communication, and the victim's location and preferences will often determine how we interact on any given occasion.

I prefer in-person meetings because it's important for victims to put a face with the name of their prosecutor. Most victims simply feel more comfortable if they have a chance to meet a prosecutor at some point early in the process. Of course, these in-person meetings are a two-way street: They also allow me to pick up on body language, use my non-verbal communication skills, and assess first-hand what type of witness this person could make.

If possible, I prefer to conduct any first meeting at the victim's home or work. By my coming to them, I signal that I care enough about them to make a house call. Depending on the case, it might be appropriate to meet the victim at the scene of the crime to have him or her walk you through exactly what happened. These "witness-prep walk-throughs" have proven invaluable over my career in developing additional facts and giving me the first-hand knowledge of events and the scene to paint an accurate picture in the courtroom for the jury. I've also had situations where these crime scene walk-throughs seem to have an almost cathartic effect on the victims. Sharing that experience with them served to solidify the relationship we shared.

One important thing to remember when it comes to meetings outside the office is to always consider your safety and always use good common sense. Take an investigator if possible, and always follow any applicable office policy.

One practice that victims seem to appreciate is a quick follow-up call or email after an initial face-to-face meeting. Upon leaving such a meeting, most people will almost immediately think of questions that they wish they would have asked, and typically they are reluctant to trouble us with these types of unanswered questions. By anticipating this common "delayed question" scenario with a call or message, I show that I genuinely care about answering all their questions. By taking this extra and unexpected step, I try to leave little doubt that I care. And I believe that's all most crime victims really want—a prosecutor who cares about them.

Conclusion

There is much to learn about communicating with victims that is both beyond the scope of this article and beyond the scope of my experience. But my hope is that these four principles will give prosecutors the proper foundational mindset to communicate effectively with victims and build a bond of trust, like I did with Amy.

You might be curious as to where Amy is today and how's she doing. I don't know. In the months following the trials[3] of Amy's rapist, she would occasionally stop by the courthouse to say "hi." Despite the awful crime she had endured, it was clear that she was hopeful about the future. But soon those visits stopped. For several years thereafter, though, I would get a Christmas card from her telling me about her life. And then at some point, those cards stopped too. At first, I admit, I was somewhat hurt and disappointed, but I soon realized that her lack of contact with me likely meant that she had found some level of closure, and I was happy for her. While she may never forget what happened to her, she had put the experience behind her as best as she could and was getting on with her life.

Although I have not heard from her in many years, I have no doubt that wherever she is today, Amy is a valuable member of her community. I know that my short interaction with her years ago still serves as a source of motivation and inspiration for me as a prosecutor. She unknowingly taught me so much about the human part of my job. It was a privilege to be an advocate for her. ❇

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Endnotes

[1] Please remember to always follow your office policy, even if the advice contained herein is in conflict with that policy.

[2] I use the term "major case" to mean any serious case with a victim or any other case that requires significant contact between a prosecutor and a victim or victim's family.

[3] We tried the defendant twice to obtain stacked life sentences.

The undeniable power of anchoring

There is a powerful principle of advocacy that you have likely used before, perhaps without knowing exactly what to call it.

By Mike Holley
First Assistant District Attorney in Montgomery County

This principle has been demonstrated to work in a variety of ways, and you can put it into your practice at any time—today, if you like.

This principle is called anchoring, and it comes from the field of applied psychology. It has been repeatedly proven in study after study, and it is a powerful tool for prosecutors in their duty to see that justice is done.

What is anchoring?

Anchoring is a heuristic (hyoo-*ris*-tik). A heuristic is a "simple procedure that helps find adequate, though often imperfect, answers to difficult questions."[1] You might also think of it as a "rule of thumb" that can solve a particular problem or a "mental shortcut."

Human beings use heuristics all the time. In fact, we rely extensively on them. That's because our world is complicated, and life comes at us quickly. We are absolutely inundated with information, much of it more complicated than we are prepared to process. Our minds must constantly and quickly make difficult decisions, and to do so, all of us use various types of mental shortcuts, and we cannot help it.[2]

Juries, likewise, use such shortcuts. Lawyers pose perplexing questions to them, questions they are often not prepared by education, experience, or training to answer. Whom are they to believe between two (or five or 10) witnesses who give sometimes conflicting accounts of a crime? What are jurors to make of an expert and her complex testimony? What does "reasonable" really mean in these specific circumstances? What is the just and appropriate sentence for a defendant under a particular set of facts and taking everything into account?

Juries regularly rely on the anchoring heuristic to answer these questions—whether they realize it or not—especially when determining a specific value or differentiating between two ideas. Specifically, anchoring occurs when "we consider a particular value for an unknown quantity before we estimate that quantity."[3] Alternatively stated, anchoring is "the cognitive bias that influences you to rely too heavily on the *first piece* of information you receive."[4] The supreme emphasis here is on "first."

To understand what I am writing about, it will be helpful to read some examples of anchoring. Like I said, every person on the planet uses it to make decisions throughout our day, but we might not realize we're doing it—and we almost certainly don't call it anchoring. Here's what I mean by this term.

Anchoring by illustration

Our initial example comes from Nobel Prize winner Daniel Kahneman in his exceptional book, *Thinking Fast and Slow*.[5] Kahneman and his brilliant partner, Amos Tversky, pioneered the concept of anchoring, so it is fitting to start with their "eureka" moment.[6]

Kahneman and Tversky asked students to spin a special "wheel of fortune" created for this experiment. Despite containing several numbers, the wheel was rigged to land on only two of them: 10 or 65. The students were directed to write down the number from their spin, and then they were asked two questions:

1) Is the percentage of African nations among United Nations (UN) members larger or smaller than the number you just wrote (meaning, greater or lesser than 10 or 65 percent)?

2) What is your best guess of the percentage of African nations in the UN?

Before I reveal students' responses, note the obvious: There is no rational relationship between the number the students spun on the

wheel and the correct answer to the question about the UN. None. And the students would have absolutely known that there is no such relationship, because the number they spun and wrote down came from the most arbitrary and random way possible (literally spinning a wheel).

Nevertheless, that arbitrary and random number had a significant impact on the students' guesses about the percentage of African countries in the UN. Students who spun the number 10 guessed, on average, that the answer to the UN question was 25 percent. Students who spun the number 65 guessed that the answer to the UN question was 45 percent.

What is occurring here? The students considered a value (the number from a random spin) before they estimated an unknown quantity (the number of African nations in the UN). The random spin "anchored" their answers to the UN question. Even though the number students spun on the "wheel of fortune" had *nothing* to do with the question about the United Nations, students overly relied on that number, even though the number on its face wholly lacked any value—and they *knew* it lacked value.

The mechanism of why this happens is not entirely understood, although Kahneman's book provides some explanation of how and why anchoring works. That it *does work*, however, is clear. Here are a few other examples to help convince you of the principle.

When people were asked to estimate the height of tallest redwood tree, the answer differed dramatically when they were first asked if they thought the height was more than 1,200 feet (which yielded an average answer of 884 feet) or more than 180 feet (which yielded an average answer of 282 feet).[7] That initial "anchor" of 1,200 or 180 feet dramatically influenced people's guesses about the height of the tree.

Another example: A Korean study of 2,773 sexual assault cases showed that sentencing decisions where anchored by prosecutors. At the lowest penalty levels, a one-month increase in the prosecutors' sentencing recommendation (for example, prosecutors recommending 25 months in prison for a defendant instead of 24) resulted in a 0.25-month increase in the judge's sentencing decision. At the highest sentencing level, the prosecutors' sentencing recommendation resulted in a 0.78-month increase in the judge's decision.[8] This example makes clear that "experts," such as judges, are by no means immune to anchoring's effect—it's not just juries, in other words, who are swayed by anchoring.[9] (The medical profession in particular recognizes the power of anchoring and the potential it has for improper diagnoses.[10])

Consider this final example—and it should trouble you somewhat: A study was conducted with German judges, who averaged 15 years' experience on the bench. The judges read a description of a woman caught shoplifting, then they rolled a pair of dice. The dice were loaded to result in either a three or a nine. The judges were then asked whether they would give the woman a jail sentence of more or fewer months than the number they rolled, and finally they were asked to pronounce their sentence. (You should be able to guess the results at this point.) On average, judges who rolled a nine said they would sentence the woman to eight months in jail, while those who rolled a three would sentence her to five months.[11]

Before we move on from these examples, consider the implications of that last study: that the judges' sentences were divorced from principle and driven by an arbitrary number rolled on dice. Does this phenomenon give you pause? I hope so—because it should. These studies display the enormous power of anchoring.

Anchoring works, whether we realize it or not, and it works whether we are consciously using it or not. The evidence is clear and undeniable. (Space does not permit for a full listing of the evidence, but I have included a number of references in the endnotes below if you remain unpersuaded.[12]) Human beings cannot escape anchoring—we are not above it or removed from it, and we cannot deny that the anchoring principle is real. It is as real for judges and prosecutors as it is for laypeople (jurors).[13] Equally important, research indicates that for lawyers, the more serious the case, the more significant the anchoring effect[14] and the more juries and judges (fact-finders) will rely on anchors to make their decisions.

Anchoring in practice

Now that you are convinced (I hope) of the anchoring principle, how do we go about putting it into practice?

Well, first and foremost, we should remind ourselves that a prosecutor's role is to guide the judge and jury on a journey with justice as the destination. To do so, we must be faithful in every step and truthful at every moment. Prosecution

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is not a place for games or gimmicks. To be even more specific: A prosecutor should never ask for an outcome that is unjust simply to create an anchor—because the judge or jury just might grant that request. Don't ask for anything unjust. Full stop. Anchoring is a powerful tool, and prosecutors must utilize this tool consistently with every ethical consideration that guides our profession.

The key to anchoring is to provide a starting point for the fact-finder. While the best studies on anchoring rely on numerical anchors—that is, a number from which the recipient then makes adjustments—anchoring is not limited only to numbers. Closely intertwined with anchoring is another heuristic: the concept of "priming," or initial suggestion. In fact, Kahneman, who wrote *Thinking Fast and Slow*, believes that anchoring occurs mostly because a recipient makes decisions in light of the information *first* provided.[15] I agree. Following this line of thought, we have reason to be confident in non-numerical anchors as well. You will recognize this concept as what more experienced advocates call "setting expectations." It is anchoring in a slightly different set of clothes.

For example, assume there is an upcoming a driving while intoxicated (DWI) trial in which a DPS trooper is the investigating officer. When you as the prosecutor utter the words "DPS trooper" in court, jurors' minds race to a particular idea. This idea is their individualized mental image of what a DPS trooper will look like or should act like. From this idealized trooper, each juror will construct expectations that will either be met or missed by the real trooper. As we know, not all officers (or lawyers, for that matter) are of equal experience, ability, and training, and it's important to set jurors' expectations in an appropriate place. In the right circumstance, you could "prime" the jury by saying something like:

> "You will meet Trooper Sam Garza. At the time of this arrest, Trooper Garza, age 24, was a recent graduate of the Department of Public Safety Academy and had just completed his initial training here in our county. This was Trooper Garza's third DWI arrest, the first on his own, and this is his first time testifying."

This background on Trooper Garza is designed to "prime" the jury with an idea of a DPS trooper that's likely different from the one jurors have in their heads. (Remember, they cannot avoid constructing a mental image of a DPS trooper as soon as they hear those words. Neither can you.) Priming jurors for what Trooper Garza will actually be—rather than what they expect him to be—will prepare them to make decisions appropriate in this case rather than based on their own (unrealistic) expectations. If Trooper Garza is a little hesitant or nervous on the stand, if he is not entirely clear about some aspects of investigation, or if there are some things about intoxication investigations that Trooper Garza does not yet know, jurors will assess those things against the anchor of a trooper *you've given them* rather than their own mental construct.

Here's another example of anchoring language that sets expectations. You might tell the jury in that same DWI trial:

> "You will see a video of this traffic stop, investigation, and arrest. Please understand, when I say 'video,' I don't mean a J.J. Abrams production with multiple cameras, boom mics, stage lighting, and zoom lenses. No, this is small camera fixed behind the slightly dirty windshield of a patrol car, a patrol car parked on the side of a dark road at some distance from the action. The lighting will be poor. The video resolution will be low. The rain and wipers will sometimes block your view, and the sound does not always pick up well. The camera has a fixed lens designed to capture a wide area, not focus on a particular point. The video, as you will learn, is intended to supplement the testimony of Trooper Garza, not replace it, and although the video has some limitations, you'll see that it can still be of significant help to you."

Anchoring the video in this manner sets the jury's expectations for what they *will* see, not what they might initially expect when they hear the words "dashcam video."

There are number of other examples, things you are almost certainly doing already, to set expectations for, or anchor, judges and juries. Consider, for instance, how you might:

- introduce a child victim in a sexual assault case before she takes the stand,
- prepare a family violence jury to convict upon a showing of simply felt pain (when in fact there were visible injuries);
- discuss the use of a vehicle as a deadly weapon with a set of facts much weaker than your own; and so forth.

Also consider the power prosecutors have to go first (priming) in almost every setting: voir

dire (perhaps the most important anchoring moment), opening statement (which we should not waive), presentation of witnesses in a suppression hearing, calling a witness, etc. On a more traditional numeric basis, anchoring can be fruitful in the realm of negotiations, and the research is replete with examples.[16]

Based on those studies on anchoring and negotiations, consider these suggestions. First, the State should make the opening offer in a plea bargain, and that offer should always be based on a careful, thoughtful evaluation of the case's facts, the defendant's nature, and the community's standards. The State's offer will be the anchor, and that anchor will govern the rest of the negotiation—but *that is true only if the prosecution makes the first offer*. Don't underestimate this simple idea of going first in a plea negotiation.[17]

Second, the prosecution's offer should be elevated but principled. By elevated, I do not mean unjust but rather appropriate. After all, we expect to negotiate with the defense to achieve a result that all parties agree on. Beginning at the low end of the range will lead to predictable and generally unsatisfactory results.[18]

Third, remain aware of how anchoring changes our own expectations. If the defense makes the first offer or even if you receive a very divergent counter-offer, be aware that you may be unconsciously adjusting from what may be an arbitrary number (i.e., you've spun a 10 on the wheel of fortune). Heuristics are always at work with us—up until the point we realize it. But if we're aware of anchoring and its effects, they often fade like the mist.[19] Instead, keep yourself "anchored" to the facts of the case and the community sentiment about that type of crime.

Finally, anchoring has tremendous impact in sentencing arguments. Consistent with my warning—urgent plea, really—to never to ask for more than would be just to receive, also consider this advice. Most importantly, *do not pass the opportunity to speak first* at the close of the punishment argument. I know that deferring may seem sensible in some cases, and you may believe it to be effective based on your own experience. Nevertheless, the best research tells prosecutors to go first and to anchor the decision-maker. Anchoring depends above all else on going first—something that prosecutors have the privilege of doing at almost every stage of the trial. Do not waive opening statement.

Secondly, what should be obvious by now is still worth repeating: Prosecutors should recommend a sentence. Many of us have missed this opportunity in the past. We tell the jury to sentence the defendant to "whatever you think is fair." We had good reasons at the time, I'm sure, but do not do this anymore. *Ask for a specific sentence*. Aren't we in the best position to do so? Aren't we abdicating our duty when we fail to make a recommendation? If not us, then who? We know—or should know—that without a recommendation, particularly for a jury, we are essentially a guide abandoning our tour group in the deep forest hoping they will make it out safely. Always ask for a sentence—a just sentence.

Third, tie your recommended sentence to a rational argument. We should never, ever be arbitrary. In fact, many of our duties as prosecutors are to convert irrationality into reason, to transmit emotion into logic. Ultimately, we ask people to make weighty decisions on reason, not whim. We can and should provide specific, rational reasons for a particular sentence, and in doing so we will co-opt the power of the anchoring heuristic for honorable ends. *Never ask for a sentence that is not justified by the facts in your case*.

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Conclusion

Anchoring is real. It's undisputable. You may not like it, but that doesn't change its presence or its power. Accept it—even embrace it, because anchoring is effective. The effectiveness of much of what we do with respect to advocacy is debatable, but that is not the case with anchoring. Anchoring makes a difference.

Most importantly, now that we have put a name on this technique, which you may have used in the past and that I hope you will use in the future, I earnestly implore you to employ it responsibly, ethically, and in service of the interests of justice. I'm confident you will. ❇

Endnotes

[1] Kahneman, Daniel. *Thinking, Fast and Slow*. New York: Farrar, Straus and Giroux, 2011, p. 98.

[2] A traditional Texas heuristic: "F-150 or Silverado? Listen, don't feed me all your 'data.' I'd rather push a Ford than drive a Chevy."

[3] Kahneman, p. 119.

[4] Spadin, Linda. "The Anchoring Effect: How it Impacts Your Everyday Life." https://psychcentral.com/blog/the-anchoring-effect-how-it-impacts-your-everyday-life.

As we know, not all officers (or lawyers, for that matter) are of equal experience, ability, and training, and it's important to set jurors' expectations in an appropriate place.

[5] Among other honors, *Thinking Fast and Slow* received the National Academy of Sciences Best Book Award in 2012.

[6] The word heuristic comes from the same root as eureka. Kahneman, p. 98.

[7] *Id*., p. 124. Incidentally, the tallest redwood is named Hyperion, and it is 379.7 feet tall.

[8] Kim, Jungwook; Chae, S. "Anchoring Effect of The Prosecutor's Demand on Sentence Evidence from Korean Sexual Crime Cases." *KDI Journal of Economic Policy,* 2017, 39(3) 1-18.

[9] Real estate agents were asked to visit a house, where they were given comprehensive information on it, including the asking price. One group of agents was given an asking price that was substantially higher than the actual listed price, while the other group was given an asking price substantially lower than the actual listed price. Both groups were asked to give their own estimate on a buying price for the house, along with a list of factors they used to determine their estimate. Both groups were adamant that the asking price they had been provided had no influence their decision and that they made the decision based on their own visit and their analysis of the information provided. Despite this claim, both groups were anchored by the provided asking price by a 41-percent effect. (By comparison, students with no real-estate experience had an anchoring effect of 48 percent). *Id*., p. 124.

[10] *Cognitive Biases in Health Care*, Issue 28, October 2016, https://www.jointcommission.org/assets/1/23/Quick_Safety_Issue_28_Oct_2016.pdf.

[11] *Id*., p. 126.

[12] See, e.g., Jennifer K. Robbennolt & Christina A. Studebaker, "Anchoring in the Courtroom: The Effects of Caps on Punitive Damages," 23 *Law & Hum. Behav.* 353 (1999); Bibas, Stephanos "Plea Bargaining Outside the Shadow of Trial," *Harvard Law Review*, Vol. 117, No. 8 (June 2004); ; Mollie W. Marti & Roselle L. Wissler, "Be Careful What You Ask For: The Effects of Anchors on Personal Injury Damages Awards" 6 *J. Exp. Psychol.* 91–103 (2001); Payne, John, et al. (1998); Simmons, Joseph P., et al. "The Effect of Accuracy Motivation on Anchoring and Adjustment: Do People Adjust from Provided Anchors?" *J. of Personality and Social Psychology*, Vol. 99, No. 6, 917-932 (2010); Behavioral Decision Research and Overview. Measurement, Judgment, and Decision Making. *Handbook of Perception and Cognition* (2nd ed). 303-359.; Sunstein, Cass R., et al. "Punitive Damages How Juries Decide." University of Chicago Press, 2014. Gretchen B. Chapman & Brian Bornstein, "The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts," 10 *Applied Cognitive Psychol*. 519, 525–28, 532–33 (1996).

[13] Guthrie, Chris, et al. "Judging by Heuristic: Cognitive Illusions in Judicial Decision Making" (2002). *Cornell Law Faculty Publications*. Paper 862. See also, Miller, Colin, "Anchors Away: Why the Anchoring Effect Suggests that Judges Should be Able to Participate in Plea Discussions" (February 11, 2013).

[14] Kim, Jungwook & Chae, S., "Anchoring Effect of The Prosecutor's Demand on Sentence Evidence from Korean Sexual Crime Cases." *KDI Journal of Economic Policy,* 2017, 39(3) 1-18.

[15] Kahneman, p. 122.

[16] Stuntz, William J. "Plea Bargaining and Criminal Laws Disappearing Shadow." *Harvard Law Review*, Vol. 117, No. 8, 2004, p. 2548; Baker, S. "Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial." *Journal of Law, Economics, and Organization*, Vol. 17, no. 1 Jan 2001, pp. 149-167.

[17] Charles B. Craver, "What Makes a Great Legal Negotiator?" 56 *Loy. L. Rev*. 337 (2010).

[18] One of the best prosecutors I know and a personal mentor to me, R. Kelly Blackburn, tends to make an offer very close to what he will resolve the case with. He is certainly not inflexible, but over time defense counsel learn that when Kelly assesses a case, that assessment is based on careful consideration and is close to if not exactly what the case is really worth.

[19] You might consider reading *Mindware: Tools for Smart Thinking*. (Nisbett, Richard E. Penguin Books, 2016.) This book is something of a "how to" to resist the effect of various biases all of us have and would seem to be required reading for those of us who make truth our trade.

Combatting crime against elders (cont'd from front cover)

Intriguing targets

Why are elderly victims so intriguing to scammers? Most elderly people have worked their whole lives and saved for retirement, so they have liquid funds easily accessible. Most of our elderly citizens live on a fixed budget and would love to supplement, so they pay attention when money-making opportunities arise. But mostly, to be honest, the elderly are often easy targets. I have spoken to several psychologists and psychiatrists, and I have had them testify on the stand that often the very first part of the mind to start slipping is the "executive function" of the brain. Our executive function is what we use to make rational decisions, to organize, pay bills, and manage money, among other things.[1] For most of us, the rational question about winning the Jamaican lottery would be, "Did I even *play* the Jamaican lottery?" We would be able to spot a scam a mile away. But for someone with executive function impairment, these rational questions simply would not even come to mind.

Have you ever been questioned by an elderly relative about how to post a picture on Facebook or how to send a tweet? The answer nowadays is more and more commonly a resounding yes. Not only is our elderly population living longer, but they are not shying away from electronics anymore. The increasing elderly population is embracing technology in greater numbers every year.[2] People aged 65 years or older in the U.S. comprised 14.5 percent of our population in 2014, but that number is expected to grow to 21.7 percent by 2040.[3] The numbers are similar in all the age brackets over 65.[4] What does this mean for prosecutors? Simply, more cases with elderly victims. A large study, conducted with a cumulative 2,335 years' worth of information, gives an estimate of $36.48 billion (with a B) of loss per year to elder financial abuse.[5]

The Bexar County District Attorney's Office had a dedicated Elder Fraud Unit for almost 15 years. I joined the unit in early 2015. Our office no longer has the dedicated unit, but most cases involving financial crimes against the elderly are assigned to the Special Crimes Unit; these cases must be given particular attention because of the unusual and various challenges that arise. These cases have no shortage of issues, from legal and geographical, to psychological and physical.

Issues prosecutors face

Prosecutors handling elderly victim cases often encounter complications due to these victims' physical and mental states. In addition to the commonly identified problems with memory, these victims may die before trial, may not be able to testify due to health reasons (they are bedridden, comatose, etc.), may not be fit to testify for mental health reasons (Alzheimer's, dementia, memory loss, etc.), and may not be competent at the time of trial but were competent at the time of the offense. Some of these issues may or may not be cured with a quick indictment and motion for a deposition under Art. 39.025 of the Texas Code of Criminal Procedure. For those that cannot be fixed that way, prosecutors face a whole host of *Crawford*, hearsay, and effective consent issues.

Typically, most if not all of the issues stem from the victim's mental health. There will be victims of every degree of mental decline severity. In some cases it will be as clear as day that an incompetent elderly person was taken for a ride, while in others, an elderly victim is as sharp as a tack and very willing to testify. The big issues come in the gray areas where the victim is still able to care for himself and make some decisions but cannot exactly manage finances.

Typically, most if not all of the issues stem from the victim's mental health. There will be victims of every degree of mental decline severity. In some cases it will be as clear as day that an incompetent elderly person was taken for a ride, while in others, an elderly victim is as sharp as a tack and very willing to testify.

And of course, the question of mental acuity leads to a huge issue in prosecuting elder theft cases: effective consent. Local prosecutors are not going to be exposed to the Jamaican lotto scams very often because the culprits are difficult, if not impossible, to identify and locate. But we will see the local scams: greedy neighbors, overzealous caretakers, or worse, impatient relatives. Most of our elderly victims may be fully willing to give up their hard-earned cash. It is a big reason so many in law enforcement chalk these cases up to a "civil matter," but the truth is that an incompetent elderly individual lacks the capacity to give effective consent due to his mental health.[6] It's proving a victim was in fact incompetent at the time of the offense that can be challenging, especially if he is still making decisions and able to live alone.

One such case I recently finished had these gray areas. Holly Sharp was the adopted daughter of a 95-year-old victim. The victim brought Holly back to Texas from a rehab facility to help manage his affairs. The agreement was for Holly to live and eat for free at his house if she managed his bills, etc. There were over $250,000 in losses to the accounts, including a reverse mortgage on

the victim's home. Even though the victim had big memory issues, I still got a deposition because, although he couldn't remember a lot of details, he definitely remembered not giving Holly permission to take his home, Cadillac, and money. The defense had a good argument that the victim was not competent to testify at the deposition, but the attorney never objected during the deposition. Nonetheless, the bank records were very clear in this case, and the defendant ended up taking a plea and going to the judge for punishment. The judge gave her 10 years to do.

How do we overcome these issues? We look to nontestimonial statements that are either non-hearsay or nicely fit a hearsay exception, including bank records, medical records, caretaker notes, and witness testimony.

Overcoming these problems

How do we overcome these issues? We look to nontestimonial statements that are either non-hearsay or nicely fit a hearsay exception, including bank records, medical records, caretaker notes, and witness testimony. In a large percentage of our cases, we are not going to have complainants at trial—they will either be incompetent, unable to come, or possibly deceased. Their absence will draw the inevitable *Crawford* objection to any statements we may have, but most records mentioned above will happen before police intervention or any lawsuits are filed and will therefore be nontestimonial. That leaves us with a hearsay objection, most of which will be overcome with a business records exception. However, some statements are still objectionable, i.e., statements from the victim about the suspect. But prosecutors still have options.

Many banks require a customer disputing his account to fill out a fraud affidavit. This affidavit asks, "What happened?" This affidavit can be a goldmine for a prosecutor because it is entirely within the purview of the business records exception and is nontestimonial, yet it is still often a statement about the suspect. Granted, portions of these statements are not going into evidence, but we should be able to get in the parts about non-consent. My former partner, Joanne Woodruff, who started our Elder Fraud Unit, tried a case, *Arriaga v. State*,[7] and obtained a guilty verdict with the competent statements of a deceased victim from the victim's bank fraud affidavit. This case was appealed and upheld by the Texas Fourth Court of Appeals.

We also find that excited utterances happen at the bank. A very frequent scenario in these cases, especially the big dollar ones, is where a family member takes the victim to a bank to check on the accounts because something is wrong. They get to the bank, only to find out the accounts are empty. What the victim says next is usually profanity-ridden and often includes, "I didn't give that S.O.B. my money!" Usually, the person who took the victim to the bank remembers these statements. As you can tell, banks are a great source of information for these cases, from tracing the funds (always follow the money trail) to fraud affidavits, from teller notes to suspicious activity reports.

Beyond bank records, we will get medical records. A large percentage of these cases do not even need the victim at all, if we can prove through witnesses and medical experts that the victim was incompetent prior to the offense and the defendant knew it. We have the ability to nip the consent issue in the bud from the very start. As stated above, an incompetent individual lacks the capacity to give effective consent due to his mental health. This is especially handy in cases where caretakers have stolen from their charges because a caretaker almost always comes into the picture after a diagnosis of declining mental and physical health. There are typically medical records documenting care needs, diagnosis, functioning, and the like. Psychiatrists and psychologists will be able to testify to how apparent a person's lack of capacity is to the average Joe, especially a caretaker. Additionally, educating police officers to ask questions and record answers helps with the mental capabilities of a complainant, as do observations of neighbors and friends of the victim.

I could go on and on about challenges these cases can bring and the options we have to overcome them, but the reality is that in most of these cases, the money is gone and it is not coming back. In our plea agreements, we have had big success with tiered offers where the better offer includes upfront restitution. We always ask for the restitution upfront—defendants typically do not pay it back on probation.

Educating the community

I feel strongly about advocating against elder fraud in our community. Benjamin Franklin said, "An ounce of prevention is worth a pound of cure," and it is so true. When the Elder Fraud Unit was a separate unit, two prosecutors were assigned to it, and we split up the speeches in the community. We would give presentations at event centers, daycare centers, churches, bank seminars, and adult education classes. I even got

to give a speech in New Orleans at a financial risk seminar. The point was to spread the message of prevention. I would usually discuss a lot of our cases to make it interesting and then move to current scams in the community: scams concerning the IRS, contractors, "pigeon drops,"[8] "grandparents,"[9] prizes and sweepstakes—the list goes on and on. Although the scams are too numerous to list or cover, there are almost always three red flags that pop up in every one of them:

1) immediacy,
2) secrecy, and
3) an untraceable form of payment.

I would advise that if even one of these red flags pop up, an elderly person should contact someone trustworthy and seek that person's opinion. Scammers are usually very controlling—they want to control every aspect of the "transaction," so to speak. They want their victim to act fast and not talk to anyone else because they know the scam would most likely be exposed. Further, they want total anonymity, so they often will request the victim pay them using a green dot card, gift card of some sort, or even the loadable silver Visa cards. The scammers will then turn around and sell these cards at a discount or even deposit funds in their accounts because most of these cards are untraceable.

If there were one method of prevention that I could get every person to understand first and foremost, it would be to *speak up*. Perhaps the main reason elderly individuals are so attractive to scammers is because most of them clam up and even hide the fact that they have been swindled. It has been estimated that only one in 14 cases of elder abuse (including physical) is reported.[10] The reasons victims do not report are plentiful: Elderly people do not want family to think their minds are slipping, they do not want to be put in a nursing home, or they simply are too embarrassed to admit what happened. Whatever the reasons, keeping quiet about the situation is about the worst thing they can do. Most banks and credit card companies give only 90 days to dispute charges on monthly statements, and scammers very often come back for more when they find a "sucker." Speaking up not only gives elders the confidence to say no to the scammers, because they have support, but it often will stop the bleeding—unlike the case with Jane above.

Another piece of advice I like to give is to have an absolute policy in place—that is, a policy to never do business with an unsolicited caller. Whether it be email, phone, or a knock at the door, if you did not solicit the sale, do not talk to the seller. My reasoning is that many elderly and retired folks get knocks at the door for home repairs, tree trimming, magazine sales, and the like. These encounters have a huge potential to lead to scams, and it is even worse for unsolicited phone calls and emails. The "sellers" in these instances have total control, as all information they give is under their control, and often they pressure potential "customers" to take the deal on the spot—many will not allow you time to check with a trusted person (setting off two red flags, immediacy and secrecy). A policy of *no deals with unsolicited callers* solves this problem because an elderly person can simply tell the caller, "I do not accept solicitations. If I need your services, I will look you up later." Chances are, they will most likely not be able to find the "seller" later, and even if they do try to look them up, more than likely they will find a better deal from a reputable company.

Lastly, I recommend elders give read-only access to accounts (bank, credit card, and retirement) to a trusted person. Doing so allows a trusted individual to check the accounts of the elderly person to make sure there are no extraordinary charges or any outlandish money movement happening. Most of the big-dollar thefts start off small, as if they are tester charges or withdrawals, and when those go unnoticed, the withdrawals or charges grow exponentially. I also recommend www.annualcreditreport.com, the only credit check site approved by the feds. You can get one free report from each of the three bureaus per year, and you can spread the credit checks out to one every three months and get a very good idea about whether your credit is being used by someone else. Plus, checking the reports regularly allows you to catch any fraud within a reasonable time.

I hope this article will be of some help on your next case with an elderly victim, along with a few suggestions for preventing these crimes. ❄

I strongly feel and advocate for community involvement with my office. Benjamin Franklin said, "An ounce of prevention is worth a pound of cure," and it is so true.

Endnotes

[1] Weill Institute for Neurosciences University of California San Francisco, "Executive Functions," Memory and Aging Center, 2019, memory.ucsf.edu/executive-functions.

A roundup of notable quotables

"They wanted a poster boy for opposition to an accomplice getting the death penalty. They picked the wrong guy to be their poster boy."

—Toby Shook, former assistant criminal district attorney in Dallas County who prosecuted the Texas Seven years ago, in a news article on the next-to-last surviving member of the gang of prison escapees, Michael Rodriguez, who was set for execution in March. His defense lawyers appealed their client's death sentence because, they say, he was not involved in the murder of Officer Aubrey Hawkins but was sentenced because of Texas's law of parties, which holds accountable everyone involved in the commission of a crime. Shook also noted that Rodriguez "gave a written confession that said he had an AR-15, a loaded shotgun, and two revolvers with him in the car, and he was prepared to start a firefight if officers started approaching, to let the others get away." https://woai.iheart.com/content/2019-03-05-texas-seven-escapee-could-be-test-case-for-capital-punishment

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

"It's never one person who gets things done; it's always a collective of people, and I've always known my role, but I just felt like I wanted to be able to fight for people who have paid their dues to society. I just felt like the system could be so different, and I wanted to fight to fix it, and if I knew more, I could do more."

—Reality TV star and multihyphenate Kim Kardashian West in the May 2019 issue of *Vogue*, on why she is studying to become a criminal defense attorney. https://www.vogue.com/article/kim-

"We have watched those tapes a jillion times, and it is like an ant bed with ants running wild out there. It is impossible to tell what is going on, who shot who, who got shot, and there is nothing to tell us definitely who fired the shots that hit the guys who were killed."

—McLennan County Criminal District Attorney Barry Johnson, explaining why he dismissed the remaining 24 charges against defendants involved in the 2015 shooting at Twin Peaks restaurant in Waco. https://www.wacotrib.com/news/courts_and_trials/da-says-he-his-team-agonized-over-decision-to-dismiss/article_2b1c84a2-1c08-5ccb-9536-89eebb0d13fd.html

[2] Anderson, Monica and Andrew Perrin, "Technology Use Among Seniors," *Pew Research Center: Internet, Science & Tech*, 17 May 2017, www.pewinternet.org/2017/05/17/technology-use-among-seniors.

[3] U.S. Department of Health and Human Services, "A Profile of Older Americans: 2015," United States Department of Health and Human Services Administration on Aging, 2015, www.hhs.gov.

[4] *Id*.

[5] Orlov, Laurie, and The True Link Data Science Team, "True Link Report on Elder Financial Abuse," *True Link Report on Elder Financial Abuse*, Jan. 2015, www.truelinkfinancial.com/true-link-report-on-elder-financial-abuse-012815.

[6] Tex. Pen. Code §31.01(3)(E).

[7] *Arriaga v. State*, 2009 Tex. App. LEXIS 5408.

[8] A "pigeon drop" is like the fraud that trapped Jane at the beginning of this article. A "pigeon" (or "mark") is persuaded to give up a sum of money to secure the rights to a larger sum of money.

[9] In a "grandparent" scam, a con artist calls or emails a victim posing as a relative in distress (or someone representing that relative) and asking for a wire transfer for bail money, hospital bills, lawyer's fees, or the like.

[10] National Research Council (U.S.) Panel to Review Risk and Prevalence of Elder Abuse and Neglect; Bonnie R.J., Wallace R.B., editors, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*. Washington, D.C.,: National Academies Press, 2003. www.ncbi.nlm.nih.gov/books/NBK98802; doi: 10.17226/10406.

Depositions in a criminal case

Recently, I found myself at Brookdale Watauga Senior Living Center with my co-counsel, an investigator, a video recorder, a court reporter, and defense counsel—and I wasn't reenacting a scene from the John Grisham's classic film *The Rainmaker*.

By Ty Stimpson
Assistant Criminal District Attorney in Tarrant County

As the video recorder was placed at the foot of a sweet old lady's bed and the court reporter began asking for everyone in the room to identify themselves, I realized this was really happening: I was set to depose a witness in a criminal case.

The victim, Ms. Peters, was an 83-year-old widow who, due to severe urinary tract infections, was suffering from memory loss and could not leave her nursing facility. Her son, while serving as her power of attorney, stole more than $100,000 from her and was charged (and later convicted) of theft of property totaling $30,000 to $150,000 and misapplication of fiduciary property totaling $30,000 to $150,000. This was not the first time her son had stolen from her over the years, but Ms. Peters was adamant it would be the last time she allowed it to happen without consequence.

With such a motivated victim—but one whose memory and physical health were declining—I initially found myself scrambling for what to do. My trial date was fast approaching, but after discussions with Ms. Peters's medical providers (in compliance with HIPAA, of course), I wondered if she would be incompetent to testify or, God forbid, even alive by the start of trial. At that moment, I did what all great trial lawyers do: I consulted with people much smarter than me, and the next thing I knew, I was preparing for my first deposition

When many of us became prosecutors, we probably never thought we'd practice civil law in our day-to-day role. Well, I thought the same thing until I was assigned to the Elder Financial Fraud unit in the Tarrant County Criminal DA's Office, where many of my victims are like Ms. Peters. Since the creation of our unit in May 2017, I have conducted five depositions, and I have two more that will be completed by the time you read this article. If I were a civil litigator, I more than likely would not be qualified to write on this topic, but because I am a prosecutor writing to other prosecutors, five depositions in two years practically makes me an expert! And so I am sharing what I've learned.

Planning and preparing

Depositions in criminal cases are governed by Chapter 39 of the Code of Criminal Procedure. We prosecutors have not always been able to depose witnesses; it was not until 2005 that the State gained the ability to take depositions in criminal cases.[1] To take a deposition, you must first file an affidavit with the clerk stating the facts constituting "a good reason" for deposing the witness and an application to take the deposition.[2] In some of our larger counties with multiple courts, "good reason" may vary a little from court to court, but luckily, Art. 39.01 tells us more broadly what is deemed good reason: for instance, if a witness resides out of state, he or she is on the verge of death, or, more common for the type of cases I handle, the potential deponent is an elderly individual.[3] It is not necessary for the affidavit to be a long statement, but it should be sufficient to give the court good reason to order the deposition.[4] Once an order is signed, the prosecution has 60 days after filing the application to take the deposition.[5]

What do you do when a defendant is in custody and a deponent cannot leave her bed without assistance? I'm glad you asked! I had such a case, where the deponent was immobile and needed an oxygen tank to breathe, and the defendant was in custody.

Coordinating the logistics of a deposition is where the headache begins. The condition of a deponent will determine where to hold the proceeding. I have conducted depositions in a courtroom, in a nursing home conference room, and at the bedside of a victim (as with Ms. Peters). You should also know the deponent's condition because of the limitations on who can take depositions—depositions can be taken only by a district judge, county judge, notary public, district clerk, or county clerk.[6] Therefore, if a deposition will occur outside the courthouse, make sure to secure one of these people, and include him or her in the order.[7] Typically, when I am deposing a witness outside the courthouse, I request a court reporter who also serves as a notary.

The Sixth Amendment's Confrontation Clause is applicable in depositions, so when a defendant is in custody, the court can issue any orders or warrants necessary to secure the defendant's presence.[8] What do you do when a defendant is in custody and a deponent cannot leave her bed without assistance? I'm glad you asked! I had such a case, where the deponent was immobile and needed an oxygen tank to breathe, and the defendant was in custody. But the show must go on, as they say. We held the deposition in the courtroom, and the deponent was transported to the courthouse by the nursing facility with the aid of her nurse. We took the necessary breaks to accommodate her medical needs, and afterward, defense counsel asked me for the best plea deal possible. Was the whole event easy to arrange? No. But was the result worth it in the end? Absolutely. Deposing witnesses shows defense counsel and defendants how serious you are about proceeding with trial. Also, depositions can offer a sneak peak of defense counsel's trial strategy with future witnesses or how he may attempt to dispute the case. That is not a luxury we often have in criminal prosecution, unlike our colleagues on the civil side.

Before you depose a witness, one thing I recommend is treating the deposition like trial. In the event a witness is unavailable for trial, the deposition will serve as her testimony. Therefore, before every deposition, I make sure to have my trial exhibits marked. That way, when I am showing exhibits to the deponent, the record is clear as to which ones I'm referencing; in addition, at trial, the same exhibit marked as "SX1" in the deposition is also "SX1" for trial.

Civil rules

The biggest difference between a criminal trial and a deposition is that the deposition is governed by the Texas Rules of Civil Procedure.[9] Unless you have experience practicing civil law, the last time many of us looked at the Rules of Civil Procedure might have been while preparing for the bar exam. The most important thing to know is the permissible types of objections during depositions: leading, form, and non-responsive.[10] The form objection encompasses a lot of different meanings.[11] And just like in trial, if the prosecutor or defense attorney does not raise objections during the deposition, she has waived the right to object.

When the unfortunate scenario happens and a deponent is unable to testify at trial, having that witness's deposition is comforting. In this situation, I file a motion asking the court to determine the admissibility of the witness's deposition pretrial pursuant to Rule 804(b)(1)(B)(iii) of the Texas Rules of Evidence. Even with the hearsay exception, my reason behind asking the court to make determination pre-trial is both to put the court on notice of my intent to call a witness through her deposition, as well as to have the court make a ruling on the objections both parties made during the deposition. Knowing that the Civil Rules of Procedure govern the deposition comes in handy here. In one instance, defense counsel, despite my efforts to refer him to Chapter 39 and its reliance on civil rules for depositions, continued to make traditional trial objections. When it came time for the court to rule on the parties' objections, defense counsel was disappointed that none of his objections were sustained because he had not properly preserved them. Not only should prosecutors be familiar with the governing rules of depositions, but we should ensure the court knows too.

Bumps in the road

Not every deposition has run as smoothly as I desired. Despite how far in advance one plans or how much one anticipates potential pitfalls, unexpected problems are unavoidable. For instance, when taking depositions, I like to video-record the proceedings because I have found that it is more effective for the jury to hear

and see the victim or witness testifying, as opposed to my reading the deposition into the record. One time, though, despite having the IT Department set up the recorder and testing everything before we started, the recorder malfunctioned, and I found out after the fact that the deposition had not been recorded.

Another potential problem to consider: We must understand that elderly victims have good days and bad days. When we were originally scheduled to depose Ms. Peters, for example, I met with her an hour beforehand, just to make sure she was comfortable with the upcoming deposition. Unfortunately, that day, Ms. Peters was not feeling well. Rather than having her on the record on an off day, I utilized my ability to extend the 60-day deadline. (The court may grant an extension for deposing a witness if the reason for the extension is due to the deponent's health or well-being.[12]) If a deponent is elderly, do not feel compelled to continue with the deposition that day if he or she is not feeling up to it. The thought of testifying is stressful enough for elderly people, and when that stress is combined with not feeling 100 percent, either physically or mentally, prosecutors can potentially hurt our cases unnecessarily. Request an extension from the judge to postpone the deposition.

Conclusion

Depositions, which once seemed daunting because of their unfamiliarity, have turned into an asset with protecting certain cases against unforeseen developments. The next time you have a case with a witness who resides out of state, who is physically unwell, or who is elderly or disabled, consider deposing that witness. Not only will you preserve that person's testimony, but you'll also have a story to one-up the civil litigators you know! ❇

Endnotes

[1] House Bill 975, 79th Regular Session (2005).

[2] Tex. Code Crim. Proc. Art. 39.02.

[3] Tex. Code Crim. Proc. Art. 39.01.

[4] Tex. Code Crim. Proc. Art. 39.025.

[5] *Id*. at 39.025(b).

[6] Tex. Code Crim. Proc. Art. 39.03.

[7] *Id*.

[8] Tex. Code Crim. Proc. Art. 39.025(f).

[9] Tex. Code Crim. Proc. Art. 39.025(e).

[10] Texas Rule of Civil Procedure 199.5(e).

[11] *Id*.

[12] Tex. Code Crim. Proc. Art. 39.025(e).

If a deponent is elderly, do not feel compelled to continue with the deposition that day if he or she is not feeling up to it. Request an extension from the judge to postpone the deposition.

What the Office of Inspector General offers Texas prosecutors

Editor's note: This is one in an occasional series from allied professionals and how they can help county and district attorney's offices.

By Lizet Hinojosa
(at left) Benefits Program Integrity Deputy Inspector General, and
Kate Hourin
(at right) Information Specialist, of the Texas Health and Human Services Office of Inspector General in Austin

The Texas Health and Human Services Office of Inspector General (OIG) works with county and district attorneys to prosecute client-benefit fraud and retailers who commit fraud. The clients investigated by the OIG Benefits Program Integrity (BPI) Division are people who may be ineligible for Supplemental Nutrition Assistance Program (SNAP); Temporary Assistance for Needy Families (TANF); the Women, Infants, and Children (WIC) Program, and Medicaid benefits. The retailers and clients investigated by the OIG Electronic Benefit Transfer (EBT) Trafficking Unit are those who may fraudulently use and accept EBT cards (the electronic cards on which clients receive their benefits). BPI also works certain benefit trafficking cases.

How a case originates

The OIG develops potential fraud and overpayment cases through referrals from several sources including the OIG's General Inquiries email, OIG Fraud Hotline, and Texas Integrated Eligibility Redesign System. If BPI determines a case is valid, it is assigned to an investigator. If a complaint is not valid, the complaint is closed.

The OIG's EBT unit investigates the misuse or trafficking of benefits at the retail level, while BPI investigates clients trafficking benefits. In the case of potential retailer fraud, the OIG's EBT unit sends all cases first to the U.S. Department of Agriculture Food and Nutrition Service (FNS),

FY 2018 Completed BPI Investigations[1]

Location	Investigations Completed	Prosecution	Administrative Disqualification Hearing	Non-Fraud
Region 1, 2/9 (Abilene/Lubbock)	3,102	67	82	2,114
Region 3 (Dallas/Fort Worth)	2,014	12	291	603
Region 4 (Tyler)	525	0	20	303
Region 5 (Beaumont)	435	12	31	169
Region 6 (Houston)	1,389	0	92	470
Region 7 (Austin)	1,753	10	127	952
Region 8 (San Antonio)	1,142	28	174	400
Region 10 (El Paso)	1,969	6	208	1,041
Region 11 (Corpus Christi/Edinburg/Pharr)	1,867	14	468	244
Total	**14,196**	**149**	**1,493**	**6,296**

1 Benefits Program Integrity Division, Texas Health and Human Services Office of Inspector General.

which administers the SNAP program, to ensure the OIG and FNS are not duplicating efforts on the same cases.

Once the conflict inquiry is completed, EBT investigators begin their operations, keeping stores under surveillance and monitoring the systems the federal government has in place to look for potential fraud. They also talk to cooperating witnesses to gather evidence. The EBT unit will review the alleged criminal activity evidence with the local prosecutor office, either through email or face-to-face, to ensure the OIG gathers sufficient evidence to prosecute. Once the investigator completes the investigation, the cases are packaged and sent to the DA or CA.

The EBT unit investigated 102 retailer cases in fiscal year 2018 with 16 investigators. BPI investigated more than 14,000 cases in fiscal year 2018 with 76 investigators looking into 7,000 potential fraud cases at any given time. To investigate client fraud, Texas's 254 counties are categorized into 11 regions and three areas (north, central, and south), with the north region of 120 counties having the majority of cases.

Local prosecutors may require further information from the OIG or request more evidence before prosecuting a client, and the OIG works with prosecutor offices to secure search warrants and gather any additional evidence to make a case. The OIG EBT unit also has five peace officers who can secure search warrants and arrest warrants in a timely manner and work with other law enforcement agencies, if needed, on a case. Investigators may also testify during a trial. The cases the OIG and DAs bring against retailers are third-degree felonies or higher, which can carry a prison sentence and financial penalty.

Case processes

The OIG has two avenues through which to pursue clients and retailers suspected of fraud. The first is the non-fraud route, using an administrative disqualification hearing; the majority of cases are resolved in this way. These cases are often the result of client error when filling out the application for benefits or agency error when entering the information into the system. These cases need less documentation and evidence. The clients or retailers receive an evidence packet and may sign a waiver to indicate they agree to a repayment plan. Clients also have the choice not to admit guilt, and the case would then go before a hearing officer who makes a final decision.

The second avenue is prosecution through a local DA's office. A typical BPI investigation takes 180 days, with an average case completed in 155 days. The OIG then provides evidence to the DA that shows clear intent on the client's part to defraud the state or that they intentionally lied about the information provided to Access and Eligibility Services (AES) either at initial application or renewal. Common examples include not reporting or underreporting income, and not reporting correct household members. The burden of proof is higher than in an administrative hearing, and the OIG provides a comprehensive packet of information to the DA to pursue the case.

"The people we investigate are people using benefits improperly. They are either not eligible for benefits, or they are retailers trafficking benefits," says Inspector General Sylvia Hernandez Kauffman. "When they commit fraud, they are taking away resources from people who are truly eligible. We appreciate the work district attorneys do to prosecute or settle the cases the OIG investigates."

"We appreciate the work district attorneys do to prosecute or settle the cases the OIG investigates." –Inspector General Sylvia Hernandez Kauffman

Case resolution

Once the DA's office resolves the case, either through prosecution or an agreed-upon settlement, it alerts the OIG about the final disposition. The OIG establishes a claim,[1] the total dollar amount of the overpayment, which is required to be repaid, against the client, which is used by the Texas Health and Human Services to monitor and process payments from clients.

If you suspect fraud, waste, or abuse taking place in the benefits system, call the OIG Fraud Hotline at 800/436-6184, or use the fraud reporting form on the OIG website.[2]

Endnotes

1 https://hhs.texas.gov/laws-regulations/handbooks/twh/part-b-case-management/section-700-claims.

2 https://oig.hhsc.texas.gov/report-fraud.

A view from the bench

When I started working in a courthouse, I was in awe of the folks in the black robes.

By Eric Kalenak
Assistant District Attorney in Midland County

Imagine my shock when the judge I was assigned to started dropping f-bombs left and right in our very first meeting. Now, I'm not a prude; I'd heard and used the word before. It's just that I imagined all of the judiciary were cultured, Oliver Wendell Holmes-types who play golf in country clubs and attend the symphony. It was a silly presumption, I know, but I was young.

The truth, as we all know, is that judges are just like you and me, only judgier. They look at the world from a different standpoint because they have different responsibilities. I was once a judge.[1] And putting on that black robe is a humbling experience.

You, dear reader, may even become a judge someday. But before you do, you might benefit from someone else's mistakes—mine—rather than your own. What follows are some tips that I have learned over the years from mistakes my colleagues and I have made. Names have been changed or left out, especially to protect the guilty.

Don't ex parte.

Both the Code of Judicial Conduct and the Rules of Ethics prohibit *ex parte* communications.[2] Prosecutors might spend a lot of time in and around the judge's chambers talking about the state of the docket or whether a certain case is prepped for trial, and it is all too easy to slip in a salient fact about a case when the judge calls to ask if you are ready for trial. But resist that temptation.

I'll never forget when I was trying a murder case many years ago. I was talking to the judge and mentioned a seemingly innocuous fact about the case. A short while later, I received a phone call from the irate defense lawyer threatening to file a grievance against me for engaging in an *ex parte* communication. It may have just been bluster in the midst of litigation to throw me off, but you know what? He was right. We prosecutors don't realize the privileged position we hold in our courts. We are probably the lawyers our judges see the most, and we should cultivate a good working relationship with those judges, but we shouldn't abuse the privilege by trying to "home team" the defense lawyer.

While I'm at it, I should probably put in a word about not getting too close with judges. A good working relationship is great, but if we're bending office policy to help a judge move cases, we've gone way too far. Remember, we work for the DA or CA, not the judge. Following this advice can be especially difficult when your boss has a prickly relationship with your county's judges. (I've been there.) It feels like a child in the middle of a custody suit, especially if the judge likes you—you may feel personally disloyal to that judge if you can't do some of the things (not unethical, but against office policy) she asks. It's unpleasant to say no in such a situation, but we have to stand firm.

Be honest.

Honesty is about more than just what we say in court. A courthouse is like a small town: Everyone knows everyone, and word gets around fast. If you're playing fast and loose with the truth with anyone in the courthouse, everyone will know about it sooner or later, and it will damage your reputation.

I once worked with a colleague who had a reputation for dishonesty in matters large and small. I was warned about him before I even met him. How do you think I approached that fellow once I did meet him? Very carefully. And, whether we liked it or not, his behavior affected how our judges dealt with the rest of the office. The judges were less likely to grant us continuances, even when we had missing witnesses and

the like, because this colleague had lied in some of his continuance motions.

I practice mostly in the appellate realm these days, and I am constantly amazed at how many appellate lawyers misstate the record over and over again. I once mentioned to an appellate court judge how frustrating it was to see lawyers do this and I wondered if he noticed. He said that judges *do* notice, "and we know who they are." Don't be that dishonest lawyer.

Be kind to the judge's staff, even when they don't deserve it.

If you're like me, someone who sometimes has trouble with the Christian admonition to love thine enemies, this one can be especially hard.[3] First, though, a word about court staff in general—court coordinators, bailiffs, court clerks and court reporters. The vast majority are hard-working, diligent, smart, overworked, and underpaid. They literally make it possible for you to do your job. Be nice to them. No, be *very* nice to them, not only because it is the right thing to do, but also because they can make your life a living hell if they want to.

A story: a long time ago in a courtroom far, far away, the court coordinator didn't like me. I don't exactly remember why. I may have had a cross word or two with her. Mistakes were made, as they say. As our relationship soured, my world grew chaotic. I was soon getting calls from the bailiff, telling me the judge was wondering where I was for a hearing that was going on that very minute—the one I didn't get notice for. You get the picture.[4]

That said, I have often had court staff go the extra mile for me, doing things they didn't have to, and make my job easier because we were on good terms. Think about that the next time you are tempted to snap at a clerk because you are having a bad day.

Another word about judges and their staff: Complain at your own risk. Sometimes we encounter a member of the court's staff who is just bad at his job. I don't mean malevolence or evil, just incompetence. He's failing to send notices of hearings, not out of spite—he's just clueless. You may be tempted to march into the judge's office to tell her just how incompetent her secretary is, but Don't. Do. It. Think about it from the judge's perspective. Her staff is relatively tiny. She has invested a lot of time and effort in picking them.[5] There can be a certain *esprit de corps* in such environments. She probably likes her staff a lot. And you, the interloper, are going to tell the judge how she screwed up in hiring this person?

I had a colleague do this exactly once. All he got for his trouble was a red-faced, spittle-flecked tongue lashing. Our only hope in this situation is to suck it up, buttercup. Eventually you will get moved out of that court or maybe, just maybe, the judge will finally catch on to her staffer's incompetence. Be prepared to at least partially fall on your sword until then. If the judge asks why you weren't ready for the hearing, be honest but not accusing. [6] Tell her that "your office" didn't get notice and that you'll investigate why such a thing happened.[7] Maybe the defense attorney will chime in and say she didn't get notice either. Build a record in the judge's mind about the fault of her staff member without being accusatory. This is far from a perfect solution, but as a famous movie character once said, "Everybody takes a beating sometime."[8]

Be prepared.

I shouldn't have to say a lot about this. It is, after all, our job to get ready for court. But being prepared can sometimes mean getting ready for a trial the judge calls about on Friday afternoon. You know, the one that's at the very bottom of the trial list that you and the defense attorney thought you would never reach. It's a bummer—a lost weekend, really—and this sort of thing is the grist of many intra-office conversations and bitch sessions.

But here's the thing: There is a pecking order in the criminal justice system, and an assistant prosecutor is not on top. Maybe, if and when you are a judge, you will remember what it was like when you were a lowly ADA[9] and you'll never go to the bottom of the stack; rather, you'll listen to prosecutors and defense attorneys about which cases are ready and which aren't. But until that day, see the Henry Hill quote above about taking an occasional beating.

We don't love our jobs because they are easy; we love them precisely because they are hard. The judge shouldn't gratuitously add to the difficulty, but sometimes she will. If you work under a judge who jealously guards her docket and will brook no input from you on scheduling, my heart goes out to you.[10] Your only consolation is that you tried the case and got it off your docket once and for all. You did it.

I once worked with a colleague who had a reputation for dishonesty in matters large and small. I was warned about him before I even met him. How do you think I approached that fellow once I did meet him? Very carefully.

Speak up.

Whether we call it political correctness or just good old-fashioned courtesy, times have definitely changed. Years ago, I heard a judge use the n-word in a full courtroom during a huge docket call. That was just plain wrong, even by the standards of the day. The rest of the lawyers in the courtroom—including me—just kind of looked at the floor and shuffled our feet like we didn't hear it. Not the finest moment for our profession. Atticus Finch would have hung his head in shame.

What should we do when we encounter a judge who is totally out of bounds? Consider filing a complaint with the State Commission on Judicial Conduct.[11] Now, I'm not talking about filing a complaint every time a judge makes you feel like a dummy or yells at you. If that was the case, I would have filed about 800 complaints by now. No, what I'm talking about is a judge who makes sexist or demeaning comments toward the female lawyers, or who in some other way exhibits flagrant bias or prejudice against a lawyer or litigant because of who they are. Judges who do this sort of thing are very rare and getting rarer, but if you do encounter such a judge, be prepared to act. You will be doing our profession and the judiciary a big favor.

Years ago, I heard a judge use the n-word in a full courtroom during a huge docket call. That was just plain wrong, even by the standards of the day. The rest of the lawyers in the courtroom–including me–just kind of looked at the floor and shuffled our feet like we didn't hear it. Not the finest moment for our profession. Atticus Finch would have hung his head in shame.

Write well.

This final point is for all my fellow appellate practitioners, but trial attorneys, don't stop reading—everyone should write well! You may think appellate judges are a myth because they are so seldom seen out and about (especially since some of our intermediate courts have cut back on oral argument), but appellate judges do exist, and they may know you best. They read your writing, after all—your innermost thoughts (about the law). And what they know about you may not be so swell.

That you should write well should really go without saying. but it apparently is not obvious to some appellate practitioners, many of whose work I read on a daily basis. I read so much dross that I sometimes want to blind myself at the end of the day, just so the agony will stop. And if *I* am sick of it, think about it from an appellate judge's perspective. That's all they do: Read, read, read, then write. All day long. When I was a judge, I can't tell you how much it brightened my day to read something concise and well-written from either side. And, I'll be honest, whichever side wrote well had a leg up in my book.

It seems that so many lawyers think it is adequate to simply vomit words onto a page and be done with it. But that is lazy, unprofessional, and unacceptable. As Brian Garner says, every lawyer who writes is, by definition, a professional writer.

How does one become a better writer? Well, read Brian Garner, the editor of Black's Law Dictionary and author of numerous books on the art of writing. There are many other worthwhile writers, such as Wayne Scheiss of the University of Texas and Ross Guberman, who has a great Twitter feed (@LegalWritingPro) where he gives examples and legal writing quizzes. Some of these folks are highfalutin' civil lawyers who get paid the big bucks, but that shouldn't deter us from emulating them. We should strive to write as well as—and even better than—our civil brethren. After all, we have the greatest client in the world, the State of Texas.

Conclusion

When you look at the world from the judges' perspective, their actions can make a lot more sense. They have an awesome responsibility, and 99 percent of them take it very seriously. Believe it or not, their job is not just to make our lives more difficult, even if it sometimes seems that way. They might not always try to meet us halfway, but we can try and see their side of things. It would make our jobs easier to put in the effort. ❇

Endnotes

[1] Why am I back prosecuting? Catch me at TDCAA Annual Update in the bar and I might tell you. Suffice it to say that the sting of rejection from a not-guilty verdict doesn't seem so bad when you've been rejected by two out of three voters in a 28-county region!

[2] Tex. Code Jud. Conduct, Canon 3(B)(8); Tex. Disciplinary Rules Prof'l Conduct R. 3.05(b).

[3] I'd like to emphasize that the anecdote I tell under this point does not apply to any of the court staff I currently work with, all of whom are wonderful, wonderful people. Really!

[4] And that woman is now my wife! No, not really. My wife is a former court clerk, but she was one of the ones I was nice to.

[5] Or maybe not. I thought of one secretary whose name the judge must have drawn from a hat full of names picked randomly from lists of rejected jurors.

[6] You could also consider the possibility that it is your fault. Ever clean off your desk to find the notice about that hearing months ago you were sure you didn't get?

[7] Your reputation for honesty will come in handy here.

[8] Henry Hill (played by actor Ray Liotta) in *Goodfellas*, 1990.

[9] But, then again, maybe you will forget like the rest of the ex-prosecutor judges seem to have.

[10] You can blame "Baby Judge School" for that. One of the first things they teach new judges is not to let the elected prosecutor control the docket.

[11] www.scjc.state.tx.us.

How we reduced our DWLI caseload

At the end of 2016, we noticed that more than 20 percent of our office's pending cases were Driving While License Invalid (DWLI) offenses.

By Dusty Gallivan
County Attorney, and
Linda Granados
Pre-Trial Intervention Director, in Ector County

With a total caseload of about 6,000, that was significant—about 1,200 DWLI cases—and some of these were habitual offenders who had never had a driver's license (DL).

A DWLI offense occurs when people continue to drive after the Department of Public Safety (DPS) suspends, revokes, invalidates, or cancels their licenses for any number of reasons. Rather than pay the fees and surcharges required to reinstate their licenses (more on those costs in a moment), many drivers continue to drive without a valid license, racking up even more fees and surcharges if they're stopped for other offenses. These drivers are then trapped in a vicious cycle from which it's hard to recover—thus, a fifth of our caseload was comprised of DWLIs.

Fees and surcharges

In 2003, DPS launched the Driver Responsibility Program. This program allows DPS to assess surcharges on drivers convicted of certain offenses. This surcharge is in addition to other fees, and it is applied each year for three years per violation. (Yes, the surcharges occur each year for three years per violation.) The surcharges are collected by a third-party company called Municipal Services Bureau (MSB), which receives a 4 percent service fee along with installment fees.

DPS assesses the surcharges in two ways: 1) through the point system and 2) based on convictions. In the point system, drivers are assigned "points" as a result of each conviction for a moving violation. For example, a conviction for speeding results in two points on the driver's record. If the violation involves a wreck, three points are assessed. The points system gives drivers some leeway before surcharges kick in: Each driver is allowed six points every three years without surcharges. After exceeding six points, though, that driver is assessed a $100 surcharge,

an additional $25 for each point over six, and a service fee from MSB.

With conviction-based surcharges, that leeway is nonexistent. Once an individual is convicted of, say, a DWLI, driving without insurance, or driving without a DL (among other conviction-based offenses), the surcharge is automatically assessed on his driving record annually for three years from the date of conviction. The surcharge for a "no insurance" violation, for example, is $250, plus service fees from MSB. That $250 surcharge is assessed each year for three years, and failure to pay the surcharges—even missing a payment one month—results in a driver being "not eligible" to drive. (DPS mails notice of this surcharge to the driver's address on file, but we've heard from many DWLI defendants that they never received such notice—and haven't been paying the surcharges—because the notice went to an old address.)

Reinstating a driver's license means paying surcharges, collection fees, reinstatement fees, and other court fees, and many drivers simply can't afford all of these costs. These individuals continue to drive without valid driver's licenses and without insurance, making our roads more dangerous. These drivers also run the risk of compiling even more points, convictions, and surcharges if they encounter law enforcement for driving without a valid DL or without insurance.

How can we help?

We decided we wanted to do something—but what? We are prosecutors, not social workers. How could we help people recover (or get) a valid Texas driver's license and stop this cycle of incarceration, prosecution, convictions, surcharges, and invalid DLs?

Then we had an idea: What if we started a new program using our existing pretrial intervention (PTI) model? By intervening with these defendants pre-trial, we could help them get a valid driver's license, make sure they are following the rules of probation, and avoid yet another DWLI conviction and all the associated consequences. This seemed like a perfect solution.

About the same time, we hired a PTI Director, Linda Granados, one of the coauthors of this article. Fortunately for us, Linda had previously worked for a local attorney who specialized in helping clients get and keep their driver's licenses. When that attorney retired, Linda was available for employment with our office.

Linda knows the ins and outs of whether someone is eligible for a driver's license in Texas, and if not, what he or she needs to do to become eligible. After a few months of getting acquainted with our office and pre-trial intervention in general, Linda implemented our new DWLI program. Here's how it works.

Our DWLI program

Linda reviews all pending DWLI cases and determines which defendants we can assist in getting their licenses within a reasonable time frame (about six months). She makes a list of all DWLI cases with notes on the defendants' eligibility and provides that list to each prosecuting attorney.

Not every DWLI defendant is eligible for pretrial intervention. Eligibility is determined after reviewing the defendant's DL status on the public DPS website (www.texas.gov/driver, in the DL Reinstatement & Status section) and considering the number of enforcement actions blocking his driver's license. Drivers with enforcement actions such as "MAB" (which stands for Medical Advisory Board, a panel of doctors who can revoke a person's DL for medical reasons) and delinquent child support will not be considered for PTI because those actions prevent a driver from obtaining even a valid occupational DL. Drivers with existing DL suspensions that are over a year long also don't qualify for the program because the only way for them to get a valid driver's license is to obtain an occupational license, and that often requires an attorney's help or a lot of work on the defendant's part to file the paperwork himself. If a driver's license has been suspended via ALR (Administrative License Revocation) for a driving while intoxicated (DWI) arrest, refusal to take a breath or blood test, or failing a breath or blood test, that defendant is usually not qualified for PTI because his license can be suspended further for the DWI conviction or by a prosecutor's discretion. Similarly, other actions, such as having five or more outstanding fines and court costs (under Texas's Failure to Appear/Failure to Pay system) will also disqualify a defendant from our program. That's because to reinstate a DL, he would have to pay for or resolve those outstanding fines (usually for moving violations and other ticketed offenses), which will, in turn, result in additional convictions on his record, and those convictions would

invalidate his driver's license. (Like we wrote earlier in this article, it's a vicious cycle.)

If a defendant *is* eligible for the program, we offer him or her admittance. Admittance requires defendants to follow all the same rules as probation, report to the probation department once a month, and report to Linda once a month. The main condition of the program is that the defendant must obtain a valid Texas driver's license. The defendant is also responsible for the PTI administrative fee and the cost of supervision, though he or she is not required to complete any community service or take any classes (unless one is separately required to get a valid driver's license). As with all PTI cases, the agreement includes jail time for failing to complete the program successfully.

Even if someone is eligible for PTI, we also offer a fine-only option, which will resolve the DWLI charge by the defendant pleading guilty and paying the fine. Those defendants who choose this option, however, do not actually get their driver's licenses reinstated—they have merely resolved the DWLI charge. With this fine-only choice, they get a new conviction on their driving records, a new suspension of their driver's license, and a new surcharge. Unfortunately, some defendants would rather pay the fine and court costs than be on a form of probation for six months to a year. We had to draw a line: If they're not willing to do the work to reinstate their licenses, why waste our time, effort, and money on them?

The PTI program, on the other hand, gives defendants the opportunity to get their driver's license *and* avoid the conviction for DWLI. Linda's role is to strategize how she can help them clear whatever is blocking their DLs. (She uses www.texasfailuretoappear.com and www.txsurchargeonline.com to view defendants' driving records.) The blockage is usually because they haven't taken care of old traffic tickets, they have an outstanding fine or court cost on their records, they have no proof of insurance, or there's another type of suspension on their records. In some cases, Linda has been able to get surcharges waived or reduced by requiring the defendant to apply for MSB's indigence/incentive program. If the defendant is a veteran or if he was in prison while the surcharges were accessed, he is more likely to qualify for full waiver of the surcharges.

Ramping up

The program got off to a slow start because only a few defendants were willing to make an effort to get their licenses. After about six months, though, the program started to take off just through word of mouth. We had defendants come to court and ask to be on the program—Linda even fielded calls from people who were not facing criminal charges (but who had outstanding surcharges) asking to be in the program. We created a flyer (reprinted on page 40 and available for download at our website, www.tdcaa.com) to give to DWLI defendants who don't join the PTI program so they can navigate the tricky waters of DL reinstatement themselves.

On average, about 38 percent of DWLI defendants are eligible for our PTI program. Of these, 12 percent accept the offer to get their driver's license. In the past 24 months, we have had more than 150 people in the DWLI program with a success rate of more than 70 percent.

To date, our office has helped more than 100 people get a valid driver's license, some of whom had never had a license in their lives! At the time of this writing, the number of DWLI cases in our office has dropped significantly, to about 10 percent of our total caseload. We are sure there are several factors that combined to reduce the number, but we'd like to think we played a small role in not only making our community safer, but also in saving taxpayers money and reducing how much time officers spend processing DWLI cases. ❇

To reinstate a driver's license, a person would have to pay for or resolve outstanding fines (usually for moving violations and other ticketed offenses), which will, in turn, result in additional convictions on his record, and those convictions would invalidate his driver's license. (Like we wrote earlier in this article, it's a vicious cycle.)

WHY IS MY LICENSE "INVALID"?

1. **GOOGLE "TEXAS LICENSE STATUS"**

Welcome | Official Texas Driver License Eligibility System | Texas.gov
https://txapps.texas.gov/txapp/txdps/dleligibility/login.do ▾
Check Driving **Eligibility** & Pay Reinstatement Fees. The **Texas** Department of Public Safety (DPS) online **License Eligibility** system is available to help **Texas** drivers: ... For information about these items and for other **driver license** questions, please visit www.txdps.state.**tx**.us ...
Missing: ~~google~~

2. **TYPE IN YOUR:**

Login

Please enter the following information from your Texas driver license or ID card, then select "Login".

Driver License or ID Number: Required.

Date of Birth: Required. (mm/dd/yyyy)

Last 4 Digits of Social Security Number: Required.

Login This form submits to a secure server.

3. **WHAT IS YOUR "STATUS"?**

STATUS: Your license status is currently ELIGIBLE. A status of "eligible" means you are allowed to drive if you have a valid driver license in your possession. If you do not have a valid driver license, you are eligible to apply for one. Just stop by any Driver License Office location.

LOCAL OFFICE: 2800 Wright Drive (near Midland Airport)
(512) 424-2600
www.dps.texas.gov ("Get In Line Online" before you go)

OR

STATUS: Your license status is currently NOT ELIGIBLE. A status of "not eligible" means you are prohibited from operating any motor vehicle or obtaining a license at this time.

4. **IF YOU ARE "NOT ELIGIBLE" ... SCROLL DOWN.**

LOOK FOR:

i. ENFORCEMENT ACTIONS
ii. FAILURE TO APPEARS (*www.texasfailuretoappear.com*)
iii. SURCHARGES (*www.txsurchargeonline.com*)
iv. FEES

Brought to you by The Ector County Attorney's Office

Contingency contracts, opioids, and your county

Full disclosure: As a 19-year plaintiff's personal injury lawyer (before entering public service) and a lifelong migraine sufferer, I am a big proponent of both contingency fee contracts and opioid use, in the right situation.

By Vance Hinds
Assistant County & District Attorney in Ellis County

It is that last part that seems to cause the most trouble. Can a county retain private attorneys under a contingent-fee contract to sue the companies responsible for the opioid epidemic? The short answer is yes, but as with all things in life, the devil is in the details. Hoops must be jumped through and hurdles must be cleared.

To understand the obstacles involved, we must first revisit The Great Tobacco Settlement of 1998. In 1996, then-Attorney General Dan Morales sued the American Tobacco Company and others accusing them of fraud and racketeering. The State of Texas hired outside counsel to assist General Morales with the lawsuit. Attorneys John Eddie Williams, Walther Umphrey, Harold Nix, Wayne Reaud, and John O'Quinn entered into a contingency fee agreement with the State. The attorneys would cover all of the expenses of the litigation for a 15-percent interest in the recovery. If there were no recovery, Texas would owe nothing. In January 1998, the case settled for $15.3 billion. Surprisingly, costs and fees owed to the private attorneys evolved into its own dispute in need of arbitration, and the arbitration panel awarded the private attorneys $3.3 billion. I know we now live in a world of billionaires Mark Zuckerberg, Jeff Bezos, Warren Buffet, and Bill Gates, but $3.3 billion is still a significant amount of money, even by 2019 standards.[1]

Three-point-three billion dollars paid to five plaintiffs' lawyers ruffled a few feathers. In response, in 1999 the Texas legislature added Subchapter C: Contingent Fee Contract for Legal Services (§§2254.101–2254.150) to Chapter 2254 of the Texas Government Code: Professional and Consulting Services. This subchapter provides the manner and situations under which a state governmental entity may compensate a public contractor under a contingent fee contract for legal services.[2] Here the savvy local government lawyer would argue that a county is not a state governmental entity. That savvy lawyer would be correct, but our legislature, in all its wisdom, fixed this problem for us.

In 2007, the legislature enacted §403.0305 of the Government Code stating that a public agency as defined under §30.003(3) of the Water Code may not enter into a contract as provided by Subchapter C, Chapter 2254, without review and approval by the Comptroller. Now the fun begins. Section 30.003(3) of the Water Code defines a public agency, in part, as any district, city, or other political subdivision or agency of the state which has the power to own and operate waste collection, transportation, treatment, or disposal facilities or systems. Section 364.011(a) of the Health and Safety Code includes the following language: "A commissioners court by rule may regulate solid waste collection, handling, storage, and disposal in areas of the county not in a municipality or the extraterritorial jurisdiction of a municipality." Additionally, §364.013(1) of the Health and Safety Code gives the counties authority to acquire, construct, improve, enlarge,

repair, operate and maintain all or part of one or more solid waste disposal systems. For those still following along with me, this means that because a county can handle its own solid waste, we have to get Comptroller approval to enter into a contingency contract with a private attorney to sue the opioid manufacturers. (You read that right: Our ability to handle our own poop triggers Comptroller approval of contingency fee contracts with outside attorneys.)

What does that mean for us county attorneys? Sections 2254.103–2254.106 of the Government Code outline what is required to obtain Comptroller approval and what must be included in the contingency fee contract. Although some of this information may be specific only to state governmental entities, most of it applies to local governments and public agencies as well. Before a commissioners court can enter into a contingency fee agreement, the court must find the following:

- there is a substantial need for the legal services;
- the legal services cannot be adequately performed by the attorneys and supporting personnel of the state governmental entity or by the attorneys and supporting personnel of another state governmental entity; and
- the legal services cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the matter for which the services will be obtained or because the state governmental entity does not have appropriated funds available to pay the estimated amounts required under a contract providing only for the payment of hourly fees.[3]

Additionally, §§2254.105 and 2254.106 of the Government Code have requirements that must be included in the contract before the Comptroller will approve it. The latter specifically addresses the computation of the contingent fee and reimbursement of expenses. The contract must establish a reasonable hourly rate for the work performed by an attorney and support staff.[4] The highest hourly rate may not exceed $1,000 an hour. The contract must establish how the base fee is to be calculated.[5] The contingent fee is computed by multiplying the base fee by a contracted reasonable multiplier not to exceed four.[6] The multiplier can be adjusted according to the expected difficulties, risk, recovery potential, and delay.

For example:

If Senior Attorneys earn $1,000 per hour;
Associate Attorneys earn $500 per hour;
Paralegals earn $150 per hour; and
Secretaries earn $75 per hour

At the end of the case:

Seniors:	100 hours	x	$1,000	=	$100,000
Associates:	500 hours	x	$500	=	$250,000
Paralegals:	750 hours	x	$150	=	$112,500
Secretaries:	600 hours	x	$75	=	$45,000
		Base Fee			$507,500
		Multiplier		x	4
		Contingent Fee:			**$2,030,000**

The contract must also establish a maximum percentage for the contingency fee in addition to the method used above.[7] The maximum percentage cannot exceed 35 percent. The contract must state that the contingent fee will not exceed the *lesser* of the stated percentage of the amount recovered or the amount computed by using the hourly method described above.

Therefore, in the example contract above, if the contingency percentage was 20 percent and the case settled for $500 million, then the contingency fee would be calculated as follows:

$500,000,000 x .20 = $100,000,000

Because $2,030,000 is less than $100,000,000, our private attorneys would receive only $2,030,000. In other words, there will never be another $3.3 billion contingency fee recovery by attorneys representing a state or public agency in the State of Texas.

Turning to opioids

Which brings me to my migraine medicine. The United States suffered 47,600 opioid-related overdose deaths in 2017. These overdoses amounted to a 157-percent increase in such deaths since 2007. On average, 130 Americans die every day from opioid overdoses.[8] These deaths, coupled with the crippling effects of opioid addiction, cause long-term residual damage to the State of Texas and its local entities.

Many Texas counties and other local entities have retained outside legal counsel to sue the pharmaceutical companies that produce and market opioids. The contingency contracts the

counties have signed must comply with Chapter 2254, and they require approval by the Comptroller. In November 2018, I submitted a PIA (Public Information Act) request to the Comptroller for all public information available for public agencies that requested approval of their contingency fee agreements involving opioid litigation. I received information concerning 68 public agencies: 64 counties, three cities, and one hospital district. Most were approved by the Comptroller, a few were pending, and sometimes, the Comptroller requested that the contract be changed to track the requirements of Chapter 2254. It is obvious that a significant number of counties believe the opioid litigation is worthy of participation.

All of this begs the question: What happens if your county entered into a contract without Comptroller approval or enters into a contract that does not comply with Chapter 2254? I am not sure I can provide a definitive answer to that question. The only Texas case really touching on this issue is *Int'l Paper Co. v. Harris County*, where Harris County retained private attorneys on a contingent-fee basis to file an environmental enforcement action against Int'l Paper. The defendants moved for temporary injunctive relief because:

1) the county did not comply with the statutory provisions that control when a government entity can hire attorneys on a contingent-fee basis;

2) the county violated the state constitution's separation-of-powers doctrine by agreeing to payment of the private attorneys' contingent fee from funds to which the state may be entitled; and

3) the federal constitution's due-process guarantee prohibits private attorneys from prosecuting a quasi-criminal action on a governmental entity's behalf for a contingent fee.

The trial court denied the injunctive relief, and the defendants filed an interlocutory appeal. While the appeal was pending, the county amended its contingency fee agreement multiple times, addressing many of the defendants' original concerns, and as a result, the appellate court found that the only actual controversy still remaining was whether the county's use of contingent-fee counsel violates the defendants' due process rights, so we missed our opportunity for an answer to the question on what happens if a contract does not comply with Chapter 2254. It is my opinion that the contract is probably void but easily corrected by amendment. The appellate court let Harris County go forward with its contingent-fee contract against Int'l Paper.

For a good summary of the cases and the law involving contingency agreements and public entities, see the 2009 Columbia Law Review Article "State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?"[9] Another case for reference is *Merck Sharp & Dohme Corp. v. Conway*.[10]

All this may change, though, with the current legislative session. Three pending bills are working their way through the capitol: House Bill 2003, House Bill 2826, and Senate Bill 28. Some proposed changes include that the approval process may switch from the Comptroller to the Attorney General; additionally, many more requirements could be added to the contract, procurement process, and qualifications of the attorney. This legislative session may create a brave new world for contingent-fee agreements.

My advice, if your county wants to retain an attorney with a contingent-fee agreement, is to comply with Chapter 2254 of the Texas Government Code in whatever form survives. I have a feeling that my county's ability to handle its own poop will make it harder for me to get my migraine medicine. ❇

What happens if your county entered into a contract without Comptroller approval or enters into a contract that does not comply with Chapter 2254? I am not sure I can provide you a definitive answer to that question.

Endnotes

[1] Mark Curriden, "Historic tobacco case revisited: biggest litigation win ever or a complete scam?," *Dallas Morning News*, April 15, 2016.

[2] Tex. Gov't. Code §2254.102(b).

[3] §2254.103(d).

[4] §2254.106(a).

[5] §2254.106(b).

[6] §2254.106(c).

[7] §2254.106(d).

[8] The U.S. Department of Health and Human Services Website Information Concerning the Opioid Epidemic. https://www.hhs.gov/opioids/about-the-epidemic/index.html.

[9] Leah Godesky, State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine, 42 *Colum. J.L. & Soc.. Probs*. 587 (2009).

[10] *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733, 2013 U.S. Dist. LEXIS.

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A DNA database of suspected offenders

Have you ever heard of the DNA Supported Suspected Offender File?

By Lt. James Hammond
Investigations Division, Criminal District Attorney's Office, Dallas County

If the answer is no, it's understandable—when I have discussed it at seminars and conferences, most prosecutors and investigators don't know what I'm talking about. That's why I am writing this article, so that prosecutors and investigators might know about a tool for seeing that justice is done, especially in old or cold cases where DNA testing has identified a suspect.

2019 marks the 10th anniversary of the statute that established the DNA Supported Suspected Offender (DSSO) file. A description of the program can be found online at www.dps.texas.gov/administration/crime_records/pages/dnaSuspOffendFile.htm, and the rules regulating the program itself reside in the Administrative Code, which might explain why it's not familiar to many prosecutors.[1]

The DSSO file program came about after our office's Conviction Integrity Unit (CIU) had identified several actual perpetrators who could not be prosecuted for their crimes because the statute of limitations had expired. The First Assistant at the time, Terri Moore, had an idea to somehow permanently identify these perpetrators for potential future crimes, and that's how the DSSO file was born. Then-CIU Chief Mike Ware testified before legislative committees in Austin about the significance of such a file, and the bill was passed into law in 2009.

The Administrative Code provisions allow the entry of criminal information into an offender's criminal history, not as a conviction but as an addendum. The DSSO file is not just a database of sex crime offenders, though—it also includes individuals who have been linked to other crimes via DNA. Here's how an addendum looks:

THIS PERSON'S DNA PROFILE CANNOT BE EXCLUDED OF A PERSON SUSPECTED TO HAVE COMMITTED A CRIME
ORI: TXDPS6900
INVESTIGATING UNIT: TEXAS DPS DNA CRIME LABORATORY AUSTIN

ORI: TX057015A
INVESTIGATING UNIT: DALLAS COUNTY CRIMINAL DISTRICT ATTORNEY
CONTACT PERSON: JOHN DOE
PHONE NUMBER: 2146533600
OCA: F90-12345
DATE OF AFFIDAVIT: 2019-08-11
DATE OF OFFENSE: 1990-09-28
OFFENSE CODE: SEXUAL ASSLT
OFFENSE DETAIL LITERAL: SEXUAL ASSAULT
SUBJECT TO PROSECUTION FLAG: N

The DSSO file program came about after our office's Conviction Integrity Unit (CIU) had identified several actual perpetrators who could not be prosecuted for their crimes because the statute of limitations had expired. The First Assistant at the time, Terri Moore, had an idea to somehow permanently identify these perpetrators for potential future crimes, and that's how the DSSO file was born.

One of the early entries our office made into the DSSO file was Byron Peal (a pseudonym). The Texas Department of Public Safety CODIS Lab identified Peal in one of the CIU's exoneration cases as the actual perpetrator of a robbery, kidnapping, and sexual assault. (The man who was wrongfully convicted of these crimes was released after serving 15 years in a Texas prison.) Peal and his accomplice had abducted a couple at gunpoint in the West End entertainment district in Dallas, drove them to an ATM, forced them to withdraw cash, and took them to an abandoned house where he beat both of them and sexually assaulted the woman.

Because the statute of limitations had already expired, Peal could not be prosecuted in that case, but his name and his DNA connection to the crime was entered into the DSSO file. When he was arrested again in 2018 on several other charges, the DSSO addendum on his criminal history was available to prosecutors as a previous "bad act" that factored into the punishment phase of his trial on the new charges.

Entering information

Entering a criminal's bad act, whether sexual assaults, other felonies, or misdemeanors, into the file requires the following:

- a copy of the forensic DNA results;
- an affidavit submitted by the investigating criminal justice agency approved and signed by a district judge;
- a copy of the offender's fingerprints; and
- completion of the DPS Form CR-40.

This information is confidential and can be disseminated only to other criminal justice agencies. The person subject to this law can request a review of the addendum placed on his or her criminal history.[2] Now that you all know about the database, my hope is that more perpetrators are entered into the system.

Seeing justice done

The DSSO file serves another function, too. It has been our experience that the original victims of long-ago crimes can receive a modicum of justice, even if the actual perpetrator will not stand trial for the crime committed against *them*, if their case could be a factor in any future punishment trial. That previous victim or other witnesses could be called to testify, which, in effect, could serve as the victim's "day in court," even if it's not for the offense in which he or she was victimized.

As for Mr. Peal, when his identification in the exoneration case was announced in the media, he called me the next day with his tale of woe. It seems his mother had watched the news reports of his involvement, and she was upset at what he had done—he called me to complain that I had made his mother mad at him. He missed the point that he had escaped decades or even life in prison had he been correctly identified in the aggravated kidnapping, robbery, and sexual assault—rather, he was put out that his mother was angry. I'll gladly field dozens of such tone-deaf phone calls from offenders if it means they are paying for their long-ago crimes.

This has been an invaluable tool for the Dallas County Criminal District Attorney's Office, and it's one that other law enforcement agencies across the state and even the country may find equally useful in solving crimes and identifying actual perpetrators. Please feel free to contact me at James.Hammond@dallascounty.org with any questions. ❄

Endnotes

[1] Tex. Adm. Code, Title 37, Part 1, Chapter 27, Subchapter L, Rule §27.161.

[2] The contact person at the Department of Public Safety's Crime Records Service is Michelle Farris. Reach her at 512/424-7659 and Michelle.Farris@dps.texas.gov.

Staying on the right side of *Standefer*

There are some cases that every prosecutor should read and understand.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

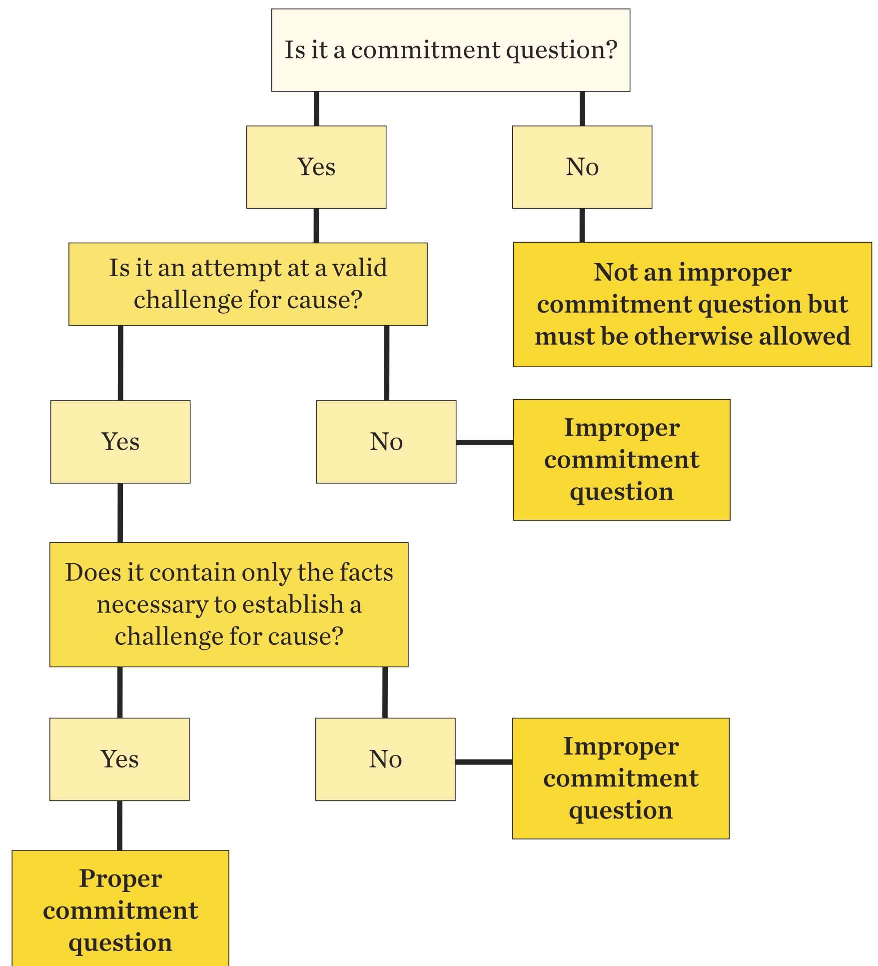
If you last in this profession for more than a day, you know the "top of the marquee" United States Supreme court cases like *Brady, Miranda,* and *Terry*. On a level just below those undeniably well-known cases are lesser known but equally important cases from the Texas Court of Criminal Appeals like *Almanza* and *Kelly*. Each of these cases weighs in on important parts of our responsibilities as prosecutors.

One Court of Criminal Appeals case that is far too often overlooked is *Standefer v. State*. *Standefer* deals with the idea of improper commitment questions in voir dire. A full and complete understanding of *Standefer* is absolutely critical to those prosecutors seeking to master the art of selecting a jury.

Standefer at a glance

Jack Krohn Standefer was tried in the County Court-at-Law of Midland County for driving while intoxicated.[1] Prior to trial, the State filed a motion in limine to prevent the defense from asking prospective jurors whether they would presume the defendant guilty if he had refused a breath test alone.[2] Prior to jury selection, the trial court found that would be an improper commitment question and prohibited Standefer from asking about it.[3] The defendant was subsequently convicted and placed on two years of community supervision. The El Paso Court of Appeals reversed the conviction after finding that this question was a permissible probe into the prospective jurors' biases and prejudices.[4]

The Court of Criminal Appeals granted the State's petition for discretionary review and issued a relatively brief, three-part inquiry to determine what constitutes an improper commitment question. The first step in such an inquiry is to determine whether the proposed question is a commitment question at all. The second step determines whether the prospective juror's response to the commitment question would lead to a valid challenge for cause. If the question *would* lead to a valid challenge for cause, the final step is to determine whether any additional facts are necessary to challenge for cause. Put it all together, you end up with this flow chart:



Today, 18 years after the Court of Criminal Appeals reached its decision in *Standefer,* the topic of commitment questions still seems to befuddle attorneys and judges alike.

Even if you have never read Standefer, *it doesn't take long to understand that commitment questions are bad. Except … not every commitment question is improper.*

Step 1: What is a commitment question?

In *Standefer v. State,* the Court of Criminal Appeals began its opinion by asking, "What is a commitment question?" We can all be thankful that the Court cut to the chase and immediately answered that question. Commitment questions commit a prospective juror to resolve an issue a certain way after learning a particular fact.[5] A commitment question can also ask a prospective juror to *refrain* from resolving an issue on the basis of a fact that might be used to resolve the issue.[6]

Commitment questions are generally phrased to elicit a "yes" or "no" answer where one or both answers commit the jury to resolve an issue in a certain way.[7] Open-ended questions can be commitment questions, too, if the question asks a prospective juror to set the hypothetical parameters for his decision-making.[8]

Step 2: "Challenge for cause" test

On more than one occasion, I have heard defense counsel say, "Objection: improper commitment question" in response to one of my voir dire questions, and I know I'm not the only one. Even if you have never read *Standefer,* it doesn't take long to understand that commitment questions are bad. Except … not every commitment question is improper.

To determine when a commitment question is proper, the Court devised the "challenge for cause" test. The Court recognized that, sometimes, the law *requires* jurors to commit to certain things. For example, a prospective juror must be able to consider the entire range of punishment in a given case. Because the law requires this commitment, it is proper for attorneys to ask a prospective juror, for example, whether she could consider the maximum possible sentence of 10 years' confinement for a third-degree felony.[9] The juror's response to this question could potentially render that juror challengeable for cause and, for that reason, it is a proper commitment question. The *Standefer* Court held that this type of commitment question—one that leads to a challenge for cause—is the only type that is proper.

Step 3: Facts beyond those necessary

Not all "challenge for cause" questions are proper, however. Some questions meet this challenge-for-cause requirement but are nonetheless improper because the question includes facts in addition to those necessary to establish a challenge for cause. Look at *Atkins v. State,* for example. In that case, the prosecutor asked prospective jurors if they could convict a person who was arrested while possessing, in his pocket, a crack pipe containing a residual amount of cocaine.[10] This question includes too much detail and too many facts. It would have been permissible to ask about prospective jurors' ability to follow a law that holds a person guilty of possession even though the possession involves only a residue amount of the drug in question.[11] In *Atkins,* though, the inclusion of facts regarding the defendant's arrest, his possession of the pipe, and the location of the pipe in his pocket went beyond what was necessary to sustain a challenge for cause.[12] These additional facts made an otherwise proper question improper.

When applying the law to the question presented in *Standefer*—"Would you presume someone guilty if he refused a breath test on his refusal alone?"—the Court first determined that such a question *is* a commitment question.[13] That's because it asks the prospective juror to resolve the issue of guilt against the defendant if the juror learns a specific fact.[14] The Court next considered whether the question includes only the facts necessary to establish a valid challenge for cause.[15] In Texas, the law allows jurors to presume guilt from a defendant's breath test refusal, so this inquiry would be improper because it does not lead to a proper challenge for cause. The Court of Criminal Appeals held that the trial court properly prohibited that question from being asked in voir dire.[16]

Staying on the right side of Standefer

You can read until your eyes bleed and still find yourself crossing the line with an improper com-

mitment question. As any seasoned trial prosecutor will tell you, a "canned" voir dire is never the answer. Well-crafted voir dires take planning and preparation. The exact phrasing of our inquiries of prospective jurors needs to be a part of this preparation. As you are planning out just how you will ask these questions, consider the following examples:

1) "If the victim is a nun, could you be fair and impartial?"

A juror could be "fair" and still take into account the victim's status as a nun (where that status is logically relevant to the issues at trial), or that juror could fail to take into account the victim being a nun if the juror perceived that such a status should not be controlling.[17] This question is not a commitment question because prospective jurors are not asked to resolve or refrain from resolving an issue.

2) "Can you consider probation in a case where the victim is a nun?"

In this question, the juror is asked to say whether he would refrain from resolving an issue in the case (probation) based upon a fact in the case (the victim is a nun).[18] And as that example illustrates, the word "consider" does not prevent a question from being a commitment question;[19] this question is, in fact, a commitment question.

This question addresses the prospective juror's ability to consider the entire punishment range, which the law requires (including probation), and a juror's inability to do so would lead to a valid challenge for cause. However, because the question contains an additional fact (that the victim in the case is a nun) not necessary to establish a challenge for cause, it is improper.

3) "What circumstances, in your opinion, warrant the imposition of the death penalty in a capital murder case?"

This is an example of an open-ended commitment question.[20] The question asks a prospective juror to define the evidence he requires to assess the death penalty. It is not a proper commitment question, though, because the possible answers would not render the prospective juror challengeable for cause. "Do you think there might be circumstances that would mitigate against the death penalty?," on the other hand, does not commit this juror to consider specific kinds of evidence in a specific manner,[21] so it is not a commitment question. It does, however, raise the topic of mitigating circumstances and permits—but does not require—the juror to express his view on various relevant factors.[22]

4) "Could you convict the defendant if you hear no testimony from the complaining witness?"

This question requires the juror to resolve the guilt of the defendant based on a specific fact (no testimony from a complaining witness), so it is a commitment question.[23] This question seeks to determine only whether prospective jurors could convict the defendant of assault family violence in the absence of the victim's testimony. The commitment question here would not give rise to a valid challenge for cause and is, therefore, improper.[24] You could fix this question by asking whether the prospective jurors could reach a guilty verdict in the absence of the victim's testimony *even if the State otherwise proved the elements of the offense beyond a reasonable doubt.*[25]

Conclusion

I know it's a little cliché, but it bears repeating all the same: You cannot win a case in voir dire, but you can absolutely lose a case in voir dire. As prosecutors, it is our first opportunity to make an impression on jurors and our only opportunity to have any sort of discussion with them before the verdict is returned. *Standefer*, brief as it is, does a lot to affect the shape these discussions take. Before your next voir dire, commit to understanding *Standefer* and use it to make the most out of your first meeting with the jury. ❇

Not all "challenge for cause" questions are proper, however. Some questions meet this challenge-for-cause requirement but are nonetheless improper because the question includes facts in addition to those necessary to establish a challenge for cause.

Endnotes

1 *Standefer v. State*, 2 S.W.3d 23 (Tex. App.–El Paso 1999).

2 *Id.* at 24.

3 *Id.*

4 *Id.* at 27.

5 *Standefer v. State*, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001).

6 *Id.*

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[7] *Id.*

[8] *Id.* at 180.

[9] *Id.* at 181.

[10] *Atkins v. State*, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997).

[11] *Standefer*, S.W.3d at 182.

[12] *Atkins*, 951 S.W.2d at 789-90.

[13] *Standefer*, S.W.3d at 183.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Standefer*, 59 S.W.3d at 180.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Standfer*, 59 S.W.3d 177, n. 7.

[22] *Id.*

[23] *Sandoval v. State*, 2019 Tex. App.LEXIS 984, *11 (Tex. App.–Houston [1st Dist.] 2019 no pet. h.).

[24] *Sandoval*, 2019 Tex. App. LEXIS 984 at *13.

[25] *Cf. Delacerda*, 425 S.W.3d 367, 382 Tex. App.–Houston [1st Dist.] 2011 pet. ref'd) (reasoning that prospective juror who could not convict defendant in absence of "physical evidence," even if the State otherwise proved elements of offense beyond reasonable doubt, was subject to valid challenge for cause).

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