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The Texas Prosecutor

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

Code like a pro: your no-stress guide to CJIS reporting

Let's be real: When you imagined working in a prosecutor's office, you probably pictured courtrooms, legal arguments, and high-stakes decisions.

By Michelle Bork, TBLS-BCP
Supervising Civil Paralegal in Kaufman County

You probably didn't dream of data fields, codes, or entering information into statewide databases. But here we are.

In today's legal world, what happens *in court* is only half the story. The other half lives in the system that records it all: CJIS.

The Criminal Justice Information System (CJIS) is the official logbook of justice in Texas. It's how the decisions made by prosecutors get turned into data that shapes everything from criminal histories to grant funding. One of the most important—and frequently misunderstood—pieces of that system is the Prosecutor Action Field, or PAF code. It might look like a single letter on a screen, but that little code packs a big punch. Use the right one, and you're documenting reality, protecting due process, and helping your office earn funding. Use the wrong one—or skip it entirely—and you might be creating false records, confusing background checks, or even jeopardizing your county's grant eligibility.

So let's break it all down. What is CJIS reporting? What are PAF codes? Why do they matter? How do you use them properly—and how do you fix them when something goes wrong? This article walks you through the process step-by-step, gives you real-world (and occasionally humorous) examples, and helps you feel confident when it's time to "code like a pro."

What is CJIS reporting?

CJIS is a statewide system maintained by the Texas Department of Public Safety (DPS). It's designed to track criminal justice activity from the moment of arrest all the way through the final disposition. That includes arrests, charges, court decisions, and—yes—prosecutorial actions. Whenever a prosecutor makes a decision on a charge, that decision must be reported to CJIS using:

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The room where it happens

"No one really knows how the game is played / The art of the trade / How the sausage gets made / We just assume that it happens / But no one else is in / The room where it happens"

—Lyrics from "The Room Where It Happens," by Lin-Manuel Miranda, et al., *Hamilton* (2015)

By Shannon Edmonds
TDCAA Executive Director in Austin

Theater

No one would accuse me of being a fan of musical theater. I can count the number of professional musicals I've been to on one hand, and most of those I did not go to willingly. (The things we do for our spouses!) But I *am* a fan of *political* theater. This year marks the 13th time I've had a front row balcony seat to watch our biennial state legislature do its thing. So, maybe it is not surprising that while I've been to only a handful of Broadway-style musicals in my life, two of those were the same show: *Hamilton*. That production recently returned to Austin in April, but this was the first time I had seen it in the middle of a legislative session, and that timing gave me a new perspective on prosecutors' legislative efforts.

Where it happens

Even if you haven't seen *Hamilton* in person or on Disney+, you're probably familiar with the concept of the hit song quoted at the start of this column. It's sung by the character of Aaron Burr, who is desperate to "be somebody" in the new United States—and to be somebody, he realizes that he has to be where the important political decisions are being made. In Austin, we get to see some of those same political characters come to town in January of every odd-numbered year, traveling from far and wide so they can be in the Big Pink Building where "it" happens. And boy, does it happen! This year, TDCAA ended up tracking more than 1,730 bills and resolutions over the five-month session because of their potential impact on the work of our members. In a word, this volume can be *overwhelming*. But the rewards can be great, for those willing to participate.

Skin in the game

Why get involved with the legislative process? Another line of the song provides the answer:

"When you got skin in the game, you stay in the game / But you don't get a win unless you play in the game"

With so many bills potentially impacting your jobs, it is clear that you have "skin in the game"—even if you don't relish the idea of coming to Austin to get involved in the sausage-making. Whether it's judicial branch raises, criminal discovery changes, expanded removals of prosecutors, grand jury "reform," or any of the hundreds of Penal Code and Code of Criminal Procedure changes proposed this session, our legislature increasingly seems interested in what you do and how you do it. And that means that those who fail to play the game end up losing to those who are in the game.

Fortunately, our association is blessed to have so many members who have taken this reality to heart and "played the game" in Austin this session. They include Jacob Putman, CDA in Smith County; Jennifer Tharp, CDA in Comal County; Staley Heatly, CA in Wilbarger County; Philip Mack Furlow, 106th Judicial DA; Erleigh Wiley, CDA in Kaufman County; Jack Roady, CDA in Galveston County; Brett Ligon, DA in Montgomery County; Brian Middleton, DA in Fort Bend County; Jarvis Parsons, DA in Brazos County; and many other elected prosecutors who came to Austin for one bill, or one day, or one week this session. In addition, several elected prosecutors made it possible for one or more of their assistants to ride herd on the Lege for extended periods this session, including Lauren Lawrence (Tarrant County), Carmen Morales

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Now playing in TDCAA's online training

Do you remember in elementary school when you were sitting in the classroom, kids whispering a bit louder than usual because the teacher wasn't there yet, and you heard in the distance squeaky wheels and metallic reverb rattling down the hallway?

By Joe Hooker
TDCAA Assistant Training Director in Austin

In rolled the gigantic tube TV, ratchet-strapped to a media cart: movie day! There were few things better than going to school, expecting multiplication tables and penmanship lessons, and getting to watch a movie instead.

While TDCAA cannot promise you the same magic of watching Shadow slowly yet triumphantly climb over the hill at the end of *Homeward Bound*, we can assure you that the writers at Disney never had your continuing legal education in mind. But TDCAA does! And we promise hours of pertinent, instructive training that will make you a more ethical, informed, and State Bar CLE-compliant prosecutor, all from the comfort of your favorite office chair or living room couch.

Let me tell you a little about the current showings at TDCAA's online movie theater and what we plan on featuring in the near future.

Current showings

Introduction to Juvenile Law. TDCAA's first online foray into the wild world of Juvenile Law, this is a must-watch for new practitioners in this often overlooked but critical area of the justice system. Our juvenile law experts hail from across the state and give insight for prosecutors practicing in both rural and urban jurisdictions. *4.0 hours of CLE. Cost: Free.*

Mandatory *Brady* Training (2022). This audience favorite is now on its third version, but watch out, A Star is Born, because the fourth iteration of this essential (and absolutely mandatory) training will be released in 2026. If you haven't seen this film, watch it today—because you might not only be missing a prosecutor classic, but also you might not be in full compliance with Texas Government Code §41.111. *1.25 hours of ethics CLE. Cost: Free.*

Grievances and Prosecutorial Ethics. Want to know how to be ethical professionally? Curious what a grievance is and what you should do if you receive one from the State Bar? This member-exclusive series is for you. Featuring ethics experts Scott Durfee and C. Scott Brumley, this series does a deep dive into the grievance process as well as changes to the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. *2.75 hours of ethics CLE. Cost: Free for paid TDCAA members.*

Fundamentals of Child Welfare Law. This series will help prosecutors learn how to protect some of society's most vulnerable members. In this six-part video course, you will learn the fundamental skills of child welfare law specifically designed for prosecutors who represent the Department of Family and Protective Services. *5.25 hours of CLE. Cost: Free.*

Mental Health Video Series, Parts 1–5. This series of five videos runs the gamut on the intersection between a defendant's mental health and the criminal justice system. From the basics of mental health terminology to how to start a mental health specialty court in your jurisdiction, this series features both mental health specialists and prosecutors from across the state who focus on cases involving mental health issues. *14.25 hours of CLE. Cost: Free.*

Prosecuting an Intoxication Manslaughter Case: A Panel Discussion. This video course covers the essentials of trying an intoxication manslaughter case, including charging decisions, common defenses, crash reconstruction, toxicology evidence, jury selection, trial preparation, and working with victims and their families. The panel discussion of experienced prosecutors is moderated by TDCAA's DWI Resource Prosecutor, W. Clay Abbott, and includes Jessica Frazier of the Comal County Criminal District Attorney's

Office, Andrew James of the Dallas County Criminal District Attorney's Office, and Alison Baimbridge of the Fort Bend County District Attorney's Office. *3 hours of CLE. Cost: Free.*

Coming attractions

Legislative Update (Episode 89). The legislative branch of TDCAA has been burning the midnight oil since this, shall we say, *interesting* legislative session began. A record number of bills were filed this session, but which ones will make it over the finish line? Tune in after the dust has settled.

Forensics in the Courtroom. "I'm not a scientist but ..." is something prosecutors across the state say in courtrooms every day. And the statement is true: We are indeed not scientists. But if we cannot communicate clearly and informatively with our experts, defense experts, and the jury, our ability to do justice is impeded. Taught by prosecutors who, while not scientists, are experts at communicating to witnesses and juries about forensic science and evidence, this course will cover both foundational forensic science and evidence as well as more newly accepted forms of forensic evidence.

Becoming Competent at Competency. A foundational principle of the justice system is that everyone on the journey through it is competent. But it is a presumption that can be challenged at any stage of the proceedings; can be raised by any party, including the court; and can be based on myriad reasons. This course will cover what prosecutors need to know about competency and how to properly prepare and proceed through a competency trial.

Diminishing Diminished Capacity. Arguments of diminished capacity are used every day in courtrooms to excuse criminal behavior without raising an actual legal defense. What is the jury actually allowed to know about defendants' mental health histories, and when? And how can prosecutors do their best to make sure that improper evidence is not presented to the jury? Find out the answers in this upcoming course. ❇

(Montgomery County), Paige Williams and Bryan Mitchell (Dallas County), Stephanie Gharankanian (Travis County), Eric Carcerano (Chambers County), Chris Gatewood and Thomas Wilson (Smith County), and many others who came to town to work on specific legislation.

As the lyrics above say, "You don't get a win unless you play in the game." The wins that prosecutors realize during a legislative session are due to the hard work of you and your peers who get in the game (even if it is sometimes unwillingly!). The time and effort of these and other fellow TDCAA members benefits everyone, and I hope you will show them your appreciation next time you see them.

The show must go on

The curtain will fall on this regular session on June 2, and regardless of what the legislature has done for you or to you, life and litigation goes on. So, if you were not able to make it to the room where it happens this session, fear not! TDCAA will bring our own (off-off-) off-Broadway review to you in person or on screen this fall. We will soon begin the process of updating our publications and working on our popular Legislative Update CLE program. Be on the lookout for more information about those books and events by checking the training page of our website later this summer. Hector Valle (TDCAA's Director of Governmental Relations) and I are definitely not Lin-Manuel Miranda, but we have seen and heard some things at the capitol that may shock or entertain you (or both!), and we will do our best to deliver a good show this fall! ❇

In remembrance of Allison Attles-Bowen

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

In our modern-day lives, where many hours are spent together with colleagues, workplaces become more than just a job we go to every day; they are a place where others become like second family. A work community.

Allison Attles-Bowen

Then when a dear coworker passes away, the loss resonates deeply.

We continue to mourn the loss of Allison Attles-Bowen, victim assistance coordinator in Tarrant County and the Chair of the Key Personnel–Victim Services Board. Several from the prosecutor community have shared their heartfelt tributes:

Phil Sorrells
Criminal District Attorney in Tarrant County

Our office was incredibly fortunate to have benefited from the dedication, determination, and, most importantly, friendship of Allison Attles-Bowen over the course of her decade-long service with our office. She led a team of unsung heroes, and she was their hero—serving not just as a supervisor, but also as a mentor, steadfast leader, and source of unwavering support. Her staff knew that they could always count on her, especially in the most challenging and demanding aspects of their work. Allison was a blessing and she had a remarkable gift for giving of herself to others.

She was a constant source of calm and compassion for the victims and survivors she served. She, along with the incredible employees on her team, became the emotional backbone for so many individuals navigating the hardest times in their lives. The work they do is never easy, and it takes a special kind of person to lead and support those giving everything they have to help others. Allison was that person.

Her wealth of experience—working with the homeless, victims of physical and sexual assault, and the disabled—was evident in everything she did. She was a true advocate for those who had often been overlooked or forgotten, dedicating her life to alleviating the suffering of others.

Allison was one of a kind—an extraordinary leader, mentor, and friend. Her absence will be felt deeply, but her legacy will live on in the countless lives she touched.

Cece Jones
Victim Assistance Coordinator in Tarrant County

It was an honor to have Allison as a director, mentor, and friend for a little over 10 years. She created a supportive and safe environment here in Victim Services at the Tarrant County Criminal District Attorney's Office, which I am forever grateful for. Through her years of service, Allison touched countless lives, providing a voice for many and ensuring that victims were heard, supported, and empowered. Her tireless dedication and boundless kindness will leave a lasting mark on the communities she served. Her impact will continue to be felt for years to come.

Beyond her advocacy, Allison was a beacon of warmth, inspiration, and light. She had a way of making people feel seen, valued, and understood. Her spirit of generosity and her passion for helping others defined her life's work, which inspired so many of us. Though she is no longer with us, Allison's legacy will live on in the lives she touched, the hearts she comforted, and the change she helped create. Her memory will forever remind us of the power of kindness, resilience, and the unwavering pursuit of justice. Allison was a bright light in this world, and she will be deeply missed.

Carrie Farley
Victim Assistance Coordinator in Tarrant County

It is with deep respect and admiration that I remember Allison Bowen. She was a dedicated leader who cared about her team, coworkers, community, and all the people she served through Victim Services. She served with kindness, compassion, and a strong sense of responsibility, and she inspired us to do the same. Her door was always open to seek guidance or share a concern, and you could always count on her for wisdom, along with a story or a laugh. And her laughter was spectacular! Allison lit up every room she entered and was one of the most delightful people I have ever known, and I will miss her greatly. My condolences to her family.

Carma Anderson
Victim Assistance Coordinator in Tarrant County

Allison Bowen was an inspiration to me. As my supervisor, she was the best boss I have ever had. Her door was always open, she was an active listener, she gave constructive criticism, and she never hesitated to give compliments. She encouraged her team to come to her with solutions, not problems. She made us think outside the box. "Assess, assess, assess" was one of her favorite responses to us when assisting victims. She had a vision of a collective unit of resources working together across the county to aid victims of crime. This resulted in her convening quarterly meetings between us and the victim assistants in the police departments across the county. She understood the emotional weight her team carried when engaging with our victims and allowed us space to have our dark humor and to cry when we needed to.

Adina Morris
Victim Assistance Coordinator and Legal Assistant in Palo Pinto County

I remember the day I met Allison. It was at TDCAA's KP–VS Board meeting. She sat next to me. I introduced myself and by the end of the meeting, we were signed up to be co-presenters at the KP & VAC conference that year. Allison told me, "You and I are going to be great friends!" Boy, was she right.

Fast forward several months and several meetings and hangouts later. She called me one day to tell me that she had a new term to use, not only in our presentation, but also in our relationship: BPF: Best Professional Friend! I loved it. That is exactly what she was to me and more. She was kind, supportive, and patient, and she was a light to all who knew her. I will strive every day to be like she was in the lives of the people in my life, and I hope that I can be even half of what she was.

I will not mourn the loss of Allison in my life, because as short as it was, it was a blessing. I will cherish every memory with my dear BPF.

Colleen Jordan
Director, Victim Services Division in Harris County

I was absolutely heartbroken to hear of Allison's untimely passing. Allison reached out to me when she first became the Director of Victim Services for the Tarrant County Criminal District Attorney's Office to collaborate on best practices. Since that time, we would contact each other with questions, ideas, and suggestions. I always looked forward to seeing Allison at the Victim Impact Statement Revision Committee meetings. She was someone I admired and trusted, and she had such a kind heart. I will miss her dearly. Rest in peace, Allison.

Cyndi Jahn
Former Victim Services Director in Bexar County (retired)

I'm honored to be included in this memorial to Allison Attles-Bowen. I met Allison through TDCAA and the KP–VS Board. I didn't get to see her that often, mostly during TDCAA functions, but she contributed so much to our profession. She brought such a sense of strength to our group.

Allison was a fabulous teacher and presenter. She had such an impactful way of sharing her vast knowledge of victim services with her peers. Personally, she was everything you need in a friend: funny, compassionate, honest, and trustworthy. I feel her loss, but I am not alone in this. I know her family and friends feel the same. The advocates with whom she served at the Tarrant County CDA's Office must feel her loss daily. The victims she served there may never know how fortunate they were to have had her assistance during their time in the criminal justice system.

Allison left us all too soon. I pray healing mercies for her children and family members. I know they will keep her spirit alive through their memories of Allison. We as her victim services family must do the same as we serve the victims we encounter daily. Allison would expect nothing less

Allison left us all too soon. … We as her victim services family must do the same as we serve the victims we encounter daily. Allison would expect nothing less from us.

from us. Carry on in this important work you have been entrusted to do, with a true servant's heart, in Allison's honor and memory!

Jalayne Robinson
TDCAA Director of Victim Services

Allison Bowen was such an inspiration and devoted friend to me. Although we did not work together on a daily basis like many who have submitted tributes in her memory, nor am I one of the many crime victims Allison assisted, I recall when Allison was there for me in my time of need. During our Key Personnel & Victim Assistance Coordinator Conference in November 2023, my husband became ill back home after complications from a recent surgery. Though my husband assured me he would be fine until I could get back home, Allison was right there to offer me support. She came to my hotel room, and we sat in our pajamas until late that night while Allison helped me through a time when I was torn between work life and family life—as we all are from time to time. Allison always knew exactly when to listen and when to simply be present. Her greatest gift was making everyone feel like they mattered.

Victim services consultations

As the Victim Services Director at TDCAA, my primary responsibility is to assist Texas prosecutors, VACs, and other prosecutor office staff in providing support services for crime victims in their jurisdictions. I am available to provide training and technical assistance to you via phone, by email, in person, or via Zoom. I can tailor individual or group training specifically for your needs. The training and assistance are free of charge.

Are you a new VAC? This training would be perfect for you! To schedule a free consultation, please email me at Jalayne.Robinson@tdcaa.com. Many offices across Texas are taking advantage of this free training—see the photo, below, of my recent visit to Houston County. ❇

Left to right: Destini Mancilla, VAC and Grand Jury Clerk; Marisol Garcia, high school volunteer; Jalayne Robinson, TDCAA Director of Victim Services; Thomas Shafer, DA Investigator; Daphne Session, District Attorney; Lawson Hamilton, Assistant DA; and Kristin Wells, VAC in the County Attorney's Office.

How and why *Reese* re-armed 18- to 20-year-olds

Every week since the Fifth Circuit's decision in *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives,*

By Richard Guerra
Assistant Criminal District Attorney in Bexar County

prosecutors in my office have been challenged to demonstrate how Texas Penal Code §46.02(a)(2)—which prohibits Texans younger than 21 years old from carrying a handgun outside the home—is consistent with our nation's historical tradition of firearm regulation. With no higher-court guidance, I frequently suggest that prosecutors search for ways to mount a prosecution that avoids directly dealing with this issue. For example, individuals commonly break multiple gun laws simultaneously. A person who violates §46.02(a)(2) often also violates §46.02(a-1)(2)(A) by engaging in criminal activity other than a Class C traffic violation. Did the defendant have contraband? Are there other facts that could lead us to prosecute for an offense that lacks the uncertainty surrounding §46.02(a)(2)'s constitutionality?

In *Reese*, the Fifth Circuit held that 18 U.S.C. §§922(b)(1) and (c)(1) (also referred to collectively as "the Federal Statutes") and their attendant regulations are unconstitutional. These Federal Statutes prohibited Federal Firearms Licensees (FFLs) from selling handguns and handgun ammunition to adults between the ages of 18 and 21. The Federal Statutes are analogous to Texas Penal Code §46.02(a)(2) because they effectively disarm, albeit in different ways, the same group of people.

Does *Reese* forbid Texas from prosecuting 18- to 20-year-olds for carrying a handgun outside of the home? The unsatisfying lawyer answer is always, "It depends." However, the Fifth's Circuit's historical analysis in *Reese* offers some much-needed guidance. Let's dive in.

Background

Federal Statutes 18 U.S.C. §§922(b)(1) and (c)(1) prohibit FFLs from selling handguns and handgun ammunition to adults ages 18 to 20.[1] The plaintiffs—who included multiple 18- to 20-year-olds and three nonprofit organizations—sued the Bureau of Alcohol, Tobacco, Firearms, and Explosives in federal district court to challenge the law's constitutionality.[2]

The district court's opinion largely relied on the historical analysis that the Fifth Circuit had conducted in *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, which—before *Bruen*—had upheld the Federal

[1] Specifically, §922(b)(1) prohibited FFLs from selling handguns to 18- to 20-year-old individuals and (c)(1) prohibits FFLs from selling a handgun or handgun ammunition to a remote purchaser unless that purchaser submits an affidavit in which they swear that they are 21 or older.

[2] These individuals are also members of the three plaintiff organizations, which include the Second Amendment Foundation, Firearms Policy Coalition, Inc., and the Louisiana Shooting Association. The organizations' other members include 18- to 20-year-old adults and FFLs. *Reese v. Bureau of Alcohol Tobacco Firearms & Explosives*, 647 F. Supp. 3d 508 (W.D. La. 2022), *rev'd and remanded*, 127 F.4th 583 (5th Cir. 2025).

Statutes' constitutionality.[3] The district court acknowledged that—at the time of our nation's founding—militia service was required for 18- to 20-year-olds, which consequently implied the right to purchase firearms.[4] However, the court focused its analysis on the varying minimum ages that some colonies and states had set for militia service, which could dip lower than 18. The court also cited to certain evidence which showed the Founders' belief that the Second Amendment did not curtail legislators' ability to restrict firearm access to groups of people who were thought to lack "civic virtue." Ultimately, the court upheld the Federal Statutes.[5]

Moreover, the district court reviewed historical evidence through the 19th Century, observing that gun control intensified during this period. The court remarked that *Bruen* utilized this 19th-Century evidence "as mere confirmation" of the U.S. Supreme Court's earlier conclusions and relied on it to uphold the Federal Statutes, stating that it was doing the same.[6] The plaintiffs appealed to the Fifth Circuit, which abated the appeal pending the Supreme Court's decision in *Rahimi*. Afterward, the Fifth Circuit reversed the district court.[7]

"Why" and "how" the Federal Statutes impacted the right to bear arms were central to the circuit court's analysis into the nation's historical tradition of firearm regulation.

As the judges saw it

The Fifth Circuit held that 18 U.S.C. §§922(b)(1) and (c)(1) are unconstitutional under *Bruen*, refined by *Rahimi*.[8] "Why" and "how" the Federal Statutes impacted the right to bear arms were central to the circuit court's analysis into the nation's historical tradition of firearm regulation. Quoting from *Rahimi*, the Court opined that a law which regulates firearms for a permissible reason may unconstitutionally infringe on the right when it goes beyond what was done at the founding.[9]

At the start of its analysis, the Fifth Circuit quickly rejected the government's argument that the Second Amendment's plain text did not cover the conduct—the commercial purchase of firearms—that the Federal Statutes prohibited. This rejection is consistent with a statement from an earlier Fifth Circuit opinion—*United States v. Diaz*—in which the court observed, "As in *Rahimi*, the 'two-step' view of *Bruen* is effectively collapsed into one question: whether the law is consistent with our nation's history of firearm regulation."[10] Even though the words "purchase," "sale," or similar transactional terms are not in the Second Amendment's text, the Court reasoned that the right to "keep and bear arms" implied the right to purchase them.[11]

Next, the Court analyzed whether 18- to 20-year-olds were part of "the people" protected by the Second Amendment. In doing so, it largely relied on the historical analysis contained in *D.C. v. Heller*.[12] The Court rejected the government's argument, which relied on *Heller* to assert that "the people" covered by the Second Amendment are limited to the "political community" because the founding-era right to vote was reserved for citizens over 21. But *Heller* does not state that the "political community" referred only to those who could vote.[13] Rather, *Heller* indicates that the "political community" includes all who are part of the national community or those who are sufficiently connected with this country to be considered part of that community.[14] Just as it is

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[3] *Reese v. Bureau of Alcohol Tobacco Firearms & Explosives*, 647 F.Supp.3d 508, 521 (W.D. La. 2022), *rev'd and remanded*, 127 F.4th 583 (5th Cir. 2025) (citing *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012), abrogated by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022), and abrogated by *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), and abrogated by *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 127 F.4th 583 (5th Cir. 2025).

[4] *Reese*, 647 F.Supp.3d at 522.

[5] *Id*. at 522.

[6] *Id*. at 518.

[7] *Reese v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 127 F.4th 583, 587 (5th Cir. 2025).

[8] *Id*.

[9] *Id*. at 588.

[10] *United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024).

[11] *Reese*, 127 F.4th at 590.

[12] *Id*. at 592.

[13] "What is more, in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *D.C. v. Heller*, 554 U.S. 570, 580, 128 S. Ct. 2783, 2790–91, 171 L. Ed. 2d 637 (2008).

frivolous to define "arms" as those in existence only at the Founding, it is likewise ludicrous to limit "the people" in such a way. Doing so would imply excluding law-abiding, adult citizens from Second Amendment protection based on property ownership, race, or gender. The Court noted that the Constitution can and must apply to circumstances beyond what the Founders specifically anticipated. Even so, the text's meaning is fixed according to the understandings of those who ratified it.

Having determined that the Second Amendment covers the commercial purchase of firearms and that the plaintiffs are included in "the people" protected by the Second Amendment, the Court analyzed the nation's historical tradition of firearm regulation. Central to determining whether the law is analogous to our historical regulatory tradition are: 1) how the regulation affects the right to bear arms and 2) why the regulation impacts the right to bear arms.[15]

The Court identified the 1792 Militia Act as strong evidence that 18- to 20-year-olds had the same Second Amendment protections as those who were 21 or older at the founding. The act required 18-year-olds to enroll in the militia and to furnish their own weapons and ammunition.[16]

The Court then dissected the Founding-era laws that the government argued were analogous to 18 U.S.C. §§922(b)(1) and (c)(1). For example, resolutions passed in 1810 and 1824 disarmed students at the Universities of Georgia and Virginia. But the "how" and the "why" were too different from the Federal Statutes to work as compelling analogues because: 1) the resolutions applied to all students regardless of age, and 2) the resolutions were meant to effectuate student discipline and academic rigor, not to disarm all minors.[17]

The Court dismissed Pennsylvania's 1755 Militia Act, which required parental consent for individuals under 21 to enroll in the militia, as not relevant to the inquiry because the Pennsylvania legislature passed another statute in 1777 that set the enrollment age at 18.[18]

Comparable militia laws—which required parents to furnish firearms for young men's militia duty—were similarly pushed aside because such a requirement did not indicate that these young men lacked the right to keep and bear arms themselves. The Court also disregarded South Carolina's eligibility requirements for constables—which categorically excluded those under the age of 21—because this age grouping was only one of the categories of people and professions that were barred from constabulary duty. Moreover, exempting individuals from serving as constables is not analogous to curtailing their right to acquire a handgun.[19]

The government asserted that *Rahimi* allows the legislature broad authority to restrict the gun rights of "categories of persons" that "present a special danger of misuse." But the circuit court disagreed. According to the Court, the law at issue in *Rahimi* applied only upon a judicial finding that the defendant represented a credible threat to another's physical safety, whereas 18 U.S.C. §§922(b)(1) and (c)(1) apply without such a determination.[20]

Finally, the Court disregarded statutes from Reconstruction and the late 19th Century because they are too distant in time from the Founding era. According to the Court, *Heller* and *Bruen* considered sources from the 19th Century only to confirm and reinforce earlier historical evidence. The Court clarified that post-Founding era laws that are inconsistent with the Constitution's original meaning cannot overcome the wording of the Constitution's text.[21]

The takeaway

The Fifth Circuit recognized that *Rahimi* refined the historical inquiry by using the language of "how" and "why" a regulation lessens the right to bear arms. With this understanding, the Court stated that a law that regulates firearms for a permissible reason may still infringe on the right

Having determined that the Second Amendment covers the commercial purchase of firearms and that the plaintiffs are included in "the people" protected by the Second Amendment, the Court analyzed the nation's historical tradition of firearm regulation.

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[14] *Heller*, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260, 110 S. Ct. 1056, 1058, 108 L. Ed. 2d 222 (1990)).

[15] *Id*. at 588.

[16] *Id*. at 593.

[17] *Id*. at 596.

[18] *Id*. at 597.

[19] *Id*.

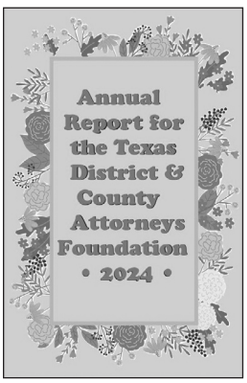
[20] *Id*. at 597–598.

[21] *Id*. at 600.

Continued in the orange box on page 13

Takeaways from our 2024 Annual Report

Since the 1970s, TDCAA has enjoyed some form of grant funding to support the mission of educating Texas prosecutors.



By Rob Kepple
TDCAF Executive Director in Austin

The profession has been fortunate to have grant funding from the Judicial and Court Personnel Training Program ably administered by the Court of Criminal Appeals. That funding is essential to deliver the quality training and support prosecutors need. But as anyone who works in a government office knows, sometimes a single source of support isn't enough to get the job done.

Enter **Tom Krampitz**, a former executive director of TDCAA, who coined the saying "two dollars of services for every dollar of grant funding"—meaning, the association has always found a way to make its funding go farther. That principle has been one of the keys to TDCAA's success, as leadership sought to diversify and build support for the myriad live conferences, online courses, books and manuals, and needed personnel. And the principle is reflected in the Foundation's 2024 Annual Report (find it on our website in this issue of the journal). In 2024, the CCA grant accounted for 48 percent of the support to TDCAA. The rest came from other sources, including a modest 2 percent from the Foundation.

I say modest, but I submit it is important for a few reasons. First, the Foundation is young and growing. With an endowment hovering at around $1 million and increasing, there is a promise of future support. Second, the Foundation funds some core training activities, including the Advanced Trial and Appellate Advocacy Courses, Train the Trainer, and the Prosecutor Management Institute (which was developed with Foundation funds). Third, the Foundation offers the stability to not only pay for some training mainstays, but also the flexibility to jump in when needed and supplement grant funding. A few examples:

- for many years the Foundation has supported the work of our Victim Services Director with salary and then supplemental funding;
- when last-minute construction at a host hotel disrupted a TDCAA conference, the Foundation quickly came to the rescue, paying to move the course to a new (and even better) venue;
- the Foundation helped pay for filming and production for the mandatory *Brady* training that every prosecutor must regularly take;
- with no other funds available, the Foundation provided each attendee of January's Prosecutor Trial Skills Course with a copy of the *Family Violence Manual*;
- the Foundation is committed to funding production of an upcoming two-hour online ethics presentation; and
- the Foundation is committed to providing ongoing financial support for the critical work of the new Domestic Violence Resource Prosecutor position.

Being able to nimbly jump in and support a project when other funding is not immediately available is a strength of the Foundation.

Finally, the Foundation gives prosecutors a way to recognize folks with "in honor of" or "in memory of" pledges. It also gives those in the profession a way to recognize others who are dedicated to justice with a nomination and membership in the Texas Prosecutors Society.

So when you have a moment, I urge you to take a look at 2024's Annual Report. It's a page-turner! ❇

Recent gifts to the Foundation*

Brian Baker
Jamie Felicia
David Finney
Mike Guarino *in memory of Bob Scheske*
Rene Guerra
Rusty Hardin
Donna Hawkins
Cheryl Henry *in honor of Rob Kepple*
Rob Kepple *in memory of Allison Attles-Bowen*
Rob Kepple *in honor of John B. Holmes Jr.*
Rob Kepple *in honor of Judge Susan D. Reed*
Rob Kepple *in memory of Betty Marshall and C. Chris Marshall*
W.C. "Bud" Kirkendall *in honor of Rob Kepple*
Audrey Louis
Barry Macha
Kurt Sistrunk *in honor of Mike Guarino*
Debbie Stricklin *in memory of Don Stricklin*
Beth Toben

* gifts received between February 8 and April 4, 2025

when it goes beyond what was done at the founding. I find it useful to think of the reason for the regulation as the "why" and the scope of the regulation as the "how." To be sure, there are likely other ways to use this language, but we will have to wait and see how *Bruen* and *Rahimi* develop in the coming months.

Recall that the district court considered evidence that indicated the Founders believed the Second Amendment did not restrict legislators' ability to restrict firearm access to groups of people who were thought to lack "civic virtue." However, the Fifth Circuit did not consider this evidence. Reading into it, I suspect that courts will find the Founders' thoughts and beliefs to be less useful than analyzing the text of the analogous laws from the founding era. After all, *Bruen* acknowledged that the Constitution must apply to "circumstances beyond those the Founders specifically anticipated."

Even though Texas Penal Code §46.02(a)(2) and the Federal Statutes penalize different groups of people (18- to 20-year-olds and FFLs, respectively) for different conduct (carrying a handgun outside the home and selling handguns and handgun ammunition, respectively), the ultimate result of both laws is the same: They restrict firearm possession and access to the same group of people: 18- to 20-year-olds. Additionally, the Militia Act of 1792—a federal statute passed by the Second Congress—is strong evidence against restricting firearm access to this age group. I think it will likely be difficult to overcome this evidence in a challenge to Texas's statute.

Time will tell, to be sure, but the mosaic is becoming clearer. ❇

Photos from Train the Trainer

Photos from our Prosecuting Domestic Violence & Child Sex Assault Conference

Code like a pro: your no-stress guide to CJIS reporting (cont'd from the front cover)

- a PAF code (from Appendix M) and
- a Prosecutor Action Date (PAD)—this is the actual date the decision was made (i.e., filed in the court or indicted), not the date someone logged it into the system.

If you're thinking this sounds like a lot of pressure for one little field, you're absolutely right.

Why do Prosecutor Action Field Codes matter?

Let's look at what can happen when a PAF code is used correctly—or incorrectly.

1) Accurate records. If a case is rejected but reported as filed, CJIS will reflect a prosecution that never actually happened. That error becomes part of someone's official criminal history, and that person could be denied a job, security clearance, or a firearm purchase, or he could even lose a case in court—all because of a data entry mistake.

2) Protecting defendants. The criminal justice system relies on fairness, and part of that is making sure records tell the truth. A defendant shouldn't be haunted by a charge that was actually rejected, just because it was reported incorrectly.

3) Grant funding. Here's where reporting hits the budget. Many local, state, and federal grants are tied to CJIS data. Whether your office supports diversion programs, mental health courts, family violence initiatives, or DWI (Driving While Intoxicated) dockets, you won't get credit—or funding—if those outcomes aren't properly recorded.

Texas counties are required to maintain at least 90 percent disposition completeness for the prior five years to remain eligible for key grants. If the case isn't reported, it doesn't count. So be looking at 2019–2024 when you run an "open offense" report through the CJIS Electronic Disposition Reporting System (EDRS); this report will pull up all arrest charges that have not been closed out with a PAF code.

4) Audit and compliance. DPS conducts routine CJIS audits. If your office has missing or inaccurate PAFs, those issues become audit findings—and those findings take time and staff to correct.

5) Internal metrics. PAF codes aren't just about compliance—they're also useful in tracking what your office is doing. From declinations and filings to diversions and no-bills, these codes help leadership make informed decisions about policies, staffing, and community needs.

How to report a PAF code

Step 1: Review each charge individually. Each arrest charge is reported separately. Don't assume that one code fits the entire arrest—multiple charges may lead to multiple outcomes. And double check that TRN (Tracking Incident Number, which is assigned to the arrest), as some may be duplicated.

Step 2: Choose the correct code. Use the codes listed in Appendix M: Prosecutor Action.[1] Match the prosecutorial action to the appropriate letter. (See the orange box below for the most common codes.) If you're not sure, ask. Never guess.

Step 3: Use the correct date. The Prosecutor Action Date (PAD) is the actual day the decision was made, i.e., the charge was filed or indicted. Do not use the date it was entered into the system.

Step 4: Submit it promptly. CJIS requires the entry to be made within 30 days of the decision. Most offices aim for seven to 10 days to stay well ahead of the deadline.

Step 5: Fix mistakes quickly. Everyone makes errors. If a code was entered incorrectly, update it in your case management system or coordinate with your DPS field auditor to make a correction. (More on fixing errors below.)

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[1] https://www.dps.texas.gov/administration/crime_records/docs/cjis/appendixM_PAF.xls.

PAF Codes greatest hits

Code	What it means
A	Prosecutor accepted the charge
B	No-bill by the grand jury
C	Charge changed or reduced
D	Dropped by arresting agency
F	Pretrial diversion with filing
G	Defendant absconded
N	Rejected without diversion
P	Pending diversion or deferred prosecution
R	Reduced to a Class C misdemeanor
T	Taken into consideration
W	Withdrawn by complainant
Y	Rejected after successful diversion

Fun scenarios that help it click

These examples are just for fun, but I hope you get the idea.

Scenario 1: The split decision
Defendant: Harry Potter
Charges: Possession of controlled substance PG-2 and resisting arrest
Outcome: Filed the possession charge but rejected the resisting
Codes: A (accepted) for possession and N (rejected) for resisting
Lesson: Always code each charge separately.

Scenario 2: The downgrade
Defendant: Ralph Kramden
Charge: Assault Family Violence–Strangulation
Outcome: Prosecuted as a misdemeanor assault
Code: C (changed charge)
Lesson: Use C, not A, when the original charge is changed—not accepted as is.

Scenario 3: Diversion done right
Defendant: Brian Klas
Charge: Illegal fishing
Outcome: Successfully completed pretrial diversion (PTD)
Codes: Start with P (pending PTD), then change to Y (successful completion [rejected]) after successful completion of PTD.
Lesson: N is only for outright rejections. Use Y (rejected) for successful diversions.

Scenario 4: The surprise bonus charge
Defendant: That Karen
Original Charge: Obstruction or retaliation
Outcome: Filed the original and added another charge
Codes: A for the original; C001 (county attorney) or D001 (district attorney) for the added charge. Use TRS number D001 for any added charge if the charge is a felony or is being filed by the district attorney's office. If adding a misdemeanor charge filed by the county attorney's office, use TRS number C001. When adding multiple charges, sequence the TRS numbers accordingly (e.g., D001, D002, D003).
Lesson: Know how to enter codes for new charges.

Scenario 5: Grand jury says no
Defendant: Mr. Bill
Charge: Burglary
Outcome: No-billed by the grand jury
Code: B
Lesson: This wasn't your office's decision—let the record show it was the grand jury's call.

Scenario 6: The no-show
Defendant: Keyser Söze
Charge: Murder and criminal conspiracy
Outcome: Pending in intake prior to indictment; the bondsman files affidavits to go off bond (ATGOB, CCP Art. 17.19); warrants are pending
Code: G—can't locate defendant (he has absconded)
Lesson: Update the codes later once you accept and/or reject the charges and resolve the prosecution action.

Scenario 7: The case that never showed up
Defendant: Otis Campbell
Charge: DWI
Outcome: Arresting agency never filed the case and the statute expired.
Code: D for agency dropped charge
Lesson: If it never made it to your desk, it's a D, not a rejection.

More pro-level CJIS reporting tips

Train everyone. From prosecutors to clerks—everyone should understand how and why PAF codes matter.

Audit regularly. Pull a few random cases each month and verify their PAF accuracy. I find that running an "open offense" report through EDRS helps tremendously. This report will show you all arrest charges that haven't been closed out with a PAF code. Once you've got the report:

1) review each open case;
2) determine whether a final decision has been made;
3) apply the correct PAF code from Appendix M; and
4) submit the update through your reporting system.

Making this a regular part of your internal review process helps keep your data clean, your county compliant, and your office ready for the next grant opportunity.

Continued in the orange box on page 19

Making CJIS audits a regular part of your internal review process helps keep your data clean, your county compliant, and your office ready for the next grant opportunity.

How understanding the rules of voir dire can help you select the right jury

French artist Jean Cocteau once said, "Art is science made clear." We contend that voir dire is very much a melding of art and science.

By Angela Kao & Jason Bennyhoff
Assistant District Attorneys, and
Ashley Jackson
(not shown) former Assistant District Attorney, all in Fort Bend County

A prosecutor who is an expert at voir dire can bring out veniremembers' innermost feelings and biases to determine whether a particular person will be a good juror for the State, or whether that panelist should be struck—that is the art of jury selection.

But there is a science to jury selection as well; that is understanding the law governing it—in particular, when a veniremember may be struck for cause and by whom. Further, understanding when the law allows a veniremember to be struck peremptorily, where a challenge for cause is not applicable (or not granted), and ensuring that the prosecution's strikes do not create appellate error. This article will give a primer on the rules governing voir dire to assist prosecutors in directing their questions toward statutorily permitted grounds for striking veniremembers for cause.

Jury selection in general

Both the Texas and U.S. Constitutions guarantee criminal defendants a fair trial by an impartial jury.[1] Jury selection plays an essential role in upholding a criminal defendant's right to a fair trial by an impartial jury.[2] While it's called jury selection, the process in practice is that of jury de-selection, as it serves as a mechanism for both the court and the parties to examine prospective jurors and exclude those who may be unable to impartially follow the court's instructions and assess the evidence.[3]

In Texas, the rules governing jury selection can be found in Chapter 35 of the Code of Criminal Procedure. Jury selection begins once the trial judge calls a criminal case for trial and the parties announce they are ready.[4] The court qualifies the veniremembers[5] after determining whether any panelists should be dismissed based on an exemption or excuse or by consent.[6] Both the prosecution and defense are entitled to examine the veniremembers, focusing on biases and beliefs that may affect impartiality.[7] Veniremembers may be excluded from the petit jury through peremptory challenges[8] or for cause.[9]

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[1] U.S. Const. Amend. VI; Tex. Const. Art. I, §10.

[2] *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

[3] *Id*.

[4] Tex. Code Crim. Proc. Art. 35.01.

[5] Throughout this article, persons who appear in jury selection are referred to as "veniremembers" so as to distinguish them from those who actually ultimately make their way onto the petit jury, though the relevant Code of Criminal Procedure articles use the term "juror" throughout; hence, where Code provisions are quoted or referred to directly, the term "juror" is used so as to be consistent with the usage in the CCP. See, e.g., Tex. Code Crim. Proc. Art. 35.14 mandating that a "juror" may be struck peremptorily.

[6] Tex. Code Crim. Proc. Arts. 35.03, 35.04, 35.05, 35.10, 35.12.

[7] *Abron v. State*, 523 S.W.2d 405, 407 (Tex. Crim. App. 1975).

[8] Tex. Code Crim. Proc. Art. 35.14.

[9] Tex. Code Crim. Proc. Art. 35.16.

Trial courts have considerable discretion over the voir dire process.[10] A judge may impose reasonable restrictions on the process, such as limits on the amount of time each party can question veniremembers and restrictions on the topics that may be addressed.[11]

Rules governing challenges for cause

"A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury."[12] The rules governing challenges for cause appear in Art. 35.16 of the Code of Criminal Procedure, which prescribe not only what a challenge for cause is, but also what facts would render a juror incapable or unfit to serve on the jury and which party may make a challenge for cause based on those facts.

Either party may challenge a juror for cause for any of the following reasons:[13]

- the juror is not a qualified voter in the state and county (though the failure of registering to vote is not a disqualification);
- the juror has been convicted of misdemeanor theft, a felony, or a crime of moral turpitude;
- the juror is under indictment or other legal accusation for misdemeanor theft, a felony, or a crime of moral turpitude;
- the juror is insane;
- the juror is physically unfit to serve and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case;
- the juror is a witness in the case;
- the juror served on the grand jury that found the indictment;
- the juror served on a petit jury in a former trial of the same case;
- the juror has a bias or prejudice in favor of or against the defendant;
- the juror has formed an opinion about the defendant's guilt or innocence that would influence the juror's verdict; or
- the juror cannot read or write.

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[10] *Jacobs v. State*, 560 S.W.3d 205, 210 (Tex. Crim. App. 2018).

[11] *Id*.

[12] Tex. Code Crim. Proc. Art. 35.16(a).

[13] Tex. Code Crim. Proc. Art. 35.16(a)(1)–(11).

Use your technology. Most case management systems (CMSes) can flag missing or inconsistent entries. Let those tools do some of the heavy lifting.

Appoint a CJIS liaison. Having one person oversee compliance and be the contact with DPS streamlines everything.

Coordinate with clerks. Work closely with court staff to ensure all open offenses are tracked and closed properly.

Oops—now what?

Everyone makes errors. What matters is how you handle them. Here's what to do:

1) Find the mistake through audits, staff review, or system alerts.

2) Submit the correction through your case management system or CJIS.

3) Note the correction in the file with a brief explanation.

4) Loop in your DPS field auditor if you are unsure how to make a correction, unsure of how to report an action code, or if you don't believe it is your charge—it may belong to another county.

5) Use it as a learning moment for training or system updates.

Final thoughts

Let's face it: CJIS reporting isn't flashy. It's not going to win you courtroom glory or make for a great Netflix docuseries. But it is *vital* to ensuring justice is properly documented. Every time we enter a PAF code, we are writing a piece of the official story—one that follows people for years and shapes decisions at every level of the justice system.

Get it right, and your office earns the credit, avoids compliance issues, and supports fair outcomes. Get it wrong, and the ripple effects can be serious. So, take a breath, double-check your entries, and remember: CJIS doesn't just reflect what happened. It shapes what happens next. Go on now and code like a pro! ❇

Though all the above grounds may be asserted by either party, several of them may not be waived, even if both parties consent.[14] A veniremember who has been convicted of a misdemeanor theft or a felony, who is charged with misdemeanor theft, a felony, or a crime of moral turpitude, or who is insane may not be seated on the petit jury, even if the parties consent.[15]

In an ideal world, the clerk's office screens the veniremembers for any obvious disqualifications such as non-residency, lack of U.S. citizenship, or illiteracy, prior to their appearance at jury selection. However, the reality is that attorneys will likely need to spend at least a small portion of their time in jury selection examining the panel on these grounds.

Although these grounds may seem relatively straightforward at first glance, in practice, the little nuances may surprise you. For example, John Doe has lived in Fort Bend County his whole life. He recently moved to Bexar County for a new job. John Doe still receives his mail at a residential address in Fort Bend County. Is John Doe a resident of and a qualified voter in Fort Bend County?[16] The answer is: It depends, and only John Doe can tell us where he considers his permanent residency to be.[17]

Thus, although attorneys are eager to get to the heart of the case, the best approach is to address the above grounds during jury selection (and also make sure you have alternate jurors). It is a punch to the gut when you realize that a juror on the panel is disqualified due to an avoidable error, especially when there are no alternate jurors and you're eager to get to opening statements.

In an ideal world, the clerk's office screens the veniremembers for any obvious disqualifications such as non-residency, lack of U.S. citizenship, or illiteracy, prior to their appearance at jury selection. However, the reality is that attorneys will likely need to spend at least a small portion of their time in jury selection examining the panel on these grounds.

If the parties are pressed for time due to a complicated case necessitating a longer voir dire, consider making a joint request to the presiding judge. If the presiding judge is amenable, the parties may address at least some of the above grounds with the panel during their welcoming remarks and introductions, thereby saving the State and defendant time in their respective voir dires. For example, quick questions to identify potential strikes may be posed as: "Raise your juror number card if you:

- are not a resident of this county;
- are unable to read or write English;
- served on a grand jury pertaining to this case;
- have a mental or physical disability that may preclude you from jury service in this case; or
- recognize the defendant, his defense attorneys, the prosecutors, or the presiding judge."

Follow-up questions are usually necessary. For instance, a veniremember may indicate that he is hearing impaired. However, if upon further discussion, it is discovered that the issue can be resolved by allowing the veniremember to sit closer to the witness stand or wear a hearing aid, so the veniremember may not necessarily be disqualified as "physically unfit to serve."[18] Ultimately, it is within the trial court's discretion whether the juror is "fit for jury service" in that particular case.[19]

Of course, some veniremembers may feel uncomfortable answering sensitive questions in a group, so always inform the panel that they have the option of approaching the judge individually after the State's and the defendant's respective voir dires to address any concerns they may have. Moreover, rarely does one own up to a felony conviction in front of a group of strangers. The better way to handle this is to have your investigator run a criminal history check of each venireperson.

Ordinarily, during voir dire, a party establishes a challenge for cause by examining the veniremember, with the jurors' responses serving as the foundation for the challenge for cause. Granted, a veniremember must undergo examination before being struck for cause, but a party

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[14] Tex. Code Crim. Proc. Arts. 35.16(a) and 35.19.

[15] *Id*.

[16] "A person is disqualified to serve as a petit juror unless the person is a resident of this state and of the county in which the person is to serve as a juror." Tex. Gov't Code §62.102.

[17] See *Heiselbetz v. State*, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995) (upholding trial court's denial of a challenge for cause where prospective juror testified he maintained permanent residence in the county where he was a registered voter); *Hutson v. State*, 291 S.W. 903 (Tex. Crim. App.1927) (concluding that juror living out of county for four months was qualified as a resident because he had no intention of abandoning former residence).

[18] *Chappell v. State*, 519 S.W.2d 453, 457 (Tex. Crim. App. 1975).

[19] Tex. Code Crim. Proc. Art. 35.16(a)(5); see also *Nobles v. State*, 843 S.W.2d 503, 515 (Tex. Crim. App. 1992).

is not restricted to the veniremember's responses in establishing a challenge for cause; the party may rely on extrinsic evidence alongside the responses.[20] As an example, a veniremember's questionnaire answered outside of voir dire is extrinsic evidence that may be used alongside his responses during voir dire to establish a challenge for cause.[21] But a questionnaire answered outside of voir dire, standing alone, is insufficient to establish a challenge for cause.[22]

State's challenges

The State may challenge a juror for cause (but the defense may not) on the following grounds:[23]

- the juror has conscientious scruples in regard to the death penalty (in a death penalty case);
- the juror is related within the third degree of consanguinity or affinity to the defendant; or
- the juror has a bias or prejudice against any phase of the law upon which the State is entitled to rely for a conviction or punishment.

Defense challenges

The defense may challenge a juror for cause (but the State may not) on the following grounds:[24]

- the juror is related within the third degree of consanguinity or affinity to the victim or a prosecutor on the case; or
- the juror has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to the offense or as mitigation or of punishment.

Bias or prejudice

The effectiveness of the prosecution's voir dire depends on how the prosecutor presents and paints the question of whether a juror has bias or prejudice against any phase of the law upon which the State or defense is entitled to rely. In general, the goal for prosecutors in voir dire is to protect the "State-friendly" jurors and to identify those jurors who are "bad" for the case. A skilled artist recognizes that a layperson, uneducated and unarmed with the law, may fall into the defense's bias trap. Thus, he uses his time in voir dire to identify State-friendly jurors to educate and arm them with the law. This is because a veniremember may not be excused for cause until the challenging party first explains the law to the panel and then ask if they can follow the law, regardless of their personal views.[25]

Commonly, defense attorneys breeze through the presumption of innocence and then ask the veniremember to "raise your hand if you think my client is guilty just because we're here today." The reality is that in a room of 30 or more people, some hands will go up. In fact, someone on the panel usually cleverly quips: "Well, we wouldn't be here if he hadn't been arrested!"

The defense attorney will then attempt to strike the veniremembers who raised their hands, arguing that those people are biased or prejudiced against his client, who has a right to the presumption of innocence. But not so fast! Just because a person holds bias or prejudice does not automatically make him subject to a challenge for cause. The proponent of a challenge for cause does not meet the burden until he shows that the veniremember understood the requirements of the law *and* could not overcome his prejudice well enough to follow the law.[26]

Thus, if a prosecutor took the time to educate the venire panelists on: 1) the presumption of innocence; 2) the State's burden to prove each element beyond a reasonable doubt; and 3) a juror's oath to follow the law, then generally speaking, fewer hands go up when the defense attorney asks the aforementioned question. This is because the veniremembers, fully equipped with the law and the lay of the land, understand that they have not heard or seen any evidence in this case yet, and the State's got to prove it.

Commitment questions

Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact.[27] Commitment questions are commonly phrased to elicit a "yes" or "no" re-

Commonly, defense attorneys breeze through the presumption of innocence and then ask the veniremember to "raise your hand if you think my client is guilty just because we're here today." The reality is that in a room of 30 or more people, some hands will go up. In fact, someone on the panel usually cleverly quips: "Well, we wouldn't be here if he hadn't been arrested!"

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[20] Tex. Code Crim. Proc. Art. 35.18.

[21] *Spielbauer v. State*, 622 S.W.3d 314, 321 (Tex. Crim. App. 2021).

[22] *Id*.

[23] Tex. Code Crim. Proc. Art. 35.16(b)(1)–(3).

[24] Tex. Code Crim. Proc. Art. 35.16(c)(1)–(2).

[25] *Waller v. State*, 353 S.W.3d 257, 265 (Tex. App.–Fort Worth 2011, pet. ref'd).

[26] *Id*.

[27] *Standefer v. State*, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001).

sponse, although an open-ended question can be a commitment question if the question asks the prospective juror to set the hypothetical parameters for his decision-making.[28] A proper commitment question can reveal which panelists are challengeable for cause.

The inquiry for determining an improper commitment question involves two steps: 1) whether the question is indeed a commitment question; and 2) whether the question includes facts—and only those facts—that lead to a valid challenge for cause.[29]

The Court of Criminal Appeals in *Standefer v. State* illustrated the above legal concepts with the following:

> "For example, the question, '[I]f the victim is a nun, could [the prospective juror] be fair and impartial?' does not ask the prospective juror to resolve or refrain from resolving any issue. 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 fail to do so if the juror perceived that the victim's status as a nun should not be controlling. If, however, the defendant had asked, 'Could you consider probation in a case where the victim is a nun?' then he would indeed have asked a commitment question. In that situation, 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). And as that example illustrates, the word 'consider' does not prevent a question from being a commitment question. To the contrary, the word 'consider' often marks a commitment question in which the prospective juror is asked to refrain from resolving an issue after learning a fact that could be used to resolve that issue."[30]

Importantly, any attorney who has been on the receiving end of a Batson *challenge appreciates the importance of having taken good notes during voir dire. The notes don't have to be complicated, but we should always have a legitimate reason for striking someone.*

For more information on commitment questions, see this article from a past issue of the journal, www.tdcaa.com/journal/jury-selection- six-years-after-standefer, and TDCAA's book *Jury Selection* by Ryan Calvert (TDCAA © 2020), available for sale at www.tdcaa.com/product/jury-selection-2020.

Rules governing peremptory challenges

A peremptory challenge allows a party to exclude a veniremember from the petit jury without providing a specific reason.[31] Although parties are not required to provide a reason for a peremptory challenge as a matter of course, that does not mean there are no rules restricting how parties may employ peremptory challenges. For instance, a party may not use a peremptory challenge to exclude panelists based on their race, ethnicity, or sex.[32]

Importantly, any attorney who has been on the receiving end of a *Batson* challenge appreciates the importance of having taken good notes during voir dire. The notes don't have to be complicated, but we should always have a legitimate reason for striking someone. The reason can be as simple as, "I saw her sleeping during defense's voir dire." Perhaps the veniremember is wearing a shirt that says "F**k the Police," and even though the veniremember promised to remain impartial, treat all witnesses the same, and wait to hear the evidence before reaching a conclusion, your gut says not to trust him. Alternatively, you may not want a nurse on your panel because you know the blood draw in the case is problematic. Maybe a panelist's mannerisms remind you of your mother-in-law and you think they might be distracting during trial or as the jury deliberates. Whatever the reason (except if your reason is based on unauthorized reasons of race, ethnicity, or sex), always have one, and be prepared to explain why you exercised a peremptory challenge.

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[28] *Id*.

[29] *Id*. at 182; see also *Mason v. State*, 116 S.W.3d 248, 253 (Tex. App.–Houston [14th Dist.] 2003, pet. ref'd).

[30] *Id*. at 180.

[31] Tex. Code Crim. Proc. Art. 35.14.

[32] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); Tex. Code Crim. Proc. art. 35.261; see also *Georgia v. McCollum*, 505 U.S. 42 (1992) (the prosecution in a criminal trial also has a right to make a *Batson* challenge to the defendant exercising peremptory challenges based on a juror's race).

Additionally, one mistake new attorneys often make during voir dire is spending time trying to convince veniremembers to "side" with them. The reality is that you are not going to help anyone have any earth-shattering revelations about the law or change anyone's fundamental beliefs within the course of what little time you are given for voir dire. The best approach for prosecutors is to: 1) identify who is "against you" and commit them to their bias or prejudice, and 2) figure out who is "with you" and arm them with the law so that they don't fall into a bias trap.

Conclusion

Like science and art, voir dire is fun. It is both a learning experience and an experiment of your creation. This article has gone into the "science" of voir dire, now it is up to you to pick up the brush and paint. Good luck with your masterpieces and remember—beauty is in the eye of the beholder. ❇

Recent milestones

Deaths

On April 1, 2025, our Colorado County Attorney family took a gut-punch. Anela Barrett, our discovery clerk/legal assistant, unexpectedly passed away. She brought an energy and enthusiasm to the office that was infectious and made those around her better. Her sudden passing left her family unprepared for the unexpected financial burden of a funeral. Her family has set up a GoFundMe to help offset the expenses. Anyone interested in contributing can do so at www.gofundme.com/f/in-memory-of-anela-barrett-funeral-support.

—From Jay Johannes, County & District Attorney in Colorado County

To report on a person's professional accomplishment (awards, etc.), appointment to office, retirement, or death, please email the editor at Sarah.Halverson @tdcaa.com. You can write about the milestone yourself, or you can include links to a press release, obituary, or other resource. Please keep it short (no more than a few sentences).

Awards

Rob Kepple, recently retired TDCAA Executive Director (now the executive director of the Texas District & County Attorneys Foundation) was honored with resolutions on both the House and Senate floors. Senator Chuy Hinojosa and Representative Joe Moody honored Rob for his 22 years of service as the executive director and more than 30 years at TDCAA.

Juvenile transfer hearings

Facing any contested hearing can be a daunting and scary task; however, they can also generally be a great opportunity to educate new prosecutors.

By Kathleen Takamine
Assistant Criminal District Attorney in Bexar County

It helps build confidence and teaches them important skills they can take with them into future hearings or trials.

One type of contested hearing that we face in juvenile law is the determinate sentence transfer hearing, and we're going to dive deeper into that subject today. I am hopeful that you can find something to use from it in any type of hearing you are facing.

The July-August 2017 issue of *The Texas Prosecutor* had an article that went over the basics of juvenile determinate sentence cases.[1] It is a pretty thorough exploration of the topic and I recommend reading it for a basic understanding of this type of case, but it only touched upon transfer hearings, so I wanted to expand on that topic here.

Quick background on determinate sentences

In a nutshell, Texas Family Code §53.045[2] allows prosecutors to file particularly violent or serious cases without resorting to certifying juveniles as adults and transferring them into the adult system right away. However, juveniles will age out of the juvenile justice system once they reach a certain age. If they were placed on probation on any misdemeanor or indeterminate sentence[3] felonies, they would age out by the time they're 18. If they were sentenced to the Texas Juvenile Justice Department (TJJD), they would age out at 19 years old on all felony cases.[4]

In determinate sentence cases, the Family Code allows the period of probation or confinement to extend beyond when juveniles would normally age out. A juvenile can face up to 40 years in TJJD for capital felonies, first-degree felonies, and aggravated controlled substance felonies.[5] For second-degree felonies, the juvenile faces up to 20 years at TJJD and 10 years for third-degree felonies.[6] Juveniles placed on probation can serve up to 10 years on probation.[7]

This would allow the juvenile to still receive rehabilitative services in the juvenile system while ensuring the safety of the community by giving them extended sentences. There is a potential, however, for determinate sentence cases to be transferred to adult community supervision, the Texas Department of Criminal Justice (TDCJ), or TDCJ parole. This is where transfer hearings come into play. How the hearings come about and how they are conducted will depend on if the juvenile was placed on probation or sentenced to TJJD.

Before discussing determinate sentence transfer hearings, it is important to note that a

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[1] www.tdcaa.com/journal/determinate-setencing-for-juveniles.

[2] This section of the Family Code lists the types of cases that can be filed as a determinate sentence.

[3] Under the juvenile justice system, a juvenile can be committed to the Texas Juvenile Justice Department (TJJD) up until the juvenile's 19th birthday. There is no fixed term; hence, it is referred to as an indeterminate sentence. The juvenile could be released before reaching 19. It all depends on the juvenile's progress in TJJD. See www.tdcaa.com/journal/determinate-setencing-for-juveniles.

[4] See 37 Tex. Admin. Code §380.8525 (Minimum Length of Stay/Minimum Period of Confinement).

[5] Tex. Fam. Code §54.04(q).

[6] *Id*. Note: There are no offenses below the third-degree level that can be filed as a determinate sentence, hence, no mention of state jail felonies.

[7] *Id*.

transfer of a determinate sentence probation to the appropriate adult district court is not the same as certifying a juvenile as an adult and transferring the case to the appropriate district court. When you certify and transfer (or "C&T") a juvenile to the appropriate district court, for all practical purposes, that juvenile will become an adult defendant. None of the Family Code provisions in the Juvenile Justice Code apply to a juvenile who is subsequently certified as an adult. At that time, the Code of Criminal Procedure would apply to the case.

Under a transfer of a determinate sentence, the juvenile would not be considered an adult for purposes of that criminal case. That juvenile will still be considered as having been adjudicated in engaging in delinquent conduct and the case would not be considered a final conviction of the offense. The determinate sentence probation transfer to adult community supervision would, generally, fall under Texas Code of Criminal Procedure Chapter 42A.[8] However, some of the restrictions imposed by that chapter will not apply to the transferred cases. Any restrictions that Chapter 42A places on the judge[9] or any minimum period of supervision imposed by this chapter[10] would not apply to transfered cases from juvenile court.[11]

So, what occurs at these hearing?

The transfer hearing

It starts with a request of a transfer hearing.

When juveniles are placed on determinate sentence probation that extends beyond their 19th birthday, the Family Code places the responsibility of requesting transfer hearings on prosecutors.[12] Such a request must be done before the juvenile turns 19. In Bexar County, our general practice is to file a Motion to Transfer immediately after the disposition, even if the juvenile will not be turning 19 for several years. Due to the sheer volume of juvenile cases, this makes it easier to ensure that our determinate sentence cases do not fall through the cracks. Once a request a made, the transfer hearing will then be set.

Under the Family Code, transfer hearings for juveniles placed on probation are conducted as if the court were modifying the juvenile's probation.[13] The juvenile does not have a right to a jury during this hearing.[14]

So, what do I do when facing a transfer hearing?[15] First, I make myself familiar with the case. I contact and talk to the victim and the victim's family to find out if they want to testify or make a statement to the court.[16] I contact the juvenile probation officer who is in charge of the juvenile's case and get his or her recommendation.

My rule of thumb is to get a copy of the transfer order that the judge has to sign.[17] With this, I have a basic outline of what I need to present to satisfy all the requirements the court considers to transfer the case. Basically, the court must make certain findings and list the factors that it will consider in deciding whether to transfer the case. The order will ensure that the prosecutor covers all these findings and considerations. In all transfer hearings, the court has to make these findings:

- that the Order of Certification of Grand Jury approval was signed, giving the court authority to hear the determinate sentence and conduct the disposition;
- that the juvenile was adjudicated, meaning, he was found to have engaged in delinquent conduct for the offense alleged and the date alleged;

My rule of thumb is to get a copy of the transfer order that the judge has to sign. With this, I have a basic outline of what I need to present to satisfy all the requirements the court considers to transfer the case.

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[8] Tex. Fam. Code §54.051(e).

[9] See Tex. Code Crim. Proc. Art. 42A.54, Limitations on Judge Ordered Community Supervision.

[10] See Tex. Code Crim. Proc. Art. 42A.53(d).

[11] See Tex. Fam. Code §54.051(e-1).

[12] Tex. Fam. Code §54.051(a).

[13] See Tex. Fam. Code §54.051(b). See also §54.05.

[14] Robert O. Dawson, *Texas Juvenile Law*, p. 579 (Texas Juvenile Probation Commission 9th ed. 2008).

[15] I will be referring to my experience in Bexar County. The Family Code applies to all jurisdictions, but it pays to know the process that your court follows in your county. Bottom line: Know your court and know your judge.

[16] In a transfer of determinate sentence probation hearing, the prosecutor's office has to contact and inform the victim of the hearing.

[17] Courts often have the court adminstrator's office prepare the order. For Bexar County in the past, some of the juvenile courts had the prosecutor prepare an order. It will depend on your court.

- that the juvenile was placed on determinate sentence probation for a certain number of years;
- that the juvenile is a child and was born on a particular date (basically, a child at the time of adjudication and disposition);
- that the juvenile is currently 18 years old (his age at the time of the hearing);
- that the juvenile currently lives in the county of residence (for a juvenile in TJJD custody, the order will indicate that the juvenile is in TJJD custody during the time of the hearing); and
- that the transfer hearing has been held before the juvenile's 19th birthday.

Sometimes the judge will make these findings on the record at the start of the hearing. If not, the prosecutor should take the responsibility of getting that information on the record and request the court take judicial notice of the judgment and disposition order in the court's file.

The transfer hearings involving juveniles who were sentenced to TJJD tend to be more formal and intense.

Once the initials findings are made, the actual hearing itself can be quite informal, depending on the judge. The prosecutors will make a recommendation and present their evidence. I have the victim or the victim's family available to make a statement to the court if they so wish. The juvenile probation officer makes his recommendation and his reasons behind it. And then the defense will present its recommendation and bring forward witnesses. The court will weigh all the evidence and decide whether to transfer the juvenile's case to adult probation supervision[18] or deny the transfer and terminate the probation.[19]

If the case is transferred, only the petition charging the juvenile with the offense, grand jury approval of the petition, judgment placing the juvenile on determinate sentence probation, and order transferring the case to adult court will be made a part of the district clerk's public record.[20] All other reports, orders, plea paperwork, and evidence will remain in the juvenile case file. The (former) juvenile will be assigned a probation officer from the adult side of things, and he will be monitored by the adult probation department upon turning 19 years old. Any violation of probation will be handled under the Texas Code of Criminal Procedure.

One last point: Even though the case is transferred to adult probation supervision, the original juvenile court retains jurisdiction over the (former) juvenile.[21]

Transfer hearings involving TJJD

The transfer hearings involving juveniles who were sentenced to TJJD tend to be more formal and intense. Whereas the prosecutor is responsible for requesting a transfer hearing in determinate sentence probation cases, TJJD is responsible for cases in which the juvenile was sentenced to TJJD.[22] The request may be made any time after the juvenile turns 16 but before turning 19.

There are two types of transfer hearings that may be requested: an early transfer or a transfer upon the juvenile's 19th birthday. In the early transfer, once a juvenile turns 16 years old, TJJD can request a transfer when they deem it necessary. If this hearing is set, the result will either be the court denying the transfer and sending the juvenile back to TJJD or the court transferring the juvenile to TDCJ. If it's a transfer because the juvenile will be turning 19 years old, the results include transfer to TDCJ, transfer to TDCJ parole, or denying the transfer and releasing the juvenile from TJJD once he turns 19. With either request, the hearing will be conducted in the same manner.

After TJJD makes the request, the hearing must be held not later than 60 days after the request.[23] Courts have interpreted that the hearing must start by the 60th day, but it does not necessarily have to be completed within that time frame.[24] (In one case, the transfer hearing was set within the 60-day time frame but the defense attorney requested a continuance because he had been retained just before the hearing started. The court allowed the State to give an opening state-

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[18] They will be placed on community supervision under Tex. Code Crim. Proc. Chapter 42A. See Tex. Fam. Code §54.05(e). See also §54.051(e-1).

[19] In this case, the court has to give an actual date the juvenile's probation ends. See Tex. Fam. Code §54.051(c), which states: "If, after a hearing, the court determines to discharge the child, the court shall specify a date on or before the child's 19th birthday to discharge the child from the sentence of probation."

[20] See Tex. Fam. Code §54.051(d-1).

[21] Tex. Fam. Code §51.0411.

[22] Tex. Hum. Res. Code §244.014.

[23] Tex. Fam. Code §54.11(h).

[24] See Dawson, *Texas Juvenile Law*, pp.577-578.

ent, then recessed the hearing.[25]) After the request is made, the hearing is set and the court sends notice of the setting to all parties involved.[26]

During these hearings, the court may consider reports and testimony from juvenile probation officers, professional consultants, lay witnesses, and any other witnesses deemed necessary in helping the court decide the matter.[27] All written reports and all records on which the court will rely must be transferred to defense counsel five days prior to the hearing.[28] The only result of failure to meet this deadline is resetting the hearing to allow defense counsel to examine the reports and records. These hearings tend to involve voluminous records from TJJD, which include the master file on the juvenile, a summary report with a recommendation by TJJD, and a psychological evaluation. The majority of the evidence will be based on these records. TJJD sends these records to the court, the prosecutor, and the defense counsel in an email with a link.

Upon receiving all the written reports, I first concentrate on the summary report, as it is a good place to start. The master file itself can be very voluminous, and looking at the report first allows me to focus my presentation of the evidence. Although there can be time constraints, I recommend a pretrial meeting with the TJJD representative[29] who will be testifying at the hearing. I also consider calling the juvenile's previous probation officer to testify. One of the factors the court considers is the juvenile's experience and character before he was committed to TJJD. The probation officer would be able to provide this information.

In the records, I am looking for any evidence the court will consider. This is where my rule of thumb comes in handy: having a copy of the transfer order that the judge must sign. According to the order, a court must consider the following:

- the experience and character of the juvenile, both before and after commitment to TJJD,
- evidence showing the respondent is of sufficient intellectual abilities and sophistication to be committed at the Institutional Division of TDCJ,
- the nature of the penal offense,
- the manner in which the offense was committed,
- the ability of the respondent to contribute to society,
- the protection of the victim and/or any member of the victim's family,
- TJJD's recommendations, and
- whether it is in the best interest of the juvenile and of society that he is placed in the custody of TDCJ for the remainder of his sentence.

While I look through the records, whenever I find evidence that supports my argument, I note the page. When I ask about that evidence (and it tends to be a rule violation or disciplinary hearing), I have the representative refer to that page before asking my question. Being able to refer to the page makes the hearing go smoothly and move quickly. The record tends to be huge, and prosecutors can't assume everyone has read the entire file—there is no way the TJJD representative would have memorized the entire record.

Upon receiving all the written reports, I first concentrate on the summary report, as it is a good place to start. The master file itself can be very voluminous, and looking at the report first allows me to focus my presentation of the evidence.

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[25] *Id.*, citing *In the Matter of K.H.*, , No. 12-01-00342-CV, 2003 WL 744067, 2003 Tex.App. 4617, *Juvenile Law Newsletter*, 03-2-02 (Tex.App.LEXIS–Tyler 2003, no pet.)(not for publication).

[26] Tex. Fam. Code §54.11(b) states that "the court shall notify the following of the time and place of the hearing: 1) the person to be transferred or released under supervision; 2) the parents of the person; 3) any legal custodian of the person, including the Texas Juvenile Justice Department or a juvenile board or local juvenile probation department if the child is committed to a post-adjudication secure correctional facility; 4) the office of the prosecuting attorney that represented the state in the juvenile delinquency proceedings; 5) the victim of the offense that was included in the delinquent conduct that was a ground for the disposition, or a member of the victim's family; and 6) any other person who has filed a written request with the court to be notified of a release hearing with respect to the person to be transferred or released under supervision." Remember that in determinate sentence probation transfer hearings, the prosecutor has to contact the victim.

[27] Tex. Fam. Code §54.11(d). See also Dawson, *Texas Juvenile Law*, p. 579.

[28] Tex. Fam. Code §54.11(d).

[29] The representatives may change over the years but at the time of this article, Alanna Bennett and Tami Coy are the TJJD reps. I just wanted to give a shout out to them.

At the hearing

When the hearing begins, if the court does not automatically do so, I ask the court to take judicial notice of all the evidence findings, the judgment entered in the underlying case, and that notice was given to all the parties listed in the Family Code[30] and their presence in the court. If notice had not been given but the party is present in court, I ask the judge to take judicial notice of their presence. The Family Code indicates that the person to be transferred and the prosecutor must have notice of the hearing. If notice had not been given to the other parties and they did not show up, it would not affect the validity of the hearing and the decisions of the court so long as it is shown on record that reasonable efforts were made to locate and notify those people.[31]

Once the hearing is done and the case is transferred, the (former) juvenile does have a right to appeal. That's why I make sure the record is clean on my part–all the judicial notices are made and the evidence covers all the factors the court must consider.

Even though this section of the code specifies notice must be given to the person being transferred and the prosecutor, the defense attorney is never excluded. Family Code §51.10 gives the juvenile the right to be represented by an attorney at every stage of the proceedings, including transfer hearings. The hearing will not proceed unless the juvenile's attorney is present. Also, the juvenile is entitled to have a parent or guardian present. If neither is available, the court must appoint a guardian ad litem.[32] The Family Code allows the court to appoint the juvenile's defense counsel as a guardian ad litem.[33]

Once judicial notice of all parties present has been noted in the record, I put on the probation officer. As I mentioned earlier, the court considers the experience and character of the juvenile prior to commitment. The probation officer testifies to his interactions with the juvenile and all the juvenile's actions while on probation. The officer will also provide good information about the situation in which the juvenile was living prior to being committed; once released, the juvenile will likely be placed back into the same environment and same influences—so it's often a good point of argument to make.

When the TJJD representative is on the stand, he will verify that the summary report, master file, and psychological evaluations all articulate the concerns of the juvenile being transferred. Once that is established, I ask the court to take judicial notice of all the reports submitted by TJJD. I will then have the representative identify the juvenile in court, and then I ask him to go into all of the juvenile's activities after commitment, including all rule violations, hearings on the rule violations, and sanctions. It's through this witness that I want to present other factors that the court will consider: the juvenile's experience and character after being committed, the juvenile's ability to contribute to society, protection of the victim and any of her family, the best interest of the community, and the best interest of the juvenile. I emphasize any disciplinary actions, lack of progress, lack of participation in any programs, and the juvenile's overall attitude during the commitment period. It is also important to bring out whether the juvenile was made aware of what could happen if he should violate the rules or not progress in any manner.

I do want to point out that even though hearsay could reasonably be a valid objection in these hearings, in regard to the probation officer and TJJD representative testifying from the reports, courts have found them admissible during the hearing, as it is permitted by Family Code §54.11(d). This section specifically allows a court to consider the records and testimony of probation officers and post-adjudication secure correctional facility employees.[34]

Finally, if the victim or victim's family wants to testify, I put them on the stand. If they don't want to testify but would like to give a statement to the court, I let the court know, and they are given that opportunity.

At the end of the hearing, the court will ask for final arguments. I try to cover all the evidence that the court must consider in making a decision. I do not shy away from acknowledging any positive gains that the juvenile has made during his commitment—the point is that he has made gains while in custody of a secured institution. However, the negative setbacks generally outweigh the positive.

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[30] See Tex. Fam. Code §54.11(b).

[31] Tex. Fam. Code §54.11(c).

[32] See Dawson, *Texas Juvenile Law*, p.579. Appellate courts may find harmless error if defense counsel is present or if another adult family member is present.

[33] Tex. Fam. Code §51.11(c).

[34] *In the Matter of T.C.K. Jr.*, 877 S.W.2d 43 (Tex.App.–Beaumont 1994, no writ); See also Dawson, *Texas Juvenile Law*, p.579.

One final note: Once the hearing is done and the case is transferred, the (former) juvenile does have a right to appeal. That's why I make sure the record is clean on my part—all the judicial notices are made and the evidence covers all the factors the court must consider.

Conclusion

A determinate sentence transfer hearing can be very involved. I find myself combing over hundreds of pages of records and reports. However, it really is no different than dealing with a very complicated criminal trial—just a bit less scary, in my opinion. As I stated earlier, these hearings can be used to educate and train prosecutors without the added stress of a jury trial. With this in mind, I hope that anyone reading this article can find something that would help in managing these hearings. It's always a great pleasure to share my experience in juvenile law. ❇

Surviving the storm: how expert witnesses can salvage a family violence case

You're in the middle of a family violence trial. You have called a couple of witnesses and laid the foundation for the case.

By Staley Heatly
County Attorney in Wilbarger County

The responding officer testified clearly, explaining how he arrived at the scene, observed the victim's demeanor and injuries, and documented the incident. The scene photographs are good, showing redness on the victim's cheek, a cut on her lip, and tears in her eyes. The pictures also demonstrate that the home was in disarray, with furniture toppled and a broken lamp on the floor. The 911 call has been played. The victim's trembling voice can be heard asking for immediate police assistance. Everything is going well—at least, it has been. It's time for the victim to testify.

As you sit next to her in the hallway just before she is set to take the stand, you sense that something has changed. She's hesitant. She seems distant. Your stomach tightens. Then she tells you that she doesn't remember what happened, that maybe she exaggerated, or she wants to "move on" and put the case behind her. It's happening. She's recanting. You can see the case slipping away and a repeat abuser walking free.

If you have prosecuted many family violence cases, you've likely been in this situation. You are about to call a witness to the stand, and you have no idea what she is going to say. One thing is sure, however: Whether the victim minimizes the incident or completely denies it, the defense attorney will rightfully pounce on this new version of events. During cross-examination, the defense will focus on every inconsistency and paint the victim as being unreliable at best and utterly dishonest at worst. The jury, unless adequately educated, will struggle to understand why an abused woman might minimize or even deny the abuse she allegedly suffered. If you don't have a way to contextualize her behavior, the case will be in grave danger of falling apart. This is where an expert witness can save the day.

The role of experts

Expert witnesses provide juries with critical context about the dynamics of family violence. They can educate the jury on common victim behaviors that may seem like irrational or atypical responses to violence. These actions include recantation, minimization, delay in reporting, absence from trial, communicating with the defendant, and remaining in the relationship. A skilled expert will educate the jury that, rather than undermining the case, these behaviors are consistent with the dynamics of abuse and they support the conclusion that the victim is actually in an abusive relationship. Without that kind of expert testimony, jurors may fall back on common misconceptions, such as the belief that a victim would have left immediately if she were truly abused.

Circumstances at trial can change in the blink of an eye, and a cooperative victim may become reluctant or unwilling to testify due to fear, pressure from the abuser, or emotional turmoil. This is why it is crucial to always have an expert witness available or on standby in all family violence cases.

But I'm rural—I don't have access to an expert witness

The most common complaint I hear from fellow rural prosecutors is that they don't have access to family violence experts in their jurisdictions and don't know where to find them. However, the real challenge isn't necessarily a lack of qualified experts but rather the perception that local professionals don't meet the requirements. While relatively few individuals formally market them-

selves as domestic violence experts, prosecutors can expand their pool of experts by identifying and qualifying professionals with extensive experience in the field, such as advocates, law enforcement officers, victim assistance coordinators, mental health professionals, researchers, and counselors who understand the dynamics of abuse. These individuals exist in every jurisdiction, and with a bit of training, they can serve as experts on the dynamics of domestic violence.

Who can be an expert?

Texas Rules of Evidence Rule 702 outlines the requirements for expert witnesses, stating that a witness may be qualified based on their knowledge, skill, experience, training, or education.[1] It is important to note that each of these qualifiers is separated by an "or" and not an "and,"—meaning an expert does not need an advanced degree, decades of experience, and extensive training to be qualified. Instead, expertise can be derived from specialized education, practical experience, the study of technical works, or a combination of these factors. Appellate courts have held that a detective with specialized family violence training, extensive case experience, and direct observation of victim behavior is qualified to testify as an expert on intimate partner dynamics.[2] Most law enforcement agencies in Texas will have at least one officer who meets these criteria.

A female assistant district attorney with extensive experience in family violence cases recently shared with me that she frequently uses male detectives or police officers with domestic violence experience as expert witnesses. She believes that having a male expert can help counter potential jury bias when both the prosecutor and victim are women. While law enforcement officers can be effective experts, especially those with specialized training in domestic violence, prosecutors should also consider whether a more independent expert might carry greater credibility with the jury. A police officer who was directly involved in the case, for example, may be perceived as biased or overly aligned with the prosecution. However, in situations where other expert options are unavailable, a well-qualified officer can serve as a valuable stand-in. In jurisdictions with multiple law enforcement agencies, prosecutors may consider using a qualified officer from a different agency who wasn't directly involved in the case to provide a greater appearance of neutrality.

The key takeaway is that qualifying an expert in a domestic violence case is not an insurmountable challenge. It is well worth the time and effort to identify someone in your jurisdiction who, with a little training, can provide important contextual testimony when you need it. Appellate courts have affirmed the use of the following as experts on intimate partner dynamics:

- detective with training and experience;
- counselor in a police department;[3]
- social worker at women's shelter;[4]
- counselor;[5]
- victim service coordinator at the police department;[6]
- forensic nurse/sexual assault nurse.[7]

A female assistant district attorney with extensive experience in family violence cases recently shared with me that she frequently uses male detectives or police officers with domestic violence experience as expert witnesses. She believes that having a male expert can help counter potential jury bias when both the prosecutor and victim are women.

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[1] Tex. R. Evid. 702; *Jensen v. State*, 66 S.W.3d 528, 542 (Tex. App.–Houston [14th Dist.] 2002, pet. ref'd).

[2] *Dixon v. State*, 244 S.W.3d 472, 479 (Tex. App.–Houston [14th Dist.] 2007, pet ref'd) (court upheld expert testimony of detective who had received specialized training, worked at least 300 cases involving domestic violence, and observed trends related to victim behavior).

[3] *Brewer v. State*, 370 S.W.3d 471, 474 (Amarillo 2012, no pet.) (allowing a counselor in the family violence section of a police department to provide expert testimony regarding the three-stage cycle of violence).

[4] *Coker v. State*, Tex. App. 6450 (Tex. App.–Dallas July 29, 2019, no pet.) (mem. op., not designated for publication) (permitting a counselor and social worker at a women's shelter to testify about the cycle of violence).

[5] *Runels v. State*, 2018 Tex. App. LEXIS 9995 (Tex. App.–Austin Dec. 6, 2018, pet. ref'd) (mem. op., not designated for publication) (a counselor's testimony based on concepts of the cycle of violence and the power and control wheel was sufficiently reliable to allow the counselor to testify as an expert).

[6] *Booker v. State*, 2009 Tex. App. LEXIS 5541 (Tex. App.–Dallas Jul. 13, 2009, no pet.) (not designated for publication) (the victim services coordinator at a police department qualified as an expert witness in domestic violence).

[7] *Davis v. State*, 2020 Tex. App. LEXIS 6841 (Tex. App.–Dallas Aug. 25, 2020) (not designated for publication) (holding that a person who was both a forensic nurse and sexual assault nurse examiner was qualified to testify regarding domestic violence).

The first family violence expert I ever used was a professor of counseling at nearby Midwestern State University. She had 20 years of experience as a counselor and had worked with many domestic violence victims. While she was an excellent witness, she had to come from an hour away to testify, so it wasn't easy to have her on standby. In recent years, I have cultivated two expert witnesses in my small town, which has just over 10,000 people. One is a licensed professional counselor with experience counseling domestic violence victims, and the other is the executive director of our local family violence program, who has less than seven years of experience in the field. Both have come about their expertise in different ways, but they are both thoroughly qualified to testify. The counselor's qualifications are evident: She holds an advanced degree, has specialized training in domestic violence, and possesses real-world experience working with survivors. The executive director, while not professionally trained, has spent years working directly with victims, engaging in safety planning, assisting with protective orders, handling crisis calls, and collaborating with law enforcement and prosecutors. Her practical experience makes her more than capable of explaining the realities of family violence to a jury. None of the experts I've used in family violence cases had PhDs or published articles on the subject at the time of their testimony. Those credentials aren't required.

If you are having trouble finding an expert witness, start by contacting the family violence program that serves your jurisdiction. The executive director or another experienced leader in the program may be your best option, as they often have years of direct experience in the field.

A few years ago, I had a victim who had entirely recanted her original statement in a letter to the defense attorney by the time we got to trial. She claimed that she had exaggerated everything and even lied about how her injuries occurred. While I made some helpful headway during her testimony, I could see that the jury was still confused. But then our expert testified about how victims minimize abuse and how abusers manipulate them into recanting. She explained how fear, financial control, and emotional abuse all play a role. During her testimony, I could see nods of understanding from members of the jury. It all came together. The case resulted in a conviction, and I firmly believe that the expert testimony made the case go from a close call to a 30-minute verdict.

If you are having trouble finding an expert witness, start by contacting the family violence program that serves your jurisdiction. The executive director or another experienced leader in the program may be your best option, as they often have years of direct experience in the field. Additionally, board members of these programs frequently hold professional degrees and possess expertise in domestic violence. Don't overlook them as a potential source of experts. Even frontline advocates at family violence programs receive at least 40 hours of initial training, followed by ongoing annual education. Their training covers the dynamics of abuse, trauma response, barriers to leaving, and the impact of domestic violence on victims and children. More importantly, they spend their days working directly with survivors: helping them secure shelter, navigating the legal system, and rebuilding their lives. This firsthand experience provides a deep, practical understanding of family violence, which can be just as valuable as a formal degree when it comes to expert testimony.

If these sources don't work for you, consider your office's victim assistance coordinator or a victim advocate from another office or agency nearby. While the defense may make some hay related to their connection to your office, their testimony may be crucial in explaining the victim's behavior in your case. The value of their testimony will far outweigh any argument the defense makes about their relationship with your office. After all, the witnesses are not there to advocate for the prosecution; they are simply explaining the dynamics of intimate partner violence and the expected behaviors of victims in these cases.

Preparing an expert

Once you have located someone with the necessary educational or practical experience, it's time to start preparing her for court. You will want to go over the details of her testimony, the specific questions you plan to ask, and the types of questions she can expect on cross-examination. Reviewing prior transcripts of expert testimony is particularly useful as it provides insight into how other experts have structured their responses and handled tough questioning during cross-examination.[8] Because cross-examination is often the most nerve-wracking part for new experts,

[8] Visit www.tdcaa.com/journal for a transcript of a cross-examination; look for this article, and the transcript is attached to it as a PDF.

studying past exchanges can help them anticipate challenges and respond with confidence. The expert should also spend some time reviewing relevant resources to reinforce her general knowledge and understanding. There are numerous online websites and journals dedicated to intimate partner violence that are relevant to understanding victim behavior.[9] The Battered Women's Justice Project offers an online guide designed to assist first-time expert witnesses in domestic violence cases.[10] While the witness needs to refresh her general knowledge, her testimony will not be based on what she has read in studies or research. Instead, it will come from her training and what she has learned by working directly with victims of abuse. The testimony is not an academic exercise but rather an explanation of how things work in the real world with real victims.

These fundamental preparations, combined with thorough trial preparation with the prosecutor, should ensure that the expert is well-prepared for trial. However, for those looking to take their readiness a step further, the Institute of Domestic Violence and Sexual Assault at the University of Texas offers free remote expert witness training.[11] While not a requirement for qualifying as an expert witness, this training comes highly recommended. It provides invaluable insight into the unique challenges of testifying, highlights common pitfalls to avoid, and offers best practices for effectively conveying expert opinions in domestic violence cases.

Now that you have located a person and provided her with some preparation and training, you are ready to go.

Qualifying the expert

As a standard practice, my office lists both of our family violence expert witnesses in the Notice of Expert Witnesses for all family violence cases. However, merely designating someone as an expert does not mean the defense will accept her qualification without challenge. At trial, always anticipate that the defense attorney will request to voir dire the witness on her qualifi- cations.

If the defendant requests a Rule 705(b) hearing under the Texas Rules of Evidence, the court must conduct it outside the jury's presence. *It is error to deny this hearing.* During the hearing, clarify for the judge that the expert will not be offering an opinion on an ultimate issue of fact for the jury, such as if the defendant is a batterer or whether the victim was abused. Addressing these questions upfront can streamline the admissibility ruling. Be fully prepared to conduct the entire direct examination of the expert outside the jury's presence, ensuring the judge has a complete understanding of her qualifications and the relevance of her testimony before ruling on admissibility. Before the hearing, thoroughly review the expert's testimony and potential questions with her. Be open to her feedback and adjustments to strengthen the presentation. A well-prepared expert can make all the difference in overcoming admissibility challenges and ensuring the testimony is both persuasive and compelling.

Be fully prepared to conduct the entire direct examination of the expert outside the jury's presence, ensuring the judge has a complete understanding of her qualifications and the relevance of her testimony before ruling on admissibility.

Testifying

Once the judge qualifies the expert witness to testify, begin by having her introduce her occupation and qualifications to the jury before transitioning into a broader discussion of family violence dynamics. Highlight the specific strengths that make this witness particularly credible and knowledgeable. If the expert has extensive firsthand experience, such as counseling thousands of victims as an advocate, emphasize her real-world knowledge and direct victim interactions rather than focusing on academic credentials. If the expert is a law enforcement officer, underscore her practical experience by discussing the hundreds of domestic violence cases she has investigated, any special training she has received, and the number of victims she has worked with directly. Tailoring the emphasis to the expert's strengths builds credibility with the jury. You don't need to ask every possible qualifying question—just focus on those that highlight your expert's particular strengths and experiences in a way that will resonate with the jury. For example, no one expects a police officer

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[9] The National Domestic Violence Hotline has excellent general information at www.thehotline.org. For a general overview of domestic violence, *Psychology Today* has several articles at www.psychologytoday.com/us/basics/domestic-violence.

[10] https://bwjp.org/wp-content/uploads/2023/11/DV-Expert-Witnesses-Tips-to-Help-You-Prepare-FINAL-CP-FIX-11-17-2017.pdf.

[11] https://sites.utexas.edu/idvsa/training-programs/expert-witness-training.

or victim advocate to have published articles on the dynamics of intimate partner violence, so there's no need to ask that question if it doesn't apply. Once the qualifications are established, shift the focus to a general discussion of family violence, setting the stage for how her expertise applies to the facts of the case.

At this point, you will want to ask questions such as:

- "How many family violence victims have you worked with?"
- "What are some common myths and misconceptions about family violence?"
- "Is there a local family violence shelter? If so, how much space is available at the shelter?"
- "Do family violence victims often recant?"
- "Do they frequently want the case dismissed? What are some of the reasons you have seen?"
- "Do some victims return to the relationship? Why?"

A detailed outline of sample questions for an expert witness can be viewed with this article online at www.tdcaa.com/journal. (Look for this article; the sample questions are attached as a PDF.)

You don't need to ask every possible qualifying question–just focus on those that highlight your expert's particular strengths and experiences in a way that will resonate with the jury.

Explaining the dynamics of domestic violence

Once the basics have been covered, the next step is to provide the jury with a broader understanding of family violence dynamics. Texas courts have long recognized that testimony about the behavior patterns of victims and abusers is admissible, even when the expert has no personal knowledge of the individuals in the case.[12] The purpose of this testimony is not to offer an opinion on the specific facts of the trial but to educate jurors on the underlying pattern of domestic violence, helping them interpret the victim's actions and the defendant's behavior within a well-established framework.

Two of the most fundamental concepts in this area are the Cycle of Violence and the Power and Control Wheel. These models, supported by decades of research, have been widely accepted by Texas appellate courts as effective tools for explaining the realities of intimate partner violence.[13] To ensure clarity, use demonstrative exhibits to make the concepts more accessible to the jury. Ensure they are in a large format so that the jury doesn't spend time squinting and trying to read fine print.

Cycle of Violence

Begin by having the expert explain the Cycle of Violence, also known as the Cycle of Abuse. This framework illustrates how domestic violence is rarely a one-time event but instead follows a repeating pattern that often escalates over time. Make sure to discuss the underpinnings of the cycle and how it is widely used today as a tool for explaining the dynamics of intimate partner violence.[14] The expert should discuss the following:

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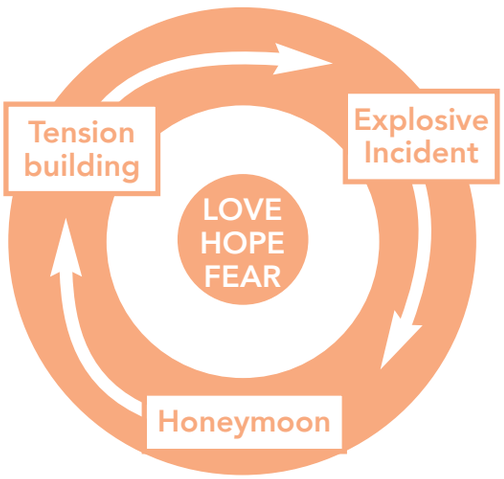
[12] *Scugoza v. State*, 949 S.W.2d 360, 363 (Tex. App.–San Antonio 1997, no pet.); *Hill v. State*, 392 S.W.3d 850, 855 (Tex. App.–Amarillo 2013, pet. ref'd) (finding expert testimony would aid the jury in understanding victim's actions and resolving conflicts in her trial testimony); *Harris v. State*, 133 S.W.3d 760, 774 (Tex. App.–Texarkana 2004, pet. ref'd) (cycle of violence testimony relevant to explain victim's behavior).

[13] *Brewer v. State*, 370 S.W.3d 471, 474 (Tex. App.–Amarillo 2012, no pet.) (finding testimony concerning "cycle of violence" assisted jury in understanding victim's delay in calling police after assault); *Foster v. State*, No. 01-17-00537-CR, 2018 Tex. App. LEXIS 2855 at *14-15 (Tex. App.–Houston [1st Dist.] April 24, 2018) (mem. op., not desig. for pub.) (explanation of family violence dynamics, including the "power and control wheel" and the "cycle of violence" provided a helpful framework for understanding the victim's behavior); *Runels v. State*, No. 03-18-00036-CR, 2018 Tex. App. LEXIS 9995 at *6 (Tex. App.–Austin Dec. 6, 2018, pet. ref'd) (mem. op., not desig. for pub.) (counselor's testimony based on concepts of the "cycle of violence" and the "power and control wheel" sufficiently reliable to uphold determination that counselor should be allowed to testify as expert); *Nwaiwu v. State*, No. 02-17-00053-CR, 2018 Tex. App. LEXIS 6290 at *2-3 (Tex. App.–Fort Worth Aug. 9, 2018, pet. ref'd) (mem. op., not desig. for pub.) (determining that testimony from counselor, including portion explaining the "power and control wheel," was reliable).

[14] The cycle was first described by Dr. Lenore Walker in her book *The Battered Woman*, released in 1979. In discovering this pattern, Walker interviewed more than 1,500 victims of domestic violence. The theory has been widely accepted in numerous works of social science including Bonnie S. Fisher; Steven P. Lab, *Encyclopedia of Victimology and Crime Prevention*, SAGE Publications; 2 February 2010, ISBN 978-1-4129-6047-2, p. 257.

- Tension-Building Phase: The abuser becomes increasingly irritable, controlling, or aggressive, creating a climate of fear.
- Explosive Incident: The abuse occurs – whether physical, emotional, or psychological. It can range from angry yelling to physical or sexual abuse.
- Honeymoon Phase: The abuser apologizes, minimizes the abuse, and may temporarily exhibit loving or remorseful behavior to regain control. See the illustration, below, for a visual depiction of the Cycle of Violence.



Have the expert describe the devastating effect of the cycle on the victim and how victims react at each step. The expert should explain that the cycle repeats itself over and over, frequently resulting in escalating violence. Ensure that the expert discusses the nonviolent methods perpetrators can use to control their victim's behavior, including verbal and non-verbal cues through body language. Once the violence has happened one time, a mere glance or a certain word can send a message to the victim that violence could happen again in an instant. This repeating cycle keeps the victim trapped in the abuser's control.

Power and Control Wheel

After explaining the Cycle of Violence, transition into a discussion of the Power and Control Wheel, which was developed in the 1980s by the Domestic Abuse Intervention Program in Duluth, Minnesota. (See an illustration of it, at right.) This tool categorizes non-physical tactics that abusers use to maintain control over their victims. The outer ring represents physical and sexual violence, while the inner ring outlines eight categories of coercive behavior commonly used by abusers.

The eight significant sections are broken down as follows:

- using intimidation,
- using emotional abuse,
- using isolation,
- minimizing, denying, and blaming,
- using children,
- using male privilege,
- using economic abuse, and
- using coercion and threats.

Each category has additional explanations included inside the wheel. For example, using male privilege includes "treating her like a servant, making all the big decisions, acting like the 'master of the castle,' and being the one to define men's and women's roles." The expert should provide a brief explanation of each category, ensuring the jury understands how these tactics operate to entrap the victim.

But don't stop there. While it is essential to educate the jury on the general aspects of family violence, prosecutors should take every opportunity to tie these specific concepts to the facts of the case. This can be done by highlighting testi-

Downloaded from theduluthmodel.org

mony that is already in evidence and presenting it to the expert in the form of a hypothetical to demonstrate how the defendant's behavior aligns with known patterns of abuse. For example, if testimony established that the defendant frequently left for the weekend without telling the victim, then came home late and demanded a meal upon his return, the prosecutor could ask: "If a victim described a partner who disappears for days without communication and then expects obedience upon his return, would that behavior align with the 'male privilege' category of the Power and Control Wheel?"

Similarly, if witnesses testified that the victim quit her job, stopped attending family gatherings, and became socially withdrawn after entering the relationship, the prosecutor could ask: "If a victim significantly reduces contact with family and friends after beginning a relationship, how does that align with the 'isolation' tactics used by abusers?"

Domestic violence occurs in all demographics: Abusers come from all racial, economic, cultural, and religious backgrounds. A defendant's status in the community, church, or workplace does not preclude him from being an abuser.

Additional topics

Depending on the facts of the case, the expert should also address other critical issues that may arise in domestic violence trials, including:

- Victim minimization and self-blame: Many victims downplay the abuse due to psychological conditioning and trauma bonding. They blame themselves and not the abuser. This is typical victim behavior.
- Counterintuitive behavior: Jurors may wonder why the victim stayed in the relationship, returned after leaving, or refused to cooperate with the prosecution. The expert can explain the psychological, financial, or emotional barriers that commonly prevent victims from leaving their abusers.
- Domestic violence occurs in all demographics: Abusers come from all racial, economic, cultural, and religious backgrounds. A defendant's status in the community, church, or workplace does not preclude him from being an abuser.

Important note

When utilizing an expert in a domestic violence case, it is crucial to align her testimony with her specific area of expertise. While a detective or police officer may be qualified as an expert on victim behavior based on her training and direct observations in past cases, her role differs from that of an advocate or researcher. Law enforcement experts should focus on real-world examples—how victims commonly recant, minimize abuse, delay reporting, continue dating the offender, etc.—rather than theoretical frameworks such as the Power and Control Wheel or the Cycle of Violence, which are better suited for advocates or academics. While this makes officers slightly less versatile as experts, their testimony remains credible and compelling. Many jurors may find firsthand experience with victims more relatable and persuasive than abstract theories.

Conclusion

Expert witnesses are invaluable in family violence cases, providing jurors with the context they need to understand victim behavior and the broader dynamics of intimate partner violence. By carefully selecting and preparing experts, you can ensure that their testimony effectively educates the jury and strengthens your cases. Whether law enforcement officers, advocates, counselors, or other qualified professionals, the right experts can make the difference between a conviction and an acquittal. Prosecutors, especially those in rural areas, should take the time to identify potential experts in their communities and work with them in advance of trial. With proper preparation, expert testimony can be a powerful tool to counter defense arguments, explain victim behavior, and ultimately hold abusers accountable. ❇

Led by counties for counties, TAC offers a host of help for prosecutors

The Texas Association of Counties (TAC) was established over 50 years ago to serve as the representative voice for all Texas counties and county officials.

By Laura Garcia
Associate General Counsel, Texas Association of Counties (TAC) in Austin

TAC's Board of Directors includes representatives from each of the official county associations; Jennifer Tharp, Criminal District Attorney in Comal County, currently serves as TDCAA's rep on TAC's Board.

TAC provides a variety of services, including pool coverage and risk management services, health benefits services, legislative support for county officials and their associations, and education and training services. Beyond that, however, TAC also provides an array of specific legal support resources available to district and county attorneys and staff that are highlighted in further detail below.[1]

Legal helpline (888/275-8224)

Since 1989, TAC's Legal Department has operated a helpline to assist county officials and staff in researching issues and finding statutes, regulations, opinions, and court cases relevant to a particular county situation. Our team of attorneys and paralegals responds to more than 2,000 inquiries every year on various county issues, including matters relating to open government, roads and bridges, and purchasing, among many others. Please contact us via phone or online at county.org/helpline if we can provide research assistance or other resources on these and other county issues as they arise.

Legal publications

In addition to the helpline, we publish a series of legal publications on many of these issues that are available for download on our website.[2] Publications address topics such as procedure and decorum for commissioners court meetings, ethics and conflicts of interest, open meetings, public finance, bail bonds, disaster response, and more. You can also request printed copies of these publications for your office. If you have any thoughts on future publications that may be helpful for counties, please let us know.

LegalEase on-demand training

We also offer on-demand continuing education online for a small fee. It covers various civil legal topics specifically tailored to county government.[3] Courses address issues such as social media and the First Amendment, website considerations, and county procurement. Attorneys can earn continuing legal education credit upon completion.

Amicus briefs and appellate practice support

Additionally, TAC's Legal Department assists many counties with civil rights and tort claims litigation questions. A number of those involve issues of special interest to prosecutors, including litigation about wrongful arrest and malicious prosecution. Sometimes that assistance may take the form of amicus briefs on significant issues that may impact prosecutors and counties.

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[1] Please visit TAC's website at www.county.org to learn more about TAC, our services, and resources.

[2] www.county.org/member-services/legal-services/legal-publications.

[3] www.county.org/member-services/legal-services/legalease-ce.

Continued in the orange box on page 39

Jury selection in child sexual abuse cases

Jury selection is an important phase of any trial. In a child abuse trial, many prosecutors believe jury selection is the most important phase of the trial.

By Anshu "Sunni" Mitchell
Assistant District Attorney in Fort Bend County, &
Jamie Felicia
Assistant District Attorney in Williamson County

Excerpted from *Investigating and Prosecuting Child Sexual Abuse* (TDCAA © 2025)

The composition of the jury, as with any case, will represent the single biggest unknown variable the prosecutor faces at trial. However, it is the jury's understanding, even before opening statements, of the difficult emotional and medical issues in a child abuse case that make or break a case. No matter how well you prepare, how strong the evidence, or how convincingly you present the case, it may not matter if the jury is not prepared for the evidence in a child abuse case.

No other crime invokes as much anger and disgust as a child sexual abuse case. People may have different views about drug offenses, for example, or about whether a murder was justified, but public opinion about child sexual abuse is united and strong. The challenge for the prosecutor is to focus and direct those strong feelings appropriately. This process starts and ends with you educating the jury about the law and the unique evidentiary issues in a child abuse case.

Threshold considerations

Child abuse cases are almost always hotly contested in the guilt/innocence phase of the trial. Unless you have a very high likelihood of the defendant's DNA on the swabs taken from the child's vagina during an acute SANE exam or some other strong corroborative evidence, you should probably focus on the guilt/innocence phase of the trial during jury selection.

What are the major weaknesses in the case? Delayed or unconvincing outcry? A lack of corroborating evidence? The complainant herself—misconduct, a bad attitude, or perhaps the fact that close family members do not believe her? Is the biggest weakness in the case the fact that the defendant enjoys a reputation as an upstanding citizen and portrays the image of a person who would never do such a thing? List the main avenues of attack the defense will likely take, and think about how you can address them on voir dire. Do not avoid difficult issues in voir dire; instead, hit them head on and confidently.

Goals of voir dire

Regardless of the specific facts and issues in the case, a child abuse voir dire should have several important goals. You should seek to:

- educate the panel about the unique issues in a child sexual abuse case, such as delayed outcry, one witness testimony, and the lack of medical or scientific evidence;
- dispel preconceived notions jurors have about who is a typical child molester and get jurors to understand there is no blueprint for a child abuse victim or how s/he will testify;
- commit the panel to following the law on evidentiary issues, such as one-witness testimony;
- fortify State's jurors and eliminate unfavorable jurors; and
- qualify jurors on the relevant punishment range and prepare them for potential lesser-included offenses.

This article talks about two of those goals: education, and preparation and commitment.[1] There's also a sample voir dire starting on page 44.

Goal: education

Introducing the offense. Introducing the panel to the offense is essential and must come first due to the "mob" attitude you will often encounter when prospective jurors find out the defendant

[1] For a complete description of all of the suggested goals of voir dire in a child sexual abuse case, see *Investigating & Prosecuting Child Sexual Abuse* by Anshu "Sunni" Mitchell and Jamie Felicia (TDCAA © 2025), available for purchase at tdcaa.com/books.

is charged with a sex-related offense against a child. More often than not, as soon as they are informed of the nature of the accusation, you will see a change in the attitude of the panelists. Typical reactions range from grim acknowledgment to disgust to open anger.

Acknowledge this change in mood. Tell them you understand the way they feel and that you expected that reaction. Explain that strong feelings of revulsion and sadness are normal but are not a valid excuse from jury service. Advise the venire that this is not a referendum on the popularity of child abuse. Point out that no one is "OK" with child abuse. Emphasize why their service is so important, and do not be afraid to use a little bit of guilt to motivate them. After all, if everyone who was offended by sexual abuse of children and disliked hearing about it were excused from jury duty, child abuse cases could never be tried. Or, worse, they would be heard by jurors who are not offended by sexual abuse of children.

Make sure to distinguish having a bias against sex offenders from having a bias against the defendant, who, as you may want to remind the panel, is presumed innocent at this point in the trial. Many panelists will raise their hands and say something like they do not believe they would make good jurors because they feel that they are biased against sex offenders. Make sure they understand that this is not an excuse from service.[2] Also explain to them that they do not know the facts of the case yet and that every case is different; make quick use of hypotheticals to calm emotional jurors.

Once you have introduced the panel to the offense, you should begin the most important part of voir dire: educating the prospective jurors on the issues they will confront in a typical child abuse trial, preparing them for the evidence the State will present, and committing them to following the law.

Education. Many jurors approach the subject of child abuse having preconceived ideas and be-

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[2] *Wilson v. State*, 436 S.W.2d 542, 544 (Tex. Crim. App. 1968) ("Mere prejudice against the crime committed by an accused is not a disqualification"); see also *Phillips v. State*, 656 S.W.2d 219, 220 (Tex. App.–Fort Worth 1983, no pet.) (expressing bias against offense of sexual assault is not grounds to excuse for cause).

TAC's Risk Management Pool support has included reviewing and offering suggestions on briefs for members when asked. We also offer the opportunity to participate in practice appellate arguments with our legal staff before upcoming oral arguments.

One case in which TAC recently participated was support of an amicus brief in *Wilson v. Midland County*.[4] The case involved a conflict of interest with an assistant district attorney who doubled as a law clerk for a state court judge. A conviction was overturned, and that person subsequently sued the county under §1983, making multiple damages claims. Midland County won at the Fifth Circuit. (Wilson's Petition for Certiorari to the United States Supreme Court is still pending.)

County Management and Risk Conference

TAC's Legal Department also supports our Risk Management Pool with its annual County Management and Risk Conference. The conference addresses a variety of topics relevant to district and county attorneys, local law enforcement, and other criminal justice professionals, including liability issues, regulatory compliance, risk mitigation, and personnel and employment law matters.

We are here to help

Led by counties for counties, TAC regularly collaborates with TDCAA and is here to serve prosecutors and your offices. Please don't hesitate to call on us. Whether it's research assistance, resource guides, or appellate practice support and briefing, we look forward to continuing to provide timely and ongoing support for you whenever you need it. ❇

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[4] 116 F. 4th 384 (5th Cir. 2024).

lieving popular societal myths about it. Jury selection is your opportunity to correct this and dispel the myths, such as:

- a medical exam on a victim of child sexual abuse will usually provide evidence of injuries;
- DNA or other forensic proof will be present in sexual abuse cases;
- a victim of sexual abuse will hate the perpetrator;
- mothers always protect their children against sexual abuse and support them if it happens;
- mothers always believe their child;
- contested divorces and child custody battles often lead to false allegations of child abuse;
- children often lie about sexual abuse and can be led to say anything;
- false allegations of child abuse are a problem;
- physical force or threats are necessary to commit a sexual assault;
- a defendant could not possibly commit an offense in the same home (or the same bed!) as other witnesses without those witnesses knowing it;
- children often make up allegations of sexual abuse to gain attention or get revenge;
- children often fantasize and are unreliable as witnesses;
- child victims should cry or show emotion when testifying;
- if a teenage victim consents, it is not the adult's fault;
- the victim usually makes outcry immediately after the assault;
- the victim should have resisted the assault and called for help right away;
- you can tell if someone is a sex offender just by looking; and
- respectable people don't sexually abuse children.

These are just a sampling of some of the myths you may need to dispel during jury selection. They may not all be applicable to this particular case, but when analyzing the weaknesses in the case prior to trial, decide which of these myths, or similar myths, you need to address.

The "typical" child sexual abuse case. The most common misconception the panel will carry into voir dire is about what a "typical" aggravated sexual assault of a child case involves. The high-profile cases that get the most media attention—the ones that prompt Amber Alerts to put the public on the lookout for abducted victims—are often stranger-on-stranger kidnappings and sexual assaults, where the perpetrator has no relationship with the victim. In fact, as prosecutors and investigators know, such high-profile cases are rare, and a "typical" child abuse case has few, if any, of these sensational ingredients. More likely, you will be prosecuting a case where a relative or acquaintance sexually abused the victim.

Debunking the myths. How do you debunk these preconceived notions and popular myths? You ask questions. Ask the panel what first popped into their minds when they learned what kind of case you were presenting. Did anyone think of a stereotypical, sensational fact scenario? Ask how many people think of that as a "typical" child abuse case. Cover common misconceptions and myths in the same way. Ask, "How many people here believe that ___?" inserting the applicable myth from above into the blank.

Sometimes prospective jurors subconsciously believe these myths, but when these erroneous beliefs are explained and discussed, they will adopt the new information and be prepared to function with it.

Sometimes prospective jurors subconsciously believe these myths, but when these erroneous beliefs are explained and discussed, they will adopt the new information and be prepared to function with it. Find out who believes the myths and who does not. Consider doing this early, even through the use of a scaled question, to determine the true beliefs of your prospective jurors before you begin educating them.

If jurors indicate they agree with any of the myths, find out why they believe them. You may be able to get a juror disqualified for bias. Remember to use open-ended questions to draw out responses because no one wants to believe that he or she is not fair and impartial. Through voir dire, you should be developing the same theories and arguments you will make later during trial to explain the facts of the case. Carefully note any jurors who seem troubled or doubtful or who seem to believe the myths of the "typical" child abuse case. You may need to peremptorily strike them later.

Use prospective jurors who have had experience with child sexual abuse to debunk some of these myths. This lets the jurors hear the realities of child sexual abuse from fellow jurors who have no stake in the outcome of the case. By incorporating and looping the jurors' own words and beliefs into your theme and echoing them during the trial, you enhance the presentation of evidence and make the case more persuasive.

Be careful about any prospective juror tainting the panel with extreme emotional or inflam-

matory remarks or "testifying" about facts pertinent to the case.[3] If a member of the panel begins to go into too much detail, politely stop him, thank him for his thoughts, and keep moving through voir dire. If a panelist insists on speaking in detail, ask the court permission to question the juror privately at the bench.

Goal: preparation and commitment

Evidentiary issues. The law does not require medical or scientific evidence to support a conviction for sexual assault.[4] Prospective jurors are challengeable for cause if they require a particular type of evidence the law does not require to convict a defendant.[5] In determining whether a venire member can follow the law, it will help if the prospective jurors understand why the law does not require any particular type of evidence for conviction so long as the State proves the case beyond a reasonable doubt.

While educating jurors about the relevant law and testing their feelings about the strengths and weaknesses of the case, make it clear to the panelists that they will be called upon to follow the letter of the law and will be expected to do so if they take the oath as a juror. Jurors must unequivocally promise they can follow the law. Some of the commitments you should consider obtaining in a child sexual abuse case are:

- Jurors will not require medical evidence to convict if the State proves its case beyond a reasonable doubt.[6]
- They will not require scientific or DNA evidence to convict if the State proves its case beyond a reasonable doubt.[7]
- Witness testimony is evidence.
- They can convict on the testimony of one witness as long as they believe that witness proves the indictment beyond a reasonable doubt.[8]
- They will not require the complainant to testify if the State proves its case beyond a reasonable doubt.[9]
- They would not automatically believe an adult over a child.[10]
- They would not automatically disbelieve a child.

A prevalent misconception, thanks to the "'CSI' effect," is that there will be some physical evidence of the crime presented at trial. Prospective jurors assume that there will be something other than the victim's testimony to prove that the defendant committed the crime. Even if you are fortunate enough to have something tangible to corroborate the word of the victim, it will rarely be as conclusive and damning as what the panel has seen on television.

Once you have educated the panelists about some of the basic issues they are going to face in a child sexual abuse case, you must specifically prepare them for the evidence by which you are going to prove the case. More specifically, you must prepare them for the *lack* of evidence in the case. Rarely will you have eyewitnesses, medical evidence, DNA, a video of the offense, or a full confession. More likely you will be going to trial with little more than the testimony of the victim. It is absolutely essential that you prepare the jury for this. They cannot be surprised.

Find members of the panel who understand the practical realities of a child abuse case. Look to members on the panel who might be able to help explain why certain types of evidence are not always available. Remind them that the abuser is the person in control of the evidence. Go through every sort of evidence you can con-

Be careful about any prospective juror tainting the panel with extreme emotional or inflammatory remarks or "testifying" about facts pertinent to the case. If a member of the panel begins to go into too much detail, politely stop him, thank him for his thoughts, and keep moving through voir dire.

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[3] See, e.g., *Young v. State*, 137 S.W.3d 65 (Tex. Crim. App. 2004) (venireperson's statement that "I have worked with abused children for 40 years, and I know they never lie about such things" would have been curable with an instruction to disregard and did not require mistrial).

[4] *Rodriguez v. State*, 819 S.W.2d 871, 873–74 (Tex. Crim. App. 1991); see also Tex. Code Crim. Proc. Art. 38.07.

[5] *Garza v. State*, 18 S.W.3d 813, 820 (Tex. App. –Fort Worth 2000, pet. ref'd); *Robinson v. State*, 985 S.W.2d 584, 587–88 (Tex. App.–Texarkana 1998, pet. ref'd).

[6] *Garza*, 18 S.W.3d at 820.

[7] *Id*.

[8] *Castillo v. State*, 913 S.W.2d 529, 533 (Tex. Crim. App. 1995); see also *Lee v. State*, 206 S.W.3d 620 (Tex. Crim. App. 2006) (valid challenges for cause from one-witness hypothetical).

[9] *Mason v. State*, 116 S.W.3d 248, 255-56 (Tex. App.–Houston [14th Dist.] 2003, pet. ref'd).

[10] *Hernandez v. State*, 563 S.W.2d 947 (Tex. Crim. App. 1978); see also *Escamilla v. State*, 334 S.W.3d 263 (Tex. App.–San Antonio 2010, pet. ref'd) (holding that there is no particular age which a child is automatically deemed incompetent to testify).

ceive and establish why the jury should not automatically expect to see it. Cover the types of evidence you may not have in the case and talk about the very practical reasons the case may not contain such evidence. Take the "CSI" effect to task. If you do not hit the "CSI" effect head-on and discuss in detail the evidence this case may not have, prepare for a not-guilty verdict.

If you do have DNA, medical evidence, a confession, or other strong corroborative evidence, you may want to devote more voir dire time to punishment issues. But even if you are fortunate enough to have a seemingly strong case, you still need to cover the issues above and ask challenge questions because:

1) you never know with absolute certainty what evidence will be admitted;

2) the defense will almost always advance alternate explanations for the evidence you have regardless of the quantity or quality of it; and,

3) undesirable jurors will often disqualify themselves answering the challenge questions about the State's possible lack of evidence. After all, you probably do not want a person who would require particular kinds of evidence on the jury even if you do have it.

"Sell" the case low on voir dire and then overdeliver in trial.

Before you delve into the law on one-witness testimony, consider stepping away from sexual abuse for a while and talk about a different type of case. Take your pick–an aggravated robbery case works well. Present the facts to the panelists and make them be the victim.

Child testimony, "on or about," the "one witness" rule, child behavior, and other issues. One of the first topics to discuss with the panel is how children think and view things differently from adults. The purpose of this discussion is to get a commitment from each panelist that he or she can view the events presented by the complainant's testimony through the eyes of that child.

Point out that children do not mark time the way adults do. Talk to the panel about a "child's calendar" and how children mark dates and times. Use examples such as Christmas, summer vacation, or the child's birthday to remind the panel about how children mark time. Show how a typical child's ability to tell when something happened is usually linked to some other important event in his life (e.g., the same week he had a birthday and got a bicycle, which house or apartment he lived in, or where he went to school at the time). Explain that if the State had to prove a date certain for child sexual abuse cases, there would rarely be a conviction. Explain that the law provides that as long as the jury finds that the case was brought before the statute of limitations has expired, then it does not matter what date is pled.

Despite the fact that there is no longer a statute of limitations in child sexual abuse cases, explain to the panel that the statute of limitations for indecency, sexual assault of a child, and aggravated sexual assault of a child used to be 10 years. Then the legislature expanded the period to the complainant's 28th birthday. If you ask the panel why the legislature would provide even more time for sexual assault cases, someone will eventually say that children sometimes do not tell about the abuse for a long time. Explore why children do not tell. The panel can provide answers: Children are afraid; someone threatened them; they are embarrassed or ashamed; the abuser is someone well-known in the community; they feel no one will believe them; etc. Ask the panel if a delay in outcry means the abuse did not happen. Ask if anyone thinks that the law of "on or about" is unfair and should not be applied to child sexual abuse cases. And finally, remind the panel that the Texas Legislature felt strongly enough about this issue and the importance of prosecuting child molesters to protect our children, that the Legislature completely did away with the statute of limitations.

Before you delve into the law on one-witness testimony, consider stepping away from sexual abuse for a while and talk about a different type of case. Take your pick—an aggravated robbery case works well. Present the facts to the panelists and make them be the victim. "You are walking to your car at night and are totally surprised by a man with a knife who demands your wallet or purse." Explain how police take a statement to preserve the victim's memory, but how the police officer cannot testify about the offense because only the victim and defendant were present. Explain how an arrest is made after identification, how no "hard evidence" was recovered in your hypothetical case (the wallet or purse is gone), and how the panelist (victim) will have to come to court and testify. Explain the law of one-witness testimony at this point: "If the jury believes your testimony and your testimony establishes each element of the aggravated robbery case beyond a reasonable doubt, that is all it takes for a guilty verdict."

Now show how a child sexual abuse case tracks the other type of case you just described. How a statement is taken from the child at the child advocacy center, how a medical examination is done but evidence is rare, and how every-

thing may come down to the testimony of the victim. Go to the bottom line about what the evidence may be. Let the panel know that at the end of the trial, the State's only evidence may be the word of the child victim. You want a member of the panel to ask: "So you're saying that all you've got is the word of a child, just he-said/she-said?" Murmurs of agreement may run through the panel, as if the question is in everyone's mind. Some people will look uneasy. Others may scowl and shake their heads. Stay calm. Do not panic. This is exactly what you want.

The prospective jurors are now face-to-face with the same issue that 12 of them will confront in the jury room: Can they convict on the basis of the victim's testimony alone? It is time to commit the jurors favorable to the State to following the law and get the remainder disqualified. Ask each panelist individually: Can you find the defendant guilty on the word of one witness—and that one witness could be a child—if you believe the witness's testimony beyond a reasonable doubt as to each and every element of the crime? This is your single most important challenge question during jury selection in a child sexual abuse case. Period. So take your time and get a solid answer from each person on the panel. If someone seems to struggle with giving you a straight answer, you must either nail them down on a strike for cause or later use a peremptory strike. Jurors who cannot commit to following the law are disqualified, and you should be able to successfully challenge them for cause.

While committing the panel to following the law on evidentiary issues, you should also prepare them for the child victim and her testimony. There is almost always something about the victim for which the jury needs to be prepared. The complainant may be exceptionally shy or reluctant to testify. She may exhibit incongruous behavior—actions, words, or emotions that superficially seem inconsistent with what one would expect from someone who has been victimized—or she may misbehave or have some prior bad acts. The issue could be delayed outcry or recantation. Or you might be concerned about something the complainant could do during her testimony: freezing up, recanting on the stand, feigning forgetfulness, or even acting inappropriately. Examine and try to predict the potential weaknesses in the case.

One way to handle these problems is by calling upon the jury panel. Find out if any of them have known a victim of sexual abuse. Ask what a child victim looks like. Can you just tell? Use any parents or teachers on the panel to encourage and enhance the discussion here. What are some of the emotions the victim felt about the abuse? Bring out the fear, shame, guilt, and anger.

Even as adults, do survivors of child abuse enjoy remembering and discussing it? Have the responding jurors think back to the circumstances of the conversation. The survivor probably spoke in private with a friend or relative many years after the fact. If an adult victim in a safe environment responds to the subject negatively, imagine how it is for a child forced to tell a courtroom full of strangers the most intimate details of sexual abuse that happened only a few months or years before and worse yet, in front of the very person who violated her.

Find out who is going to expect a child witness to testify and behave like an adult witness on the stand, and find out who realizes that testifying is not going to be easy.

Find out who is going to expect a child witness to testify and behave like an adult witness on the stand, and find out who realizes that testifying is not going to be easy.

Explain that there is no profile for a sexually abused child and that the list of possible behaviors can be contradictory. For example, one victim's school grades might drop after the sexual abuse, while another child victim's grades might actually improve because that particular child is exercising control over one of the only areas in her life that she can: schoolwork. Emphasize common sense: Children are just like adults—they have individual ways of dealing with and handling stress. Talk about a few ways people (children and adults) deal with difficult and emotional situations: Some people keep it in and bottle up their stress and rarely, if ever, talk about it. Others may talk about things right away. What if a child cries on the stand (or not)? What if a child displays "an attitude" on the stand? What if a child shows a flat affect and appears to not even care? What if the child made exceptional grades after the abuse? Lousy grades? Does it matter? Make sure the panelists can keep an open mind, and consider the child's testimony as the truth, regardless of grades, attitude, or emotion on the stand. Commit the panelists to following the law regardless of any specific problems the child witness might have so long as you prove the case beyond a reasonable doubt. ❇

Editor's note: This book, Investigating and Prosecuting Child Sexual Abuse*, is available for purchase on TDCAA's website at www.tdcaa.com/product/child-sexual-abuse-2025.*

Sample voir dire in a child sexual abuse case

Introduction

1) "Who here is against child molesters? It is OK if you care about child molesters. I'm sure everyone here cares. But there would be no justice for victims of child abuse if we waited until we found 12 people who don't care about child molesters. Child abuse is more common than we care to believe. There may be some in this room who have been affected by child abuse. This case is not about your abuser. To you, I ask you to hold me to my burden. Do you promise to hold me to my burden?" (You can add that you know your burden and you are prepared to meet your burden.)

2) "What do child molesters look like?" Discuss that child molesters come from all walks of life, including trusted people such as clergy, coaches, doctors, and politicians. Consider having the panel point out some famous people who have been convicted.

3) "Do you think a child molester is more often the stranger on the corner in a white van or is it more often a close friend or relative of the child?"

a) "What about that relationship makes it easier for that perpetrator to abuse the child?"

b) "Do you think the abuser chooses his victim? Are certain children more vulnerable? What might they look for?" (For example, those with special needs or behavioral issues.)

The law

Prosecutors need jurors to commit to "yes" or "no" answers. Examples of why this is important: There are some questions you wouldn't accept noncommittal answers to: "Do you love me, honey?" "Will you be faithful to me when you go to Las Vegas?" You wouldn't accept "I think so" or "I'll try."

On or about

1) "Do victims of child abuse always make immediate outcry?" [No.] "Why not?" [Answers will probably include shame, fear, guilt, threats, loyalty to or protectiveness of perpetrator, etc.]

2) "Does anyone here think they might hold it against a victim if she did not make immediate outcry of the abuse?"

3) "How many people here would be unable to convict, even if I prove my case beyond a reasonable doubt, unless the complainant made immediate outcry?"

4) Discuss a child's calendar.

5) Other examples, such as cold cases.

Commitment Question No. 1: Would anybody here require me to prove an exact date the assault took place?

State's evidence: What it may not be

1) "I can't get into the facts of the case at this point, so I can't tell you whether I have any particular type of evidence. I am asking these questions for a reason, even though many of my questions will be in the form of hypotheticals. Even if my hypotheticals may sound rather silly, I have to be sure you can follow the law."

2) "What kind of evidence do you expect to see in a child sexual abuse case? What kinds of things do you expect me to bring you to prove my case?" [Answers will probably include eyewitnesses, DNA, medical evidence, video of offense, and a confession.]

3) "Let's start with eyewitnesses. How many witnesses are usually around when a sex offender decides to molest a little boy?" [None.] "Of course not! The defendant is the one who gets to pick the time and place to commit the offense. The only witness is probably going to be the victim."

4) "What about DNA? Is DNA always recovered in every sexual abuse case?" [No.] "Why not?" [Answers will probably include that there may not have been any transfer of bodily fluids, offense might be fondling only, offense may not have been reported due to delayed outcry, evidence may not have been preserved or collected, etc.]

5) "How many people feel like you would have to have DNA before you could convict?"

Commitment Question No. 2: How many people here would require me to present DNA evidence before you could find someone guilty of a serious charge like aggravated sexual assault, even if other evidence convinced you beyond a reasonable doubt?

6) "What about medical evidence? Is there always going to be injury or trauma in a sexual abuse case?" [No.] "Why not?" [Answers will probably include that the offense was not necessarily violent, contact might not involve penetration or might be fondling only, injuries can heal if outcry is delayed, etc.] This is good place to go ahead and start discussing delayed outcry and why the State is not likely to have medical evidence.

Further explain that even with immediate outcry, the State often doesn't have evidence. Explain that experts will say, "Normal is normal."

7) "What about a video of the offense or a confession? Anyone think I'm going to have these?" [Probably not.]

8) "What about a police offense report? Do I get to simply introduce the offense report? Why not?" Explain hearsay.

State's evidence might be the word of a child

1) Discuss the one-witness rule. "Why would the law allow you to convict on the word of just one witness?" Give jurors an example and ask the panel if the case should still be prosecuted.

- "Where do these cases most often happen? How many witnesses are there?"
- "Between the perpetrator and the child, who decides where a child is molested?
- "Between the perpetrator and the child, who decides how many witnesses are around when a child is molested?"
- "We've talked about what types of evidence may or not be present in a case such as this and why the only witness to the actual crime may be the child."

Commitment Question No. 3: Bottom line: If my evidence is the word of a child, and you believe that child's testimony proves the case beyond a reasonable doubt, can you follow the law and find the defendant guilty?

2) The child's demeanor

- "Close your eyes. Think back to your first sexual experience. Now let's discuss it with the group. No? Why don't y'all want to do that? Is it too personal? Are you embarrassed? Now imagine a child discussing his or her sexual experience. In a courtroom."
- Discuss expectations of jurors—does the child have to cry? What if s/he giggles, etc.?
- "Who has two children in their family? Do those kids react the same in all situations?"
- "Do sexually abused children always act just one way? Are they always sad and depressed every minute about what has happened to them? Why not?" [Answers will likely include that children are resilient and even extremely traumatic events can be temporarily forgotten and put aside.]
- "How will a child behave on the stand in a trial such as this? Think she will cry?" Discuss with the jury all of the potential people a child has had to tell their story to and that the child may no longer cry when recounting the details.
- "Maybe be angry?" Discuss how kids may hate the abuse but still love the abuser: "It was special time with Paw-Paw."
- "Is it possible a child may laugh or get the giggles?" Discuss nerves, fear of public speaking, and if anyone has ever had inappropriate laughter like at a funeral.
- "How about a child who just doesn't want to talk about it anymore? Anyone have a child who gets home from school, and when you ask what she learned that day says, 'I don't remember' or 'I don't know'? Does that really mean, 'I just don't want to talk'?"

Commitment Question No. 4: Is there anyone here who would be unable to convict unless the victim has always acted "like a victim" even if I prove my case beyond a reasonable doubt?

"Do children lie? Why?"

1) How many people here have ever told a lie? Raise your hand if you have lied. Keep it up if you ever lied about being sexually abused when you actually weren't abused.

2) Why do kids lie? What kinds of things do they lie about? Do they lie to get into trouble or out of trouble? To make their little lives more difficult or to make their lives easier?

3) Anyone know someone who has denied being sexually abused when they really were?

4) What is the biggest single reason children sometimes lie? When and why do they do it? [Answer will likely be to keep from getting in trouble.]

5) Does anyone think lying about sexual abuse is a typical lie for a child? Would lying

about sexual abuse ever be the best lie to keep a kid out of trouble?

6) How many people feel like, if a victim has lied about anything, he must be lying about everything?

7) How many people would be unable to convict if the victim has lied about something, even if I prove my case beyond a reasonable doubt?

Commitment Question No. 5: Is there anybody here who would automatically believe an adult over a child?

Commitment Question No. 6: Is there anybody here who would automatically disbelieve a child?

What to listen for in the testimony:

1) Details about the assault
2) Whom the child told about it
3) When it happened
4) Where it happened
5) What happened
6) How many times it happened
7) Any opportunities for the child to backtrack and get "out of trouble" or make "life easier," versus the child providing a clear and consistent outcry

Why we have no statute of limitations, "on or about" proof, and delayed outcry

Recantation (only if it applies to your case)

1) "What can happen when a child tells someone she is being sexually abused? Can there be negative consequences?"

2) "Do you think the child ever feels pressure to 'take it back'?"

3) "Can anyone think of why a child victim would recant an allegation of child abuse?" [Answers will likely include family pressure, threats, guilt, regret over the consequences, and—possibly—the allegation was false.]

4) "How do you think it affects a child victim when her own family is not supportive of her?"

5) "Does anyone think a child can be pressured or persuaded to recant an allegation? If they do, does that necessarily mean that the abuse did not happen?" [No.] "Would you automatically believe the abuse had not happened if a child came to court and said it didn't happen?"

6) "Can you think of reasons why a child might not want his abuser to be convicted?"

7) "Would you want to hear evidence about what happened when the victim made her report of abuse?"

Commitment Question No. 7: How many people here would be unable to convict, even if I prove my case beyond a reasonable doubt, if the child victim has recanted the allegation or recants the allegation in court?

Consent (only if applies to your case)

"Sexual contact with a child is a crime even if the child agrees to have sex. How do you feel about that?"

- "Why do you think the law forbids sexual activity under a certain age?"
- "Could you follow that law even if you believed the child agreed to the sexual activity?"

Commitment Question No. 8: How many people here would be unable to convict, even if I prove my case beyond a reasonable doubt, if the child agreed to the sexual activity?

Fifth Amendment and "reverse" Fifth Amendment

1) Discuss other rights of the defendant: the presumption of innocence, the right to discovery of all the evidence, the defense's review and inspection of all the evidence, notice of State's witnesses at trial, the right to confront the witnesses, the right to present a case, and the right to subpoena witnesses.

2) "Why would a defendant not testify?" [Answers will likely include that the defense lawyer told them not to, fear of public speaking, they don't have to, etc.]

3) "It's OK to want the defendant to testify; you just can't hold it against him if he exercises his right not to do so. And if the defendant testifies, he gets no extra points."

4) "His testimony is measured by you, just like any other witness."

Personal experience with Child Protective Services (CPS)

"Anybody have a personal experience with CPS? Is there anyone who has been accused or has a family member or close friend accused of a crime like this or any other serious crime?" For

those who raise their hands, ask: "Were they treated fairly? Did the investigation have the right outcome? Is there anything about that experience they will hold against the State in this case?"If appropriate, establish bias for challenge for cause.

Lesser included offenses

1) Discussion of how the law requires admission in charge if any evidence is raised.

2) Explain that it's not multiple choice.

3) Explain that lesser crime means lesser time.

Punishment

1) "Texas law provides a very broad range of punishment for sexual offenses: up to 20 years for indecency with a child and up to life in prison for aggravated sexual assault. Some people consider that too broad. Is there anyone who would be unable to consider life outside of a murder case? How many people feel that, as a matter of personal conviction, you could not consider the maximum sentence of life in prison in a case where no one is dead?"

Commitment Question No. 9: How many people here would be unable to consider a life sentence in a case of aggravated sexual assault?

2) "What about indecency with a child? Some people feel the same way there, that 20 years for fondling is way too much. It could be as simple as a touching of the complainant's breast through her clothing."

3) "Is there anyone here who feels like the 20-year range should be reserved for defendants who actually commit some kind of sexual assault?"

Commitment Question No. 10: How many people know right now that you could never consider the maximum sentence of 20 years in prison for a defendant convicted of indecency with a child by contact?

4) Give a hypothetical about probation and a minimum sentence and shore up strong State's jurors: "Say the defendant has just turned 17 and the complainant is almost 14. Their parents are neighbors, and the teenagers are childhood friends who have grown up together. They have dated for a long time and have consensual sex. The 17-year-old is prosecuted and found guilty by a jury. It is the first time he has ever been in trouble for anything. At trial, he expresses remorse, and both his family and the complainant's family beg for mercy from the jury. Do you see how some sets of circumstances could warrant more lenient punishment? Can you agree that there is conceivably a case somewhere out there in which probation would be the appropriate result?

5) "The bottom line is that the law says that if the defendant is eligible, the range of punishment is from five years' probation on the low end to life in prison on the high end. Can everyone promise that they can follow the law and consider the full range of punishment?" Make sure they are all open to full range on all potential offenses.

Judgment

"Is there anybody who, regardless of the reason why, simply cannot pass judgment on another human being? For this type of case? For any case?"

Prior criminal jury service

"Has anyone served on a criminal jury before? Did you get to do punishment? What punishment was handed down?"

Scaled question regarding punishment and rehabilitation

"My last question is a philosophical question with no right or wrong answer. I just want your honest opinion. I'm going to go row by row and ask each of you individually. Which goal do you think should be more important in our criminal justice system when it comes to sexual abuse cases involving child victims: punishment or rehabilitation? By punishment I mean the idea of deterring or preventing crime through a penalty or retribution. By rehabilitation I mean deterring or preventing crime by focusing on the offender and trying to change him. These are both important and worthy goals, and they both deserve our time and energy. But if you have to choose, which one is more important: punishment or rehabilitation?"

"Is there anything about you that we have not discussed that you think I should know?" ❇

Back to the basics of the justice system for victims and witnesses

"Why do I have to testify? I already gave a written statement to the police—can't you just use that?"

By Jaqlynn Bless (left) & Autumn Cambra (right)
Victim Assistance Coordinators n Henderson County

It probably wasn't long into your career as a victim assistance coordinator (VAC) or prosecutor before you heard these words from a victim or witness, and you've probably heard them dozens of times since. It is understandable that laypeople don't understand the Rules of Evidence or the Confrontation Clause, but lately, the VACs in our office have noticed that the average person's understanding of the criminal justice system has decreased significantly. So much so that we have agreed that the best approach when dealing with victims and witnesses is to assume they know absolutely nothing about how the system works. To borrow verbiage from Joe Miller, as played by Denzel Washington in the legal drama *Philadelphia*, we have started to explain it to them like they are 5-year-olds.

That said, we still treat all our victims with respect and dignity. They're crime victims, after all. They didn't deserve what happened to them. We try not to insult their intelligence, but we also assume their knowledge of the criminal justice system is, at best, limited.

Maybe some of you have always taken this approach, but we always assumed (perhaps incorrectly) that the average adult had at least a rudimentary understanding of how all this works.

But some interactions we've had recently have made us reevaluate our approach. For example, some victims don't even know who we are. They don't understand what a prosecutor's office does. For one of our prosecutors, his epiphany came when he asked a victim if she knew what a plea bargain is, and she said no. That was an eye-opener.

When the possibility of probation comes up, a number of victims have been adamantly opposed to it. They see probation as a slap on the wrist. But when it's explained to them what the defendant must do (and cannot do) while on probation—and that if the defendant violates the conditions of his probation during this time, he goes to prison—their attitude changes. Were we taking it for granted that the average citizen knows what probation is and what the consequences of violating probation are? Maybe so.

Jury unanimity is another one. People seem surprised when we explain that prosecutors have to convince all 12 (or six) jurors that the defendant is guilty to get a conviction. We thought jury unanimity was commonly understood by the public. We now go over that as a part of our introductory conversations with victims.

Felony versus misdemeanor is another topic we probably took for granted. Again, it's unreasonable to expect regular people to know punishment ranges or the difference between a second-degree felony and a Class B misdemeanor, but we thought most people would at least know that a felony is a more serious crime than a misdemeanor. Taken for granted, no more. We, along with our prosecutors, tell them what the punishment ranges are for the crime or crimes they're charged with, possible lesser-included offenses, and what possible outcomes we're looking at for this crime (jail, probation, prison, etc.) This conversation also includes what is required on probation and the consequences of violating probation, as discussed above.

We are also seeing that some victims think *we* (meaning, our prosecutors) decide what the defendant's sentence will be. They think we are their attorneys. There doesn't seem to be an understanding that the defendant and judge must

agree to a plea bargain, or that if there is a trial, the judge or jury assess punishment. It's as if they think the prosecutor determines the punishment and sentences the defendant. We explain to them that we are their advocates, but at the end of the day, we represent the State, not them.

We've begun to explain how a plea bargain works. We make an offer that we feel is fair and just. We cannot force the defendant to accept a plea deal—he has to agree to it. He can either accept it, reject it, or make a counter offer, which we will consider. It takes two to tango (or, well, technically three, as the judge has to approve any plea deal). But we cannot just unilaterally impose a sentence on the defendant.

We mentioned the necessity of victims to testify earlier, and lately we've noticed that once we get them to understand that they have to testify and we can't just use their written or recorded statements, they are shocked and appalled that the defense attorney gets to ask them questions. We don't make the rules, we tell them.

We tell them that if they have any dirty laundry, we need to know about it, because the defendant is telling his lawyer about it too. And that dirty laundry will likely come out on cross examination. It is likely to be the most stressful and awful part of the entire experience, second to actually being victimized. Once this conversation takes place, that plea offer we just talked about—the one they didn't approve of—suddenly becomes much more palatable.

Similar to the "you have to testify" conversation is this one: "What do you mean he's going to be in there? I have to see him?!" A number of recent victims don't realize that their abuser (the defendant) will indeed be in the courtroom. Again, perhaps we've taken for granted that the right to be present at your own criminal trial, along with the ability to cross-examine witnesses, are basic concepts in criminal law. We no longer assume that the victim or witness knows these things. Yes, he will be there. Yes, he will be able to see you. Yes, you will likely have to look at him.

A common theme we've noticed in family violence cases and adult sexual assault cases is that cell phones, text messages, and social media are fair game. It blows victims' minds when it's explained to them that the defense attorney can confront them with what they've posted on social media or texted to their abuser (we're sure family law attorneys probably have this same problem in divorce cases).

If there was a "phone dump" on the defendant's phone, we tell victims that we have an obligation and duty to turn that data over to the defense attorney—which means the defense attorney will have access to text messages, photos, and anything else the victim sent the defendant. It is imperative that victims know the defense attorney has their phone records and will use the contents of those records against them.

What changed?

What explains this (semi-)recent decline in the average person's knowledge of how the justice system works? We have some theories that we've batted around in the office. A decline in civic education in public schools? Probably. Another reason might be a shift in entertainment options. We've been dealing with the consequences of popular TV shows and movies for a while now in this line of work—we call it the "'CSI' effect" when jurors expect a certain type or amount of scientific evidence in trial. But when was the last time there was a good legal thriller (like the aforementioned *Philadelphia*) in theaters? Or a movie adapted from any one of John Grisham's novels? It seems every movie today is based on a Disney character or superhero, or it's a biopic about a musician.

Same thing with TV. Reality shows seem to be the entertainment option du jour. The legal procedural has been replaced by crime-solving shows such as the aforementioned "CSI." While "Matlock" and "Law and Order" had their accuracy issues, at least they gave the viewer a basic understanding of what a judge, prosecutor, and defense attorney do. Maybe some of you have seen that there has been a reboot of "Matlock" starring Kathy Bates—but the new "Matlock" is about civil practice!

Whatever the reason or reasons, the decline in knowledge and understanding of how our criminal justice system works is noticeable recently. We have taken to explaining everything as if victims and witnesses have zero understanding of the system.

Continued in the orange box on page 51

We tell victims that if they have any dirty laundry, we need to know about it, because the defendant is telling his lawyer about it too. And that dirty laundry will likely come out on cross examination.

Preparing a witness for deposition

You lead your client into the conference room, take a seat across from the court reporter, and present him for deposition in a civil case. After a few formalities, opposing counsel begins: "Can you tell me your name?"

By Daniel Plake
Assistant County Attorney in Montgomery County

The witness responds, "Yes."

Counsel slowly raises his head from his outline and says, "So that's how it's going to be?" You think to yourself, "At least he is listening to the question"—which is exactly what you prepared the witness to do.

Depositions in civil litigation

I have practiced civil law since 2008, and I have represented Montgomery County and its related officers, entities, and employees as an assistant county attorney since 2011. Depositions are an inevitable and integral part of civil practice, and I have taken or attended dozens over the years. As an attorney for a government entity and in some instances its employees, my clients are often deposed in civil cases in which they are just witnesses.

For those not familiar with depositions, the civil world frowns on ambush trials. To that end, the parties have access to depose witnesses within the limits prescribed by the federal or Texas Rules of Civil Procedure. Almost every civil case requires depositions. As an attorney for a government entity, you may be taking a deposition, defending the deposition, or presenting a disinterested witness. Each role requires us to prepare the witness in a substantively different way, but there is commonality in preparing a witness for the procedure itself and how to analyze and answer questions. This commonality is the subject of this article.

It is important to consider some preliminary matters before you ever sit down with a witness.

Why is my witness testifying?

The answer to this question will influence how you prepare the witness. Consider these basic classifications:

1) The government entity is a party. (Note: The witness and the government entity may both be parties.) This can be a minefield. Things you should consider in such a situation:

a) Are there any conflicts of interest?

b) Can the witness and entity both be a party (e.g., Texas Tort Claims Act vs. §1983)?

c) Has the entity produced records?

d) Does the entity have records?

e) Do those records cast the witness in a bad light?

f) Is the witness disgruntled about an employment issue?

g) Was the witness disciplined by the agency due to acts related to the case?

2) The witness is a party. This usually means the witness has been sued. In addition to the above "minefield" considerations, you may also have to contend with questions such as, "Should I transfer all my assets to my wife's name?"

3) The witness and/or government entity may become a party. Occasionally, a witness can talk himself or the government entity into a lawsuit. You should analyze the case (read the pleadings, talk to the lawyers, and talk to your department head or elected official) to see if there is an angle where the government entity or the witness might be dragged into this suit. If so, prepare the witness for that possibility, and prepare yourself to make any necessary objections.

4) The witness is just a witness. This is very common in family law, fire and arson, and auto collision cases. Consider:

a) whether you, the prosecutor, even need to be there,

b) objections you may make (probably not many), and

c) instructions not to answer.

5) Is your witness potentially an expert? Face it: Almost every party to a lawsuit wants law enforcement on its side. These are not normal paid experts; they are benevolent, honorable, honest, and well-trained; they are beholden only to the truth; and they have no financial interest in the outcome of the case. They can make great expert witnesses, but they need to be ready for the fight. If a party is attempting to have your witness admitted as an expert, the questions will go beyond the ordinary "who, what, when, and where" and instead delve deep into their training, experience, materials on which they relied, assumptions, conclusions, and the basis for those conclusions. One side will walk them through the process and question them about the scientific method and each of its considerations, and the other will get them to admit everything they did wrong. It can be hard on a witness and will feel like a tug-of-war. Many law enforcement witnesses are used to cross examination in criminal cases, but some take the negative allegations personally.

Other considerations before a deposition include:

1) Do you need additional security at the deposition? There are many reasons additional security may be a good idea; probably the most common is if the State's witnesses arrested one of the parties. In my office, we have investigators who can sit in if needed; we could also call any of our law enforcement clients for assistance.

2) Is the time and location convenient for you and the witness? You can offer to host the deposition; most attorneys will agree to this if you help coordinate the witness's appearance.

Once you have considered the preliminary issues and made any necessary adjustment to the substantive portion of the preparation, it is time to prepare your witness.

What to expect procedurally

I spend the first portion of my prep session with procedural expectations. The purpose is to make sure everyone knows where to be and when to be there and to eliminate any procedural anxiety the witness may have. It is quick: "You are expected to be at 123 Main, Suite 100, on March 4 at 10:00 a.m. Do you have any conflicts or potential conflicts I need to address?"

Conclusion

When we took this job, we did it to help people through dark and painful periods, if not the most dark and painful periods of their lives. It's rewarding and noble work. Helping with crime victims' compensation, victim impact statements, and preparing for court is the most fulfilling. We knew that part of the job is explaining the process to victims—we just didn't know how much explaining there would have to be. Maybe we should call ourselves victims assistants and civics teachers.

The Texas Department of Criminal Justice offers some brochures for victims, but those are mostly about crime victims' compensation and the right to give a Victim Impact Statement. There doesn't seem to be much out there to educate victims about the process they are about to embark on. In writing this article, we have decided that maybe coming up with something along those lines would be a good idea going forward. If we do create something, we'll share it with TDCAA. ❇

Next, cover the appropriate attire. It may vary depending on the witness's relation to the case. If the witness is a law enforcement officer, check with his agency to see if it has a policy on acceptable dress when testifying in civil cases. In my opinion, it is acceptable but not required for an officer to wear his uniform when testifying if his deposition is related to his work as an officer. You should also consider practical issues, including whether the officer is on-duty the day of his deposition and will appear immediately after, immediately before, or during his shift. If so, he will almost certainly be in uniform unless you can provide time and a location to change. For ladies, I always request that they wear something that covers their shoulders because I had a domestic violence victim removed from court before her protective order hearing for not having her shoulders covered. Dress may require additional thought if the deposition is by video or by Zoom.

If it is a Zoom deposition, consider prepping him by Zoom or at least scheduling a quick Zoom meeting with him to confirm he knows how to appear and how to work the sound and video.

Tell the witness whether the deposition will be taken by stenograph and/or video. If it is a Zoom deposition, consider prepping him by Zoom or at least scheduling a quick Zoom meeting with him to confirm he knows how to appear and how to work the sound and video. Also, go over sharing documents and videos with sound, especially if he is to produce documents during the video call.

Cover how the deposition will start. Do your best to estimate who will be there (you might gain this information from talking to the attorneys). I say something like, "You will be at the head of a table, a court reporter will be directly to one side, a videographer will be pointing a camera at you, I will be next to you, the summoning attorney will probably be next to the court reporter, and she gets to go first." You may want to know if a guy your witness arrested, shot, tased, or removed from his home for family violence is going to be in the same room; make any arrangements you or your witness think are prudent.

Especially if this is the witness's first deposition, I make sure he is ready for the following questions:

- Are you on any medications that might prevent you from telling the truth today?
- Do you want to read and sign? The court reporter will ask if the witness would like to read the deposition and return a signed errata page with any changes. If not, the deposition will be transcribed and produced. If the witness does wish to read and sign, he will have 20 days to make any corrections once he receives the transcript. This is not a chance to change testimony—doing so will certainly subject the witness to a second deposition. Rather, it is an opportunity to correct errors. I usually insist on reading and signing if the witness or government entity is a party. If the witness is a disinterested one, I let the witness decide. It is a good way to get a free copy of the transcript (though it is not the final transcript), so if a witness would like a copy, have him read and sign. Because there is no penalty for not returning the signed errata sheet, there is really no downside in electing to read and sign—other than it delays release of the transcript by about 20 days.
- Did you discuss this case or deposition with anyone?
- How much time did you spend with your lawyer preparing? This is a fair question; however, the content of the discussion is privileged.
- Did you review any documents in preparation for your deposition? For some reasons, witnesses like to say "no" to this question, even if they did review documents. Explaining this upfront has helped reduce embarrassing corrections.
- Discuss objections and instructions not to answer. I tell the witness, "A good practice is to pause briefly after each question to allow attorneys to get their objections on the record without talking over each other. As you will see when we cover rules of testifying [below], this brief pause will benefit you as well. If someone objects, you still have to answer the question. The only time you do not have to answer is if I instruct you not to answer. The only time I am likely to instruct you not to answer is if you are asked personal questions."

Discuss breaks. The general rule is that the witness can take a break anytime he wants, so long as there is not a pending question. The best approach is for the witness to advise the attorney that he will need a break soon, and let the attorney pick a good stopping point. If the attorney is unwilling to allow breaks (which happens occasionally), then I will call a break immediately after an answer. This is rarely a problem.

Discuss the risks and benefits of taking documents and notes to the deposition. If the witness takes documents with him, then the other attorney can review those documents. Considering this, I warn that witness not to make any derogatory notes. If the witness does not mind and feels better having his own copy of his report to rely on, I generally allow it. I review the document be-

fore the witness takes it into the deposition to make sure there are no issues.

Discuss the types of depositions you have seen. In my experience, there are two types: investigatory and soundbite. In an investigatory deposition, the opposing lawyer will want to know what a witness knows and believes and how he knows it or why he believes it. In the soundbite deposition, she is going to ask horrible questions that a witness probably will not understand. I tell the witness not to answer or agree just because the lawyer is asking. Do not try to make the lawyer happy by agreeing with her.

I also explain to the witness that I cannot assist in answering questions.

How to answer questions

Witnesses who are just witnesses, as opposed to experts, are always surprised that I spend more time covering how to think about questions than I do on the substantive preparation. I start by telling my witness how important accuracy is in his answers. I remind him that lawyers ask terrible questions, so if he does not understand something, it is not because he is missing something—it is because the question is terrible. Do not be pressured into answering a bad question.

Then I cover what I call "Daniel's Five Rules of Answering Questions."

Rule 1. I hope this is the easiest rule: Do not lie! I do not care how senseless a lawyer is, she will know if a witness is lying. I tell my witnesses, "If you lie, I cannot help you, but if there is something you want to avoid for whatever reason, we can talk about that now." If a witness intends to lie, we must advise him of our obligations if he is lying.

If a witness does not want to answer questions about X, we have to consider how to proceed under the specific circumstances. For instance, if a witness wants to avoid certain subject matter, he may use non-responsive answers to try to avoid them. Witnesses may avoid topics for a variety of reasons—for example, he did something wrong and does not want to admit it; he does not want to be called to testify so he will be difficult or evasive; or he has some other agenda.

A good example of an evasive answer to counsel's question is:

"How old are you?"

"I will be 50 in January."

Most people will assume by this answer that the witness is 49, but in reality, he could be 20—so long as his birthday is in January—and the answer is still technically accurate. (For the record, I do not teach witnesses to be evasive, but some figure out how to be, and we need to be prepared to deal with them.)

Rule 2. Answer the question asked and stop talking. To illustrate my point, I pose this test: "Answer this question: Can you tell me your name?" About 90 percent of the time, the witness tells me his name, and I reply, "No, you didn't answer my question. Try again." If the witness answers the question with "yes," I approve and tell him that's the level at which I want him listening to the questions.

Now, that is the general rule, but if opposing counsel really does ask, "Can you tell me your name?" I advise the witness to go ahead and state his name—I don't want him coming across as unreasonably difficult. The attorney may think he's an evasive witness, which could result in unintended and unwanted consequences. But the point is I want my witness to listen to the questions that closely.

I tell the witness not to answer or agree just because the lawyer is asking. Do not try to make the lawyer happy by agreeing with her.

Next I ask myself questions, answer those questions, and at the end, I ask the witness to tell me to what I testified.

"Mr. Plake, do you know if she arrived at the bar before 10 p.m.?"

"Yes."

"Do you know if she was wearing a blue dress?"

"Yes."

"Do you know if she left with a man?"

"Yes."

"Do you know if she left after midnight?"

"Yes."

OK, what did I testify to? Nothing! I testified to absolutely nothing. All I said is that I know the answers to the questions; I did not answer a single question. I make sure the witness understands.

Once we have gone over the general rule to answer the question asked and then stop talking, I address the exception. If counsel is asking questions like the "do you know" questions that I just covered, consider answering them with a phrase indicating what question you are answering. For example, with "Do you know if she arrived before 10 p.m.?" the witness could answer, "She arrived after 10 p.m." Answering in this way violates the general rule, but it will make a cleaner record.

In one of my depositions, the attorney asked my officer, "Were you wearing your standard duty gear on the night that you arrested my

client?" and the officer said yes. Then he asked, "Are you wearing your standard duty gear today?" and the officer again said yes. Two hours later, counsel asked, "What is on your duty belt?" One item the officer mentioned was an ASP baton, which prompted counsel to ask, "Why didn't you use your ASP baton when you arrested my client?" The officer responded, "Because I did not have it." Of course, the lawyer thought he struck gold, catching the officer in an inconsistency: "Earlier you testified that you were wearing your standard duty gear when you arrested my client, and now you are changing your testimony and saying you were not—were you lying then or are you lying now?" The officer responded, "I was not ASP baton-certified at the time, so it was not part of my standard duty gear when I arrested your client." This whole exchange could have been avoided if the officer had answered, "I was carrying X number of items" or if the lawyer asked a better question.

Do not fall for bracketing, I advise witnesses; just keep saying, "I do not know how many leaves are on that tree," no matter how stupid opposing counsel makes you feel for saying it.

If a witness answers in this manner, the answer is technically objectionable as non-responsive, so if the attorney objects, I tell witnesses to simply answer under the general rule. For example, the attorney might ask, "Do you know if she arrived at the bar before 10 p.m.?" and, trying to be clear, a witness might answer, "She arrived about 10:30 p.m." The attorney may respond with, "Objection, non-responsive—thank you officer, but what I asked is do you know if she arrived before 10 p.m.?" The officer should then respond, "Yes." The attorney may follow up with, "How do you know when she arrived?" and he may reply, "I was watching the bar's closed-circuit TV from the office. We were doing a sting trying to catch a bartender selling to minors." As you can see in that instance, it was not as bad a question as it appeared; rather, the attorney was trying to figure how the witness obtained his knowledge.

A final caveat to the second rule: Some lawyers read from scripts or outlines. As a result, the following exchange may happen:

"What is your name?"

"My name is Deputy Smith, and I work for the Montgomery County Sheriff's Office."

"Where do you work?"

"The Montgomery County Sheriff's Office, I've been there for 10 years."

"How long have you worked there?" (etc.)

Rules 3 and 4. Rule 3 is do not guess, which I'll cover simultaneously with Rule 4, which is do not assume.

If asked how many hours a week he works, a witness probably knows his timecard well enough to answer, "I work about 42.5 hours a week." Notice two things: The estimate is on a topic the witness is familiar with, and he qualified it with the word "about." That is OK.

Next I try an exercise that involves a lawyer's trick: bracketing. "Look out my window at that tree," I say. "How many leaves are on that tree?"

The witness will probably say he does not know.

"Are there more than a million?

"I don't know."

"More than 100,000? More than 10,000? More than 1,000? More than 100? More than 10? More than one?" The witness has probably repeatedly said he does not know. If he says "yes" at any point, I follow with, "Come on! You mean to tell me you do not know if there is more than one leaf on that tree?" The witness will likely say there is more than one, to which I reply, "Are there more than two? Are there more than three? More than four?" The lawyer is bracketing—trying to pin the witness down by narrowing the questions.

Do you see the problem? Where does a witness stop? Once he stops and says there are more than X number of leaves on the tree, the attorney has now committed the witness to an answer that he already stated he did not know. Do not fall for bracketing, I advise witnesses; just keep saying, "I do not know how many leaves are on that tree," no matter how stupid opposing counsel makes you feel for saying it.

In addition to making a witness guess and bullying him into answering a question he does not know the answer to, I point out to the witness that in going through this exercise, I also got him to assume some things. First, which tree was I pointing to? I can count 17 trees from my desk. Some of them are pine trees. Are pine needles considered leaves? I don't know because I am not an arborist or a botanist, and neither is my witness. My questions got him to assume to which tree I was pointing; if it was a pine tree, I got him to assume that pine needles are leaves. I got my witness to answer questions to which he didn't know the answer.

Rule 5. Do not answer a question you do not understand. How does this happen? First, you might not understand a word, but you might think you know what it means from the question's context. Do not do that. If you do not understand a word, do not answer the

question—just tell the lawyer you do not understand and she will rephrase.

Second, believe it or not, some people answer questions to make the lawyer asking the questions happy. Do not do that. Only answer what you know.

The final test

Now that we've been over my five rules, we are ready for the final test. I ask my witness, "Have you stopped beating your wife?" There are three ways to answer this question: yes, no, and "I've never beaten my wife." But most people instinctively know there's something wrong with the question.

First off, it assumes that the witness beats his wife. If he caught that assumption, congratulate him. If not, reiterate that we just went over assumptions, and this is another example—he has to think about questions before answering. This question also has another major flaw: Two of the possible answers are ambiguous. What does it mean if you answer yes? It could mean you used to beat your wife, and now you do not. What does it mean if you answer no? (Give the witness time to answer, and really press to think of the two opposite meanings.) It means you either beat your wife and continue to do so, or it means you have never beaten your wife and therefore have never stopped.

I can tell you from asking dozens of witnesses this question that about 80 percent think a "no" answer means you beat your wife, and about 20 percent think it means you do not beat your wife. But that's the problem—"no" is ambiguous: It has two opposite meanings. At the end of the deposition there will be a transcript, black and white, and 80 percent of the people who read it will think you beat your wife if you answered "no" to such a question. A smart witness would have trusted his instincts and said, "I do not beat my wife." If the attorney objects (non-responsive), stick to your guns—it is a flawed question.

In summary

Let's bring this all together. When a witness is asked a question in deposition, he must go through this process. (All of us already do this all the time—we just do not think about it.) A witness has to think:

- Do I understand this question?
- What is the attorney asking me?
- Do I know the answer?
- Is it a truthful answer?
- When I say that answer, what does it mean?

Then, and only then, is a witness ready to answer the question. Do not worry—going through these questions takes only a second, which works out perfectly in a deposition because a witness must already pause briefly to allow everyone to get their objections on the record. I also warn witnesses that they will be tired after a deposition—listening to all the questions takes a lot out of you.

Then I move to the substantive portion of preparing the witness. But that's an article for another time.

My hope is you are now impressed with the client's answer at the beginning of this article! ❇

If you do not understand a word, do not answer the question–just tell the lawyer you do not understand and she will rephrase.

Juvenile certification after age 18

Anna is 13 years old. When she was 11, her cousin, then 16, sexually assaulted her. As often happens, she was terrified and didn't tell anyone.

By Jennifer Hebert
Assistant District Attorney in Brazos County

Now two years later, she finds out that her cousin also abused her sister, so Anna outcries to her mom. Her cousin is now 18 and no longer subject to the "traditional" juvenile justice system. Can we still prosecute him?

Alice was sexually assaulted by a stranger and outcried immediately. She had a SANE (Sexual Assault Nurse Examiner) exam, and DNA was sent to the lab for testing. The results came back a year and a half later and identified her assailant. That suspect is now 18 years old, but he was 16 at the time of the assault. Can we prosecute him? How does our scenario change if Alice was able to identify her assailant when the attack occurred but law enforcement nonetheless waited until they had DNA to present the case?

The juvenile justice system primarily seeks to rehabilitate youthful offenders so they can be productive members of society as adults. But what happens when a child commits an offense and law enforcement either doesn't know about the crime or doesn't solve the case until after the child's 18th birthday? What if law enforcement is aware of the case but doesn't yet believe they can prove it beyond a reasonable doubt? These cases are extremely nuanced and fact-specific, and as juvenile violent crime rates have increased, these types of cases have increased in volume. This article aims to help juvenile prosecutors navigate these difficult cases.

What to watch for

In Texas, jurisdiction over juvenile offenses generally ends once the offender turns 18. However, in certain circumstances, we can continue to prosecute and even initiate prosecution for a juvenile offender after the age of 18 through transfer to adult court (commonly known as certification). However, what seems like a somewhat simple process is far from it. Every case must be evaluated on an individualized basis, and even small changes to factual scenarios can affect a prosecutor's ability to proceed with the case.

While every case is different, there are several common pitfalls to avoid when evaluating juvenile cases for transfer to adult court after the age of 18:

1) do not delay. Timing and due diligence matter;

2) be careful not to confuse the elements for transfer before the age of 18 and after 18; and

3) follow all statutory procedures and requirements.

Timing and diligence matter

Texas Family Code §54.02(j) governs certification proceedings for cases in which the suspect is now 18 or older. Under subsection (j), a court may either certify the case or dismiss it. There are no other options available. To proceed with certification after a child turns 18, the court must find by a preponderance of the evidence that:

- for a reason beyond the control of the State it was *not practicable to proceed* in juvenile court before the person's 18th birthday **(Family Code §54.02(j) subsection 4(A))**, or
- *after due diligence of the State* it was not practicable to proceed in juvenile court before the person's 18th birthday because:
  - the State *did not have probable cause* to proceed in juvenile court and new evidence has been found since the person's 18th birthday;

— the person could not be found; or
— a previous transfer order was reversed by an appellate court or set aside by a district court **(Family Code §54.02(j) subsection 4(B))**.[1]

When evaluating these factors, it is important to understand who the "State" is. Just like under *Brady* and the Michael Morton Act, the State, for purposes of certification, includes both law enforcement and prosecutors.[2] For this reason, if you are prosecuting juvenile cases, you must make sure the law enforcement agencies you work with are paying close attention to the ages of the suspects they are investigating and that they work quickly and efficiently when a suspect is approaching age 18. If they (or you) aren't paying attention, it can quickly impede our ability to prosecute a case.

As we look at the factors for certification, some seem straightforward. But what is "a reason beyond the control of the State?" What does "practicable to proceed" really mean? And what constitutes "due diligence?" None of these terms are defined in the statute, and until recently, no Texas court had clearly defined them either.

To make matters even more complicated, until recently most courts tended to conflate §54.02(j) subsections 4(A) and 4(B) rather than evaluating them as separate and distinct provisions. However, the Texas Supreme Court has now provided much needed guidance with regard to the separate and distinct nature of subsections 4(A) and 4(B) and the "practicable to proceed" standard.[3]

In *In re J.J.T.*, the Court determined that "practicable" means "reasonably capable of being accomplished; feasible in a particular situation."[4] The Court then further explained that a juvenile court can give credence to valid reasons "beyond the control of the State" that made it "infeasible for the State to proceed before the juvenile turned 18."[5]

In the same case, the Court also clarified that subsections 4(A) and 4(B) of Family Code §54.02(j) are separate and distinct avenues for certification. Nevertheless, both sections involve an analysis of the State's actions specifically regarding whether the State was at fault for the delay in bringing the case and proceeding to adjudication prior to the suspect's 18th birthday. Sometimes this analysis is clear. For example, if a sexual assault victim outcries and reports the assault after the suspect's 18th birthday, there is no question that the State could not have proceeded with the case before the suspect turned 18. Nor could the State have had probable cause prior to his 18th birthday.[6]

This analysis gets much more complicated, however, when the State starts an investigation

When evaluating these factors, it is important to understand who the "State" is. Just like under Brady *and the Michael Morton Act, the State, for purposes of certification, includes both law enforcement and prosecutors.*

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[1] In addition, the court must also find that the suspect is 18 years old or older and was at least 10 (for murder and capital murder), 14 (for an aggravated controlled substance felony or first-degree felony), or 15 (all other felonies) at the time of the offense; no adjudication has been made; no adjudication hearing has been conducted; and there is probable cause to believe that the suspect committed the offense. Tex. Fam. Code §54.02(j).

[2] *Moore v. State*, 532 S.W.3d 400, 404 (Tex. Crim. App. 2017).

[3] See *In re J.J.T.*, No. 23-1028, 2025 Tex. LEXIS 208 (Tex. March 28, 2025). As a prosecutor, you may be wondering why the Texas Supreme Court is weighing in on a criminal issue. While juvenile law is a mix of criminal and civil law, juvenile cases are civil for purposes of appeals. However, once a juvenile case is transferred to adult court, the case becomes criminal in nature. As a result, depending on when the case is appealed, a juvenile case may be appealed to the Supreme Court or the Court of Criminal Appeals. In the context of certification, if a certification is appealed prior to the case proceeding in adult criminal court, the appeal goes to the Supreme Court. If, however, the case is appealed after a conviction in the adult criminal court, the case is appealed to the Court of Criminal Appeals.

[4] *Id*. at *12.

[5] *Id*. at *13.

[6] See e.g., *In re R.S.*, No. 11-19-00011-CV, 2019 Tex. App. 5166 (Tex. App.–Eastland June 20, 2019, no pet.); *In re B.W.K.*, 11-20-00238-CV, 2021 Tex.App. 2860 (Tex. App.–Eastland April 15, 2021, pet. denied); *In re D.A.C.*, 04-24-00220-CV, 2024 Tex.App. 8553 (Tex.App.–San Antonio 2024, no pet.).

prior to the suspect's 18th birthday. Before the decision in *In re J.J.T.*, Texas courts almost always focused on when the State acquired probable cause, even if the State sought certification under subsection 4(A)'s "not practicable to proceed" standard. In fact, the appellate court in *In re J.J.T.* (and other Texas appellate courts) had specifically found that a probable cause determination was dispositive of the "practicable to proceed" standard.[7] In other words, once the State had probable cause, it had to proceed or would otherwise be barred from certification.

The Supreme Court, however, made it clear in *In re J.J.T.*, that having probable cause alone does not preclude a certification if there were other factors that made it "not practicable" to proceed prior to the suspect's 18th birthday.[8] In making this determination, the Supreme Court noted that while the prior statutory scheme for certification included only the lack of probable cause as a good cause to proceed after the age of 18, the newer scheme (enacted first in 1995) expanded the good cause standard to also include a "focus on the practicality of proceeding."

The Supreme Court, however, made it clear in In re J.J.T.*, that having probable cause alone does not preclude a certification if there were other factors that made it "not practicable" to proceed prior to the suspect's 18th birthday.*

The Court then further noted that the two standards in §54.02(j) are to be applied under different circumstances:

> Under the two alternatives, the path to transfer diverges based on the development of probable cause. If probable cause develops *after* the respondent's 18th birthday, then under subsection (B)(i), the State must show that it acted with diligence and that it was not practicable to proceed until it discovered new evidence. If probable cause develops *before* the respondent's 18th birthday, however, then subsection (A) governs, and the State must show that a reason beyond the State's control made it not practicable to proceed with prosecuting the minor before the minor turned 18.[9]

The Court further noted, however, that the State is not precluded from asking to proceed under both subsections and may want to do so in case there is a dispute about when the State acquired probable cause.[10]

The Supreme Court also provided much-needed guidance regarding how courts should analyze certification arguments as to the State's actions when it comes to investigative measures. Prior to *In re J.J.T.*, Texas courts (including the appellate court in *In re J.J.T.*) had routinely found that essentially, the State could not wait to complete an investigation before filing the case if the suspect was approaching age 18, no matter how important the rest of the investigation might have been.[11] Such holdings could severely impact investigative strategies and result in poor investigative quality, thereby damaging the State's chances to prove the case beyond a reasonable doubt. The Supreme Court in *In re J.J.T.*, however, found that "the State has considerable discretion in the manner and means of conducting its investigation, and the juvenile court is charged with examining whether the exercise of this discretion devolved into unreasonable delay."[12]

As prosecutors, we ask our local law enforcement agencies to fully investigate every case so that we can determine from the beginning whether we can prove the case beyond a reasonable doubt. We want to ensure that if we are indicting a defendant, we aren't overcharging or filing a case we cannot prove at trial. But in an over-18 juvenile certification case, we did not have this luxury prior to *In re J.J.T.* This decision significantly broadens the State's ability to fully investigate prior to asking a court to certify a case, thereby better protecting the rights of suspects. It also prevents the need to prematurely file a case, arrest a defendant, and then later dismiss the case if further investigation demonstrates that the State would be unable to prove the case beyond a reasonable doubt.

A word of caution

While the Supreme Court has given us a much more workable standard, the holding in *In re*

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[7] *In re J.J.T.*, 698 S.W.3d 320 (Tex.App.–Houston [1st Dist.] 2023, *overruled*); *In re A.M.*, 577 S.W.3d 653 (Tex.App.–Houston [1st Dist.] 2019, pet. denied).

[8] 2025 Tex. LEXIS 208, at *12.

[9] *In re J.J.T.*, 2025 Tex. LEXIS 208, at *11 (emphasis in original).

[10] *Id.*

[11] *In re J.J.T.*, 698 S.W.3d 320 (Tex.App.–Houston [1st Dist.] 2023, overruled); *In re A.M.*, 577 S.W.3d 653 (Tex.App.–Houston [1st Dist.] 2019, pet. denied).

[12] *In re J.J.T.*, 2025 Tex. LEXIS 208, at *14.

J.J.T. is somewhat contrary to comments made by the Texas Court of Criminal Appeals in *Moore v. State*.[13] In that case, the Court specifically noted that investigative preferences do not establish "reasons beyond the State's control" for purposes of Family Code §54.02(j)(4)(A).[14] How these two cases are reconciled is yet to be determined, but in fairness, the facts of *Moore* with regard to when the State proceeded with the case involved more considerable delays by the investigators than those involved in *In re J.T.T.*

We do have a few examples of what can be a reason beyond the control of the State that makes it "not practicable to proceed":

- *In re B.C.B.*:[15] Finding it was not practicable for the State to proceed prior to the suspect's 18th birthday where the victim outcried shortly before the suspect turned 18 and the suspect was arrested the day before his 18th birthday after less than two months of investigation;
- *In re D.L.C.*:[16] Where the suspect was 16 at the time of the offense, 17 when the petition for transfer was filed, and 18 at the time of the transfer hearing, the court found that transfer was appropriate because "for a reason beyond the control of the State, it was not practicable to proceed" because the suspect was arrested on new charges (in another county) prior to his 18th birthday and failed to inform the State of the new charges; and
- *In re B.C.*:[17] Finding that the case was delayed due to reasons beyond the control of the State where the defendant requested a jury trial and was admitted to a mental health hospital, delaying trial. It was then further delayed due to pandemic restrictions that prohibited jury trials for a period of time.

Additionally, while the Family Code does not define "due diligence," Texas courts have interpreted the term in other contexts to require that a party do more than "sit on its rights or duties."[18] In other words, the party must attempt to move ahead or be able to reasonably explain delays.[19] These courts have further found that "due diligence" does not require the State "to do everything perceivable and conceivable to avoid delay."[20]

While we do not have a clear definition of due diligence, we do have examples of certain actions and inactions of the State that lack due diligence. For example, where a suspect was known to live out of state at a particular address and the State failed to serve him with the petition and arrest him prior to his 18th birthday, the court found that the State failed to act with due diligence.[21] Additionally, a court found a lack of due diligence when the suspect was arrested on a directive to apprehend but was erroneously processed as an adult, and neither juvenile probation nor the prosecutor were notified of the arrest. The suspect returned to his residence out of state and the prosecution decided to allow him to finish the school year before proceeding with the case.[22]

While we do not have a clear definition of due diligence, we do have examples of certain actions and inactions of the State that lack due diligence.

The moral of the story is to be vigilant. Communicate with local law enforcement agencies to ensure they understand the complexities of juvenile prosecution. Watch birth dates carefully and make sure you can explain any delays in filing and seeking certification. A failure to do so can mean the premature end of your case.

Before 18 vs. after 18

Another common mistake in certification is applying the incorrect legal standard under §54.02.

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[13] 532 S.W.3d 400, 403-05 (Tex. Crim. App. 2017).

[14] *Id.*; see also *In re A.M.*, 577 S.W.3d at 670 (choosing not to move forward despite having probable cause to proceed in juvenile court based on a preference for more evidence or a reluctance to re-interview juveniles does not qualify as reasons beyond the State's control).

[15] No. 05-16-00207-CV, 2016 Tex. App. LEXIS 6043 (Tex App.–Dallas June 7, 2016 pet. denied).

[16] No. 06-16-00058-VC; 2017 Tex. App. LEXIS 2349 (Tex. App.–Texarkana, March 21, 2017 no pet.) (mem. op.).

[17] No. 02-21-00444-CV, 2022 Tex. App. LEXIS 3031 (Tex. App.–Fort Worth May 5, 2022, no pet. hist.).

[18] *In re N.M.P.*, 969 S.W.2d 95, 100 (Tex.App.–Amarillo 1998, no writ).

[19] *Id.* at 101; *In re B.R.H.*, 426 S.W.3d 163, 168 (Tex. App.–Houston [1st Dist.] 2012, no pet.).

[20] *In re N.M.P.*, 969 S.W.2d 95, 100 (Tex. App.–Amarillo 1998, no pet.).

[21] *Powell v. State*, No. 05-07-01078, 2009 Tex. App. LEXIS 2517 (Tex. App.–Dallas April 1, 2009, pet ref'd) (mem. op.).

[22] *In re A.M.H.*, No. 12-19-00284, 2020 Tex. LEXIS 3714 (Tex. App.–Tyler April 30, 2020, no pet.) (mem. op.).

There are two types of certifications, one for children under the age of 18 (pursuant to 54.02(a)) and another for persons over 18 (pursuant to 54.02(j)).[23] Different requirements apply in each situation. At times, a case may start as an under-18 certification, but due to delays (whether because of court scheduling, defense continuances, or other factors), the case may proceed past the suspect's 18th birthday. In such cases, prosecutors must file an amended transfer petition and make sure the court is evaluating the case based on the §54.02(j) factors, not the 54.02(a) factors. If the court decides based on the wrong factors, the case is ripe for reversal on appeal.[24]

Technical statutory requirements

Certification has technical requirements that must be followed. Missing a step can result in reversal on appeal.

First, if a case is filed prior to a child's 18th birthday and the State cannot conclude it before he turns 18, make sure you file a certification petition before the child's 18th birthday. Failure to do so can—and generally will—result in dismissal of the case.[25]

First, if a case is filed prior to a child's 18th birthday and you cannot conclude it before he turns 18, make sure you file a certification petition before the child's 18th birthday. Failure to do so can–and generally will–result in dismissal of the case.

Once filed, the certification petition must state whether prosecutors are seeking certification under subsection (a) or (j). The summons must also specifically state that the hearing is for the purpose of considering discretionary transfer to criminal court.[26]

The certification petition must also be served on the suspect. Failure to do so renders the court without jurisdiction to consider the case.[27] Note that while service on any other party to the proceeding can be waived, Family Code §53.06 specifically mandates that a juvenile suspect cannot waive service, presumably because a juvenile lacks legal authority to act on his own.

Additionally, after the certification hearing, the court must issue an order including specific findings relating to the transfer.[28] Specifically, if the court decides to waive its jurisdiction it must "state specifically its reasons for waiver and certify its action, including the written order and findings of the court."[29] Further, the order must contain the court's reasons for waiving its jurisdiction, the specific statutory basis for the certification, and the findings of fact that support the decision.[30] Again, failure to do so can result in reversal of the case.[31]

Conclusion

While certification is nuanced, it is not impossible to achieve. As prosecutors, we want a full investigation before proceeding, but this is not always possible with juvenile suspects. If you are facing a situation where a suspect is quickly approaching his 18th birthday, take pause and remember that certification is only the first step. You likely do not need a complete investigation for certification (despite how much we might want one). Rather, certification requires only a probable cause standard. It may not be ideal, but you can continue to investigate after the case is certified. Be cautious, and if needed, proceed to certification to avoid the due diligence and practicable to proceed complication. ❇

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[23] Note the difference in language in the statute: While §54.02(a) refers to waiving jurisdiction over a "child," §54.02(j) refers to waiver of jurisdiction over a "person."

[24] See *In re A.M.*, 577 S.W.3d 653 (Tex.App.–Houston [1st Dist.] 2019, pet. denied); *In re D.L.C.*, No. 06-16-00058-VC; 2017 Tex. App. LEXIS 2349, at *9 (Tex. App.–Texarkana, March 21, 2017, no pet.) (mem. op.).

[25] See *In re J.E.R.-P.*, No. 04-22-00168-CV, 2023 Tex. App. LEXIS 1651, at *6 (Tex. App.–San Antonio Mar. 15, 2023, no pet. hist.)("For a juvenile court to retain exclusive, original jurisdiction, §51.0412 requires the State file the transfer petition prior to the juvenile's 18th birthday, the transfer proceedings remain incomplete prior to the juvenile's 18th birthday, and the juvenile court finds the prosecuting attorney exercised due diligence in attempting to complete the proceedings before the juvenile turned 18").

[26] Tex. Fam. Code §54.02(b) and (k).

[27] *In re D.W.M.*, 562 S.W.2d 851 (Tex. 1978) (citing to Tex. Fam. Code §53.06).

[28] Tex. Fam. Code §54.02(h).

[29] Tex. Fam. Code §54.02(h); *Moon v. State*, 451 S.W.3d 28, 49 (Tex. Crim. App. 2014).

[30] *In re J.R.C.*, 522 S.W.2d 579, 584 (Tex. App.–Texarkana 1975, writ ref'd n.r.e.) ("the reasons motivating the juvenile court's waiver of jurisdiction must expressly appear").

[31] See *In re J.J.T.*, No. 23-1028, 2025 Tex. LEXIS 208 (March 28, 2025).

The basics of selling county real property

Acquiring and owning property[1] is inherent in a county's eminent domain powers and in its duties to perform governmental and public functions.

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

These functions include the provision of necessary public buildings and facilities such as courthouses, jails, libraries, public offices, parks, and roads.

But what happens when a county no longer needs its property? If your county desires to sell a large tract of land or building that, for various reasons, is no longer needed for county purposes, what methods can you, as legal counsel, advise to sell or dispose of this property? This article provides a practical overview of the legal framework governing the sale of county property in Texas. While this article does not provide an exhaustive list of methods by which a county may sell (or otherwise dispose of) its property, it focuses on the applicable statutory provisions, procedural requirements, general exceptions, and common challenges.

Methods available to counties

The sale of county property in Texas is generally[2] governed by Chapters 263 and 272 of the Local Government Code. These chapters establish the general rule that county property should be sold by some type of competitive bid, ensuring transparency and fairness in the process. A key distinction between these two chapters is that Chapter 263 governs county property sales exclusively, whereas Chapter 272 applies to all political subdivisions, which includes counties, cities, and other local governmental entities.

Under Chapter 263, there are four methods a county can use to sell its property. The first method is by public auction.[3] Under the public auction method, the commissioners court, by an order entered into its minutes, must authorize the sale by public auction, establish the minimum bid,[4] and appoint a special commissioner to oversee the sale and conduct the public auction.[5] An appraisal is not required to determine fair market value[6] or establish the minimum bid amount. The county must also publish notice of the sale of the property in a local newspaper for three consecutive weeks beginning at least 21

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[1] For the purposes of this article, the term "property" means "real property," which is defined as "land and whatever is erected or growing upon or affixed to land." See *San Antonio Area Foundation v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000). This is different from "personal property," which is defined as "interests in goods, money, choses in action, evidence of debts, and chattels real." *Id*.

[2] Although Chapter 263 of the Texas Local Government Code specifically applies to the sale (or lease) of county-owned property, the Texas Attorney General determined that when a county sells property by other means authorized by the constitution or statutes, the general competitive bidding provisions of Chapter 263 do not apply. See Tex. Att'y Gen. Op. KP-0391 (2021) at 2.

[3] Tex. Loc. Gov't Code §263.001(a).

[4] Although §263.001 of the Local Government Code does not expressly require that a commissioners court establish a minimum bid amount, it is best to ensure that the court establishes a minimum bid amount to meet the requirements of Art. III, §52(a) of the Texas Constitution, which prohibits a county from making a gratuitous grant of a "thing of value" (e.g., county property) for private purposes. Tex. Const. Art. III, §52(a).

[5] Tex. Loc. Gov't Code §263.001(a).

[6] Fair market value is the amount a willing buyer, who desires but is under no obligation to buy, would pay a willing seller who desires to sell but is under no obligation to sell. Tex. Att'y Gen. Op. GA-0634 at 4 (2008).

days prior to the auction.[7] The sale of the property goes to the highest bidder for no less than the minimum bid established by the commissioners court,[8] and the county will subsequently issue the deed upon receipt of payment.[9] A county may choose public auction when it desires a simpler and quicker process to sell its property because an auction does not require an appraisal. Oftentimes, the entire transaction, from the initial authorization to issuing the deed to the highest bidder, can be completed within 30 days.

The second method is through the submission of sealed bids.[10] Under this method, the commissioners court must obtain an appraisal to determine the fair market value of the property. The fair market value of the property provides a benchmark for establishing an acceptable minimum bid amount and ensures that the county will not be forced to sell its property for less than its determined value,[11] unlike the previously mentioned public auction method.

Once the minimum bid amount is established, the county must publish a notice of its intent to sell the property in a local newspaper at least twice, with the second date of publication occurring at least 15 days prior to the award of the sale.

Once the minimum bid amount is established, the county must publish a notice of its intent to sell the property in a local newspaper at least twice, with the second date of publication occurring at least 15 days prior to the award of the sale.[12] The notice must include a description of the property to be sold,[13] a description of the procedure to submit the sealed bids, and the minimum bid amount.[14] In situations where a county seeks more discretion over the sale of its property to better serve the public interest, §263.007 of the Local Government Code may be the preferred method, as this statute specifically authorizes the commissioners court to reject "any and all bids submitted."[15]

The third method is a sale facilitated by a broker under §263.008 of the Local Government Code. The property must be listed in a multiple-listing service for at least 30 days. The county may pay the broker a fee only if the broker produces a "ready, willing, and able buyer."[16] After the property has been listed for 30 days, the county may sell the property to the "ready, willing, and able buyer" who submits the highest cash offer. This statute specifically excludes the public auction requirements of §263.001.[17] This method may be preferable if the county desires professional assistance in selling its property. Brokers often possess specialized knowledge of the local real estate market, including current property values, potential buyers, and effective marketing strategies. This method also shifts the burden of administrative tasks—such as advertising, showing the property, and managing offers from potential buyers—from the county to the broker.

The fourth method under Chapter 263 is not really a method by which a county can "sell" its property. Rather, the county can "exchange" its property for other property owned by a private individual or entity if the exchange is made for a public purpose.[18] The commissioners court must first authorize the exchange through an order entered into its minutes. The county must also obtain an appraisal of both properties to determine the fair market value of each.[19] The appraisal is considered conclusive for determining each property's fair market value. The total value received by the county in the exchange, including any cash and the value of the exchanged property, must be equal to or greater than the fair market value of the county's property.[20] This method also

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[7] Tex. Loc. Gov't Code §263.001(b).

[8] See Tex. Const. art. III, §52(a) (prohibiting a county from making a gratuitous grant of property).

[9] Tex. Loc. Gov't Code §263.001(c).

[10] *Id*. at §263.007(a).

[11] *Id*. at §263.007(c).

[12] *Id*. at §263.007(b).

[13] For a notice of sale to be valid, counties must strictly comply with the property description requirements, as this will provide "all bidders with an equal opportunity to compete." *Killam Ranch Props, Ltd. v. Webb Cty.*, 376 S.W.3d 146, 155 (Tex. App.–San Antonio 2012, pet. denied). A property description is sufficient if the property can be identified with "reasonable certainty" and described with such particularity that one is able to "locate the specific land being identified." *AIC Mgmt. v. Crews,* 246 S.W.3d 640, 645 (Tex. 2008).

[14] Tex. Loc. Gov't Code §263.007(b).

[15] *Id*. at §263.007(d).

[16] *Id*. at §263.008(d).

[17] *Id*. at §263.008(e).

[18] *Id*. at §263.006(a).

[19] *Id*. at §263.006(c).

[20] *Id*. at §272.001.

requires the county to publish notice of its willingness to "consider offers for an exchange" of the county's property in a local newspaper once a week for three consecutive weeks beginning at least 21 days prior to the exchange.[21] Similar to the sealed bid method, a county may exercise some discretion in the exchange of its property, as this statute also authorizes a commissioners court to "reject any and all offers" of exchange.[22] A county may choose to exchange its property under §263.006 because it can be an effective tool to promote economic development and growth in a county by acquiring land in strategic locations that are better suited for economic development projects. A property exchange can also be used to consolidate smaller, fragmented land parcels to create a larger, more useable space for development.

Chapter 272

Another option available to counties is found in Chapter 272 of the Texas Local Government Code. Specifically, §272.001(a) provides an "alternative, parallel procedure" to the sealed bid method under §263.007 of the same code.[23] It also broadens the scope of property sales to include other political subdivisions, not just counties. "Section 272.001 constitutes the 'default,' minimally sufficient procedure with which all units of state government, including counties, must comply in order to conduct a valid sale."[24] Subject to certain exceptions,[25] §272.001 provides that a political subdivision (including a county) may sell or exchange its property only through a sealed bid process, for no less than fair market value established by an appraisal[26] after publication of notice in a local newspaper.[27] Although §§263.007 and 272.001(a) both appear to empower a county to sell or exchange its property by sealed bid, the plain language of §263.007(a) indicates that the legislature intended "to provide county governments with a mechanism to draft and adopt more specific, extensive requirements relating to the sale of real property, while ensuring that any such rules adopted by a county would contain the minimum requirements for a public sale."[28] In other words, at minimum, a county must adhere to the requirements of §272.001 of the Local Government Code for the valid sale of its property to the general public—unless the county adopts procedures created specifically for counties under §263.007.

Exceptions to the rules

It is a common adage, and in this case true, that for every rule, an exception will eventually present itself. The Local Government Code lists specific exceptions to the competitive bidding and public notice requirements for the sale of county property.[29] These exceptions provide some flexibility for counties under certain circumstances, such as when the property in question is not capable of being developed, the sale is for public right-of-way purposes or as part of a public interest initiative, or the sale involves specific buyers.[30]

Properties that are not capable of being developed may include streets; alleys; or small, irreg-

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[21] *Id*. at §263.006(b).

[22] *Id*. at §263.006(c).

[23] See *id*. at §263.007(f) (stating that "the procedure authorized by [§263.007] is an alternative procedure authorized by §272.001"); see *id*. at §272.001 (establishing the requirements for a valid sale of real property by political subdivisions to the general public through sealed bid or exchange); *Collins v. County of El Paso*, 954 S.W.2d 137, 149 (Tex. App.–El Paso 1997, pet. denied) (holding that the requirements of §272.001(a) forms an "alternative, parallel procedure to the procedure created specifically for counties in §263.007").

[24] *Collins*, 954 S.W.2d at 149.

[25] These exceptions are discussed in the next section of this article.

[26] Although §272.001(a) does not explicitly require that a political subdivision obtain an appraisal to determine fair market value, the El Paso Court of Appeals determined that "an appraisal to determine fair market value constitutes an implicit requirement of §272.001(a)." *Collins*, 954 S.W.2d at 148.

[27] Tex. Loc. Gov't Code §272.001(a).

[28] *Collins*, 954 S.W.2d at 149.

[29] Tex. Loc. Gov't Code §272.001(a).

[30] The exceptions discussed in this section do not include the sale of county property by other means authorized by the constitution or statutes (e.g., the sale of school lands under Tex. Loc. Gov't Code §263.003 or the sale of land to the United States for a public building under Tex. Loc. Gov't Code §263.202). See footnote 3.

ular, or landlocked parcels (that lack access to public roads) that cannot be used independently under current zoning, subdivision, or other development regulations.[31] Counties may sell these properties to abutting property owners without meeting the public notice and competitive bidding requirements, and they can do so for less than fair market value.[32] The rationale behind this exception comes from the practical difficulties in selling these parcels of land at public auction and also the need to consolidate ownership of the parcels with abutting landowners to enhance the land's utilization.

Another exception may apply when a county desires to exchange its property for public right-of-way purposes or sell its property as part of a public interest initiative.[33] A county may exchange property it originally acquired for public right-of-way purposes for other land to be used for public right-of-way purposes.[34] This may occur when a county desires to contract with a local developer (for economic development purposes) and exchange parcels to realign an existing right-of-way to accommodate the safe flow of increased traffic. As part of a public interest initiative, a county can sell its property to contract with an independent foundation to develop the property.[35] These foundations are usually nonprofit organizations with specific missions, such as community development or affordable housing. A county may also sell its property to another entity to develop low- or moderate-income housing.[36] These sales allow the county to utilize the expertise and resources of the foundation or entity to develop the property and achieve the county's public purpose.

Further, an exception to the public notice, competitive bidding, and fair market value requirements applies when a county desires to sell, exchange, or donate its property to an institute of higher education (such as a public junior college, public university, medical or dental unit, or a public state college) to promote a public purpose related to higher education.[37] This exception may be used when a county wants to expand or develop educational facilities to benefit the community.

Another exception to the public notice, competitive bidding, and fair market value requirements applies to sales or conveyances of county property to another political subdivision.[38] Under this exception, the county may either sell for less than fair market value or donate its property to another political subdivision, provided that the sale or donation is made for a public purpose, such as a public park, community center, or public roads or easements. However, if the political subdivision that acquires the land from the county ceases to use the property in carrying out the public purpose, the property reverts back to the county.

An exception to the public notice, competitive bidding, and fair market value requirements applies when a county desires to sell, exchange, or donate its property to an institute of higher education (such as a public junior college, public university, medical or dental unit, or a public state college) to promote a public purpose related to higher education.

How do we decide?

A county has a variety of options to sell its property. But how do we know which statute or process to use, and what, if any, exceptions apply? Determining the precise scope of the statutory requirements for selling county property and the exceptions can be challenging, and the options may seem overwhelming. But the process for determining the proper method to use for selling county property and identifying any exceptions is simplified by asking questions using the investigative skills we learned as children: "who, what, when, where, why, and how?"

Who? Who are the potential buyers? This answer will usually determine whether the property must be competitively bid or if an exception applies. For example, if the potential buyer is an abutting property owner or another governmental entity, then an exception to the competitive bidding, public notice, and fair market value re-

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[31] *Id*. at §272.001(b)(1)–(2).

[32] *Id*.

[33] See *id*. at §272.001(b)(4), (g), and (i).

[34] *Id*. at §272.001(b)(3). Section 263.002 of the Texas Local Government Code also provides an exception to competitive bidding for "abandoned seawall or highway right-of-way property." However, the Texas Attorney General concluded that "a right-of-way that serves the public purposes of transporting persons and property, communication, and travel must be disposed of in accordance with §251.058(b) [of the Texas Transportation Code], and not §263.002" of the Local Government Code or §272.001 of the Texas Local Government Code. Tex. Att'y Gen. Op. GA-0471 (2006) at 9.

[35] *Id*. at §272.001(b)(3)–(4).

[36] *Id*. at §272.001(g).

[37] Tex. Loc. Gov't Code §272.001(j).

[38] *Id*. at §272.001(l).

quirements would apply.[39] If the sale is to be made to the general public, then a county should determine which method to use for the sale of its property.[40]

What? What is the nature of the property we are trying to sell? The answer will determine whether additional legal requirements must be met. For example, if the property is an irregular shaped parcel of land that the county is unable to develop, then an exception under §272.001(b)(1) would apply and the county could sell the property to an abutting landowner.

When? How fast does the county want to complete the sale? Each method for selling county property has different requirements and timeframes by which these requirements can be met. For example, if a county desires to sell a property fairly quickly and none of the exceptions under §272.001 of the Local Government Code apply, then a county may elect to use the public auction method, as this is often the fastest method to sell property.[41]

Where? Where is the property located? The location may determine whether the county requires assistance in marketing the property correctly. For example, if a county desires to sell an old building in a desirable commercial area that is experiencing significant redevelopment, the property's location may add complexities to the sale due to current demands, specialized infrastructure, and the potential for multiple uses. In that scenario, a county may want to use a broker to proactively market the property to targeted groups and significantly increase the property's visibility beyond what a county could achieve with public notices alone. Property location may also determine if any exceptions to competitive bidding requirements apply. For example, if the property abuts a parcel owned by an individual soliciting the county for the purchase of that property, then the exception for sales to abutting property owners may apply, depending on the circumstances.

Why? Why does the county want to sell the property? Any sale or disposition of county property must always serve a public purpose.[42] If the county cannot identify a clear public purpose, the property cannot be sold no matter the other circumstances.

How? How does the county want to proceed with selling this property? The answer to this question will be based on the answers to the questions above. Once we have a clear idea of who, what, when, where, and why, we should be able to determine how the county may proceed with selling the property and whether any exceptions apply. By systematically addressing all of these questions, county practitioners can effectively pinpoint the relevant statutes and identify any applicable exceptions.

Common challenges

Many Texas counties are experiencing unprecedented growth, driven by population shifts and economic development. This growth creates both opportunities and challenges for counties in managing and developing their property. The increased demand for development can lead to our client (i.e., the county) desiring the sale or exchange of county property to occur at a faster pace than the law allows. However, ensuring strict compliance and conformity with the statutory requirements for the sale of county property is crucial to ensuring a valid sale or conveyance. Any sale or conveyance that does not comply with the requirements of the statute may be void or invalid.[43]

Strict compliance with the statutes for the sale of county property is also vital to preserving the public interest, fairness, and transparency of the sale. Every transaction involving county assets is subject to public scrutiny, and county practitioners can face the challenge of navigating differing public and political opinions with respect to if and how a county-owned property should be sold. The public's right to be informed of and participate in the disposition of public assets necessitates careful adherence to legal notice requirements, competitive bidding processes outlined in the statutes, and clear documentation of all proceedings.[44] Any impropriety in the process can lead to legal challenges.

Strict compliance with the statutes for the sale of county property is also vital to preserving the public interest, fairness, and transparency of the sale. Every transaction involving county assets is subject to public scrutiny, and county practitioners can face the challenge of navigating differing public and political opinions with respect to if and how a county-owned property should be sold.

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[39] *Id*. at §272.001(b).

[40] *Id*. at §§263.001, .006–.008; 272.001.

[41] *Id*. at §263.001.

[42] Tex. Const. Art. III, §52(a).

[43] See *Collins*, 954 S.W.2d 146 (holding that "noncompliance with the bidding statutes is statutorily void").

[44] This includes obtaining the authorizations of commissioners court outlined in this article.

Continued in the orange box on page 67

Learn more about your retirement plan with TCDRS

Planning for retirement may feel like a distant undertaking when you're just beginning your career in a prosecutor's office or when you're in the throes of daily life.

By Laura Mellett
Director of Communications, Texas County & District Retirement System (TCDRS) in Austin

However, because many of you work for an employer that participates in the Texas County & District Retirement System (TCDRS), starting early can mean a lifetime of financial security.

TCDRS's well-designed and responsibly funded retirement system provides a reliable stream of income retirees can count on for life.

What is TCDRS?

Since 1967, TCDRS has partnered with nearly 860 participating county and district employers to provide retirement, disability, and survivor benefits to nearly 380,000 hardworking Texans. TCDRS members provide valuable services that make our communities better and safer places to live. They are nurses, mechanics, road crew workers, sheriffs, attorneys, office workers, jailers, judges—and most prosecutor office personnel. (Elected prosecutors with felony responsibility do not fall under TCDRS, but everyone else who works in a prosecutor's office does.) You can find our members in our ports, parks, urban areas, and rural towns.

TCDRS is a savings-based or cash-balance plan, not a traditional defined benefit plan. Employers and employees save for benefits over the course of an employee's career. These funds are then pooled and invested. Our diversified portfolio helps us meet our investment goals over the long term, with investment earnings funding an estimated 74 cents of every benefit dollar TCDRS pays.

At retirement, TCDRS benefits are calculated based on the employee's final savings balance and employer matching. This feature makes costs more predictable for participating employers and ensures funds are there when members decide to retire.

How does the plan work?

Each participating employer has its own retirement plan, and each employer decides the level of benefit it provides. That said, there are fundamentals that hold true for every TCDRS plan. TCDRS incorporates five key plan features: automatic savings, compound interest, employer matching, a lifetime monthly benefit, and account portability.

Automatic savings. When you start working for a TCDRS employer, you start saving from day one. The employer automatically deposits a percentage of each of your paychecks into your TCDRS account. Your deposit rate (between 4 and 7 percent) is set by your employer and cannot be adjusted. Money deposited into your TCDRS account is tax-deferred, so it reduces the income on which you have to pay taxes .

Compound interest. The money in your TCDRS account grows at an annual compound interest rate of 7 percent. This amount is set by legislation and does not fluctuate. TCDRS credits this interest to your account each month based on your account balance as of January 1. Over time, the value of your account can increase significantly due to compound interest (interest paid on your deposits and the interest you've already earned). At 7 percent, your money will double about every 10 years.

Employer matching. As you save for retirement, your employer will also be making contributions to fund your benefits in advance, based on the selected employer matching rate (between 100 and 250 percent!). At retirement, your benefit payment will be calculated based on your

final account balance and employer matching. Employers are required to pay 100 percent of their contributions every year to ensure funds are there when needed.

Lifetime monthly benefit. Once you reach retirement eligibility, you earn a lifetime monthly benefit for you, as well as your beneficiary or beneficiaries, depending on the payment option you choose (more on those options below). This unique feature of TCDRS means you will never outlive your retirement income, and your loved ones can be protected as well. (Keep in mind that your TCDRS benefit will not include retiree health insurance coverage. You should check to see if your employer offers this benefit.)

Account portability. If you stop working for your TCDRS-participating employer, you may choose to rollover or withdraw your account, but there are many benefits to leaving your TCDRS account open. Open accounts continue to grow with interest, even if deposits have stopped. Plus, you may eventually end up working for another TCDRS employer or one that participates in our Proportionate Retirement Program (below), meaning you could potentially become eligible to retire the account someday (meaning, start withdrawing funds for retirement income). And finally, if you earned four or more years of service before exiting employment, your beneficiary remains eligible for the TCDRS Survivor Benefit.

How do I become eligible for retirement?

To become eligible for a TCDRS retirement benefit, you need to accrue enough service time to meet your employer's eligibility requirements. Each month you make a deposit into your TCDRS account, you earn one month of current service time. Through our Proportionate Retirement Program, you can also combine service time you earned in any of the following Texas statewide retirement systems with your TCDRS service time:

- City of Austin Employees' Retirement System (COAERS)
- Employees Retirement System of Texas (ERS)
- Judicial Retirement System of Texas (JRS)
- Teacher Retirement System of Texas (TRS)
- Texas Municipal Retirement System (TMRS)

Ensuring that the sale of county property serves a public purpose is another challenge that may arise. Such a challenge generally occurs when private individuals or entities solicit the sale of county-owned property for private benefit. For example, a private owner with property abutting a narrow strip of undeveloped, unutilized land owned by the county may want to purchase that strip of land to add to his own tract of land. Even though this scenario clearly falls under the exception to competitive bid and public notice provided by §272.001(b)(1), when selling property to abutting landowners, counties must ensure that the sale still serves a public purpose.[45] This requirement prevents the use of county assets for private gain.

Conclusion

Selling county property in Texas involves specific requirements designed to ensure transparency, fairness, and validity. These requirements are generally outlined in Chapters 263 and 272 of the Local Government Code. Key considerations of these chapters include proper notice to the public, appraisals to determine fair market value, and adherence to statutory requirements regarding sales procedures. Exceptions may exist for certain types of property or specific circumstances, such as sales to abutting landowners or other governmental entities or for economic development purposes. By understanding the applicable statutory provisions, procedural requirements, and general exceptions to selling county property, we can advise our client, the county, on the correct process to enable a smooth and valid property sale transaction. ❇

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[45] Tex. Const. Art. III, §52(a).

You can also count up to five years of military service toward your retirement eligibility once you are vested.

As your service time accrues, you will reach three account milestones: the TCDRS Survivor Benefit, vesting, and retirement eligibility.

As your service time accrues, you will reach three account milestones: the TCDRS Survivor Benefit, vesting, and retirement eligibility.

TCDRS Survivor Benefit

If you have four or more years of TCDRS service, your beneficiary can apply to receive a lifetime monthly payment from your account if you pass away before you retire. Your beneficiary can claim this benefit, which will be made up of your deposits, interest, and employer matching, right away. The beneficiary doesn't have to wait until you would have been eligible to retire, and s/he can even receive the benefit if you were no longer at your county or district job, provided you kept your TCDRS account open. This benefit provides an extra layer of security and peace of mind for members and their families.

Vesting

The next important milestone you will reach on the road to retirement is vesting. Vesting with TCDRS means you have enough service time to receive a lifetime monthly benefit when you become eligible and choose to retire. The amount of service time needed for vesting — five, eight, or 10 years — is determined by your employer.

Retirement eligibility

When you become vested, you are eligible to retire at age 60. Your employer's plan, however, may have eligibility requirements that allow you to retire earlier. You are eligible to retire when you are vested and meet one of the following requirements:

- at age 60
- your service time plus your age equals 75 or 80 (set by your employer)
- at any age with 20 or 30 years of service time (set by your employer)

What are my options at retirement?

Once you're eligible for retirement, you can apply for a lifetime monthly benefit. How much you receive depends on how much money is in your account, your employer's matching rate, the benefit payment option you select (those are explained below), and other factors. As you consider your benefit payment options, think about your overall income needs in retirement, whether your spouse is covered by his or her own retirement benefits, and the ongoing financial needs of your loved ones after you pass away. All of these factors may influence the option you select.

Your options are:

- **Single Life** provides the highest monthly payment, but all payments stop when you pass away—your beneficiary will not continue to receive monthly payments. You might select this option if you are single and have no dependents or if you are married and your spouse has his or her own retirement benefit.
- **Guaranteed Term** gives you a lifetime benefit. If you pass away before the term ends, your beneficiaries will continue receiving payments until the end of the term—you can choose terms of 10 or 15 years, and the term starts on the day you retire. You might select this option if you want to provide financial support to a loved one in case you pass away during a certain timeframe, such as when a child is in college.
- **Dual Life** means that when you pass away, your beneficiary receives 100, 75 or 50 percent of the benefit you received for life. The lower the percentage you leave to your beneficiary, the higher your monthly payment. You may name only one primary beneficiary. You might select this option to provide for a spouse or other loved one who needs lifetime financial support.
- **100 Percent to Beneficiary With Pop-Up** is under the Dual Life option. Your beneficiary receives 100 percent of your monthly payment for life when you pass away. However, if your beneficiary passes away before you, your monthly payment will "pop up" to a higher monthly amount, as if you had retired under the Single Life benefit payment option.

Selecting your benefit payment option is one of the most important decisions you will make about your retirement because it will impact your monthly payment amount, if funds will be paid to a beneficiary, and for how long.

What resources does TCDRS provide for retirement planning?

Whether you are just beginning your career or nearing retirement, we encourage you to take advantage of the many resources we provide to help you with your retirement planning.

One of our most popular services is our free online retirement counseling. During your short, personalized session, a TCDRS representative can help you learn more about your account, update your information, provide personalized ben-

efit estimates, and discuss the benefit payment options with you. You can schedule a session at www.tcdrs.org/Library/OnlineCounseling.

After signing into your account at tcdrs.org, you can find your account balance, including deposits and interest; manage your contact information and beneficiaries; and access helpful planning tools, including our Benefit Payment Estimator.

For more than 50 years, TCDRS has been a model for providing reliable retirement benefits. With a plan structure as unique as the Lone Star State itself, we're proud to help hardworking Texans retire with confidence. ❇

Real-world examples of retirement with TCDRS

We asked a few people who are retired from prosecutor offices (or on the cusp of retirement) to get their perspectives on the Texas County & District Retirement System. Here's what they had to say.

Assistant prosecutor
26 years in a CDA's office

How long have you been retired?
A year, but I'm working full time on the other ("dark") side. It was my hope that I could earn enough in defense work to not have to take my TCDRS retirement yet, and I am thankful that has so far been the case. It also means my TCDRS account continues to grow each year.

How good is the retirement with TCDRS?
As I neared my retirement, I began playing with the retirement calculators on the TCDRS website. I was floored by the amounts I was seeing, not just for the duration of my life, but even the amounts of monthly payments for the duration of my spouse's life. I worked in two different prosecutor offices with different matching systems, and I could see the results of the automatic 7-percent savings from my paycheck every year, plus the county matching 200–225 percent of that, and on top of that another 7 percent compound interest. I suddenly looked like a financial genius. And I assure you, I am not a financial genius.

In a world where pensions have become almost extinct, prosecutors are growing fantastic retirement accounts sometimes without even realizing it. It's an amazing, well-deserved reward for all the hard work that prosecutors spend their careers doing.

What would you say to people who are considering a job in a prosecutor's office, or to those who are thinking about leaving?
I have noticed that most prosecutor recruitment doesn't focus much on the retirement plan at TCDRS. I can understand that perhaps it's not a strong selling point to those just out of law school with their entire career ahead of them, but it's such a strong perk that I think it should be touched on.

I don't believe anyone should stay in prosecution for the money—it's a far higher calling than that. That said, if a prosecutor is thinking about leaving with the hopes of dollar signs outside of the profession, it is worth taking a look at the TCDRS website and the benefits calculator. The results may surprise you.

On the defense side, it's certainly possible to earn more, but it's important to remember that those paydays require discipline to open and regularly contribute to a 401(k), and there are plenty of attorneys who don't. You should always make the best financial decisions for you and your family, but retirement for prosecutors is a phenomenal system that greatly rewards a career in public service.

Assistant prosecutor
29 years in a prosecutor's office

How long have you been retired?
Five years.

How good is the retirement with TCDRS?
The TCDRS retirement is good—better than most. The time value of money—a financial concept that money available today is worth more than the same amount of money in the future

due to its potential to earn interest or returns over time—can be surprising. If your county pays a good match and you leave the money alone, it can accumulate surprisingly, even if you leave a prosecutor's office. In my case, I was surprised how much it built up over the years, even from the counties I left before retirement.

The negative is smaller salaries for beginning prosecutors, especially in comparison to the private sector. A friend's granddaughter recently graduated from law school, and her first year (beginning) salary will be $230,000!

What would you say to people who are considering a job in a prosecutor's office, or to those who are thinking about leaving?
Staying in the prosecutor's office just for the retirement is probably not a good plan. If you don't have an affinity for the work, you won't last until retirement.

However, a guaranteed pension is a rarity today; it should be a consideration before abandoning prosecution. If you like the work and you have the patience to vest, you might be surprised at the TCDRS retirement package. A guaranteed 7-percent return on your investment with a county match worked for me.

I was disappointed in TCDRS when it discontinued the HELPS program. HELPS stood for Health-care Enhancement for Local Public Safety Officers, and it allowed eligible public safety officers (including prosecutors) to deduct their health insurance premiums—up to $3,000 worth—from their TCDRS monthly retirement benefit. It lowered my taxable income, but the program was discontinued in 2023.

Other than that, I kept up with the TCDRS literature along the way and have really had no surprises.

DA investigator
18 years in a DA's office and 17 years in a sheriff's office

How long have you been retired?
I'll retire this summer.

How good is the retirement with TCDRS?
I feel TCDRS is a great retirement system compared to other systems, such as 401(k) accounts, mainly because we employees put money in and the county also contributes to it. My monthly retirement will actually be more than my payroll was. It's all about your salary over the years, your age, and your years of service that determine what you'll end up with. My retirement, along with the fact that I'll be taking early Social Security at 65, will be plenty to survive on.

What would you say to people who are considering a job in a prosecutor's office, or to those who are thinking about leaving?
The benefits of TCDRS are a great reason to work at a prosecutor's office, not to mention the fact that what we do as an office is an amazing contribution to society in general. Everyone has their own callings in life so if at some point a person decides to leave a prosecutor's office and not work for an entity covered by TCDRS, it would be a benefit to them to not take their retirement but let it stay and build over the years.

Another good reason to leave your retirement money with TCDRS is you never know: You might go back to a prosecutor's office later, and then you can continue to put money into your account for a nice nest egg later on, rather than having to start over with a new TCDRS account.

Assistant prosecutor
32 years in a DA's office

How long have you been retired?
Nine years.

How good is the retirement with TCDRS?
I would call the TCDRS retirement very good. I was in a position where my years of service combined with my age equaled 100, so my retirement benefit was actually more than my monthly net pay. Another major benefit is that my husband also retired from the DA's office with TCDRS retirement, and we both chose the "pop-up option" with 100 percent going to a beneficiary. If I die before my husband, he will receive my retirement, along with his own retirement. If he dies before me, I will receive his retirement in addition to my own.

What would you say to people who are considering a job in a prosecutor's office, or to those who are thinking about leaving?
I would not say that it is worth staying in prosecution, or any other career, just for the retirement. Prosecutors should love what they do and be devoted to doing it even with the drawbacks and benefits. However, the retirement and

health care benefits are certainly important considerations. When I first started at the DA's office, an older prosecutor told me that the retirement benefits were really good, but that made little impression on me because retirement was so far in the future. Retirement is very difficult to envision or consider when starting as a new attorney.

I do think that prosecutors who leave the office before their retirement vests should carefully consider before withdrawing their retirement. It is impossible to know exactly what will happen in a career. I've seen many people who had withdrawn their retirement when they initially left actually return to prosecution, so they basically had to start over in the system. The retirement benefit should be part of the package you consider when you're thinking of going into prosecution, but it should not be the reason to be a prosecutor.

Victim services director
33 years in a CDA's Office

How long have you been retired?
About a year and a half.

How good is the retirement with TCDRS?
I think the TCDRS retirement is fabulous! I actually bring home more money through my retirement than I did with my county paycheck. The best part of the retirement system is that the fund is not based on the stock market unlike other IRAs and 401(k)s. Every evening as I watch the news and see the crazy ups and downs of the stock market, I don't have to worry about my wonderful little nest egg that sends me money each month.

What would you say to people who are considering a job in a prosecutor's office, or to those who are thinking about leaving?
The decision to work in a prosecutor's office for your entire career is based on a number of things: good work hours (a few late nights for trial prep; long trials and waiting for jury verdicts, but this isn't every week); scheduled sick leave, holidays and vacation time; and a strong, reliable retirement system, to name a few. I will admit that generally these benefits are not what kept me working in the DA's office for those many years—I truly enjoyed the work, enjoyed "wearing the white hat." I was honored to serve our citizens and assist those who had suffered at the hands of another.

The biggest downside of working is the election that comes every four years; job security isn't always based on competency, trust, and reliability, but on the political notion of the new person in office. I will admit, that as the years passed, the retirement system became a greater influence on my staying at the DA's office. If I had been left to myself to save for retirement, I'm not sure I would have done a very good job planning for the future. Thank goodness for TCDRS! ❇

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