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The Texas Prosecutor

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

Lessons on family violence from working intake

From 2019 to 2021, I was an intake attorney tasked with reviewing the family violence cases presented to our office.

By Philip McLemore
Assistant District Attorney in Brazos County

What follows in this article are some lessons I learned—or that were reinforced—during that time of reviewing probable cause statements and warrant requests, discussing investigations with officers, and presenting cases to grand juries. I make no warranties or promises that applying these lessons will make prosecuting family violence cases easy, but I will warranty and promise that applying these lessons will better position prosecutors to see that justice is done in arguably some of the most difficult cases we will ever be assigned.

Family violence cases age like bottles of fine wine—bottles that have been left outside in the Texas sun. As we recognize this reality, it is important to collect as much evidence as possible at the time an assault is reported to better equip prosecutors to see that justice is done. I cannot stress enough the importance of explaining to officers why we need that evidence, training them on how to best collect that evidence, and consistently expecting that evidence. To paraphrase Benjamin Franklin, an ounce of effort during intake is worth a pound of argument at trial.

Lesson One: Assume the victim will be uncooperative.

The one question that pervades the conversation about family violence prosecution more than any other has to be, "If she doesn't want to prosecute, why should we?" In fact, that's the title of an article that appeared over a decade ago in this very publication.[1] Many factors contribute to a victim's reticence or resistance to cooperate in the prosecution

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Carol Vance, Boomtown DA

The last edition of this journal featured an article by **Tom Krampitz** about a one-time prosecutor and TDCAA legend, **Tom Hanna**.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

At the end of that article, we had to drop an editor's note that another prosecutor legend, Carol Vance, had passed. Carol was the District Attorney in Harris County starting in 1966 and led that office through a huge explosion in Houston's population (hence, his nickname, "Boomtown DA"; he also wrote a book by that name).

I want to thank **Bert Graham, Johnny Holmes, Ken Magidson**, and **Ron Woods** for their words in tribute (see page 21 for their memories of Carol). I had the good fortune of getting to know Carol as we got the Texas District and County Attorneys Foundation up and running. He was an enthusiastic supporter of our profession and of the concept of building a legacy that will outlive our modest efforts.

Many people don't know that Carol literally founded TDCAA's training efforts. As TDCAA President in 1970, he orchestrated TDCAA's application for Law Enforcement Assistance Administration funding for prosecutor training. These early grants were the cornerstone of the training and support that Texas prosecutors enjoy today. And it is safe to say that Carol was very proud of his work as the chairman of the Texas Department of Corrections (now Texas Department of Criminal Justice). Appointed by **Governor Ann Richards** to a three-year term, Carol oversaw the growth of TDC from 45,000 to 145,000 inmates. He was most proud of the 12,000 substance abuse beds and school system enhancements he was able to usher in. As a man of deep faith, Carol spent years ministering to inmates in prisons throughout the world, including at the Carol Vance Unit in Sugarland. We are all indebted to what Carol did during his 88 years. ❇

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Atticus Finch Day

In June, I had the honor of participating in Atticus Finch Day in Bryan.

By Rob Kepple
TDCAA Executive Director in Austin

This annual gathering of criminal defense attorneys and prosecutors was the brainchild of Bryan attorneys **Shane Phelps** and **Phil Banks**. You can read the story of how it got started here (www.shanephelpslaw.com/the-atticus-files/2015/april/the-completely-true-story-behind-atticus-finch-d), but the short version is that Shane, then a prosecutor, almost came to blows with Phil, a defense attorney, right in front of a jury. They both realized that it was time to recommit to the principle of the opposing side as "the loyal opposition," and began hosting an annual gathering for both sides of the bar; it's in the hospitable and honorable mold of the famous fictional lawyer Atticus Finch from *To Kill a Mockingbird*. Although seersucker suits are recommended, I was thankful they were optional.

As a big believer in the concept of the loyal opposition, I loved participating in this event. (That's me on the left in the photo, below, shaking hands with Shane Phelps.) In a twist, my job was to give a short talk *for the defense*. Legendary prosecutor, criminal defense attorney, and judge **Travis Bryan III** spoke for the prosecution. I spoke about my view of the defense bar: loyal to their clients and doggedly determined to hold the State to its proof. I told attendees about the time as a young prosecutor when I chided a defense attorney for seeking a trial instead of working the case out with me—as well as the time when, years later after I had gained experience, I sheepishly apologized to that very same attorney for what I had said. I now count him as a friend.

My point is this: Sure, there will be dustups and exceptions, but our criminal bar is strongest when we recognize the role of our courtroom opponents and honor their efforts. We all have a job to do. I think the public expects us to continue to be honorable and rise to best versions of our respective bars. Thanks for the invite, Shane.

Rule 3.09 update

In the last edition of *The Texas Prosecutor*, I laid out the three proposals for amendments to Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct relating to prosecutors who learn of new and credible evidence of innocence. Those three proposals were discussed by the Committee on Disciplinary Rules and Referenda (CDRR) at its June 1 meeting; I won't go into lengthy detail here about what the proposals do (check prior journals to get up to speed). The committee, lacking consensus, allowed the current rule proposal that was printed in the *Bar Journal*—the full American Bar Association Model Rule 3.8

with disclosure, investigation, and remedy—to expire and punted the whole issue to a subcommittee made up of a couple members of the CDRR plus **C. Scott Brumley**, County Attorney in Potter County and Chair of the TDCAA Rule 3.09 Committee, and **Mike Ware**, director of the Innocence Project of Texas.

The subcommittee met twice, and there was still an impasse in those meetings. Mike Ware continued to push "the full Monty" of disclosure, investigation, and remedy. Scott and the 3.09 Committee offered a compromise of disclosure to the defense, disclosure to the proper tribunal and, disclosure to a statewide entity that examines claims of actual innocence (read: the Innocence Project of Texas).

Here is the Rule 3.09 Committee proposal:

> (f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:
>
> (1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to:
>
> (i) the defendant or defendant's counsel of record, if any;
>
> (ii) the tribunal in which the defendant's conviction was obtained; and
>
> (iii) a statewide entity that examines claims of actual innocence; or
>
> (2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence to the appropriate prosecutor in the jurisdiction in which the conviction was obtained.

I want to thank **Jennifer Tharp**, CDA in Comal County, and **Jack Roady**, CDA in Galveston County and TDCAA Board President, for participating in those meetings and holding the line on disclosure. We continue to hear from our members that a duty to disclose and remedy are non-starters, and as long as they are in a State Bar proposal, they will likely face stiff opposition.

That said, the full CDRR met on August 3 to discuss the continued impasse. The committee broke into two camps. Subcommittee chair **Rick Hagen** seemed to support the disclosure proposal that Scott Brumley forwarded and argued that prosecutors have a legitimate concern about having the ability to investigate and may even be in a conflict situation. Other members were not concerned about that and believed that the committee should pass a rule including a duty to investigate and let prosecutors find the resources to do it. The committee left the issue undecided yet again, pending some additional input from prosecutors on the language in Scott's proposal relating to the term "material." You can view the committee's meeting at https://texasbar-wo4m90g.vids.io/videos/799edab2191ce4c0f0/cdrr-meeting-august-3-2022.

Federal student loan help?

None of us have come to expect swift or decisive action from our federal government, and we have certainly learned not to expect it when it comes to the student loan forgiveness program for public service employees. Indeed, for a while it seemed that the government was deliberately making it hard to navigate the program.

But recently, we have heard from more of you that the program may be getting a jump-start. A friend of TDCAA even reported that his loan balance was forgiven in August! And indeed, there are reports that the current administration is looking to make student loan forgiveness a real thing: www.nytimes.com/2022/08/24/business/biden-student-loan-forgiveness.html. We will keep an eye on it, but if you are interested you should check it out: https://myfedloan.org/borrowers/special-programs.

Recently, we have heard from more of you that the federal government's student loan forgiveness program may be getting a jump-start. A friend of TDCAA even reported that his loan balance was forgiven in August!

Welcome, Kane Handford

We are very excited here at TDCAA to announce a new addition to our staff: **Kane Handford**, our new Research Attorney. Kane just graduated from the University of Texas School of Law with his L.L.M. and is keen on becoming a Texas prosecutor. We are very happy that he will bring his talents to TDCAA for the benefit of prosecutors statewide.

Bill Helwig appointed to the Rural Justice Advisory Board

Congratulations to **Bill Helwig**, CDA in Yoakum County and TDCAA Board President-Elect, on his appointment to the Rural Justice Advisory Board for Southern Methodist University's Dedman School of Law's Deason Criminal Justice Re-

form Center. Bill has been very active with the Deason Center as it explores ways to enhance the criminal justice system in rural Texas. If you know Bill, he is happy to tell you he hails from Hooterville, Texas (which is better known by others as Plains). Yoakum County is the sixth smallest felony jurisdiction in Texas by population, so the Deason Center is going to get its rural money's worth out of Bill. Thanks, Bill, for stepping up! ❇

Encouraging news regarding student loan forgiveness

Editor's note: As this issue of the journal goes to press, news media is reporting that President Joe Biden wants forgiveness of up to $20,000 of student loan debt for borrowers who earn less than $125,000 a year. We at TDCAA have also heard some encouraging news from a friend of TDCAA, Justin Wood, who wrote to us about finding out his outstanding student loan balance was forgiven in August—after many years of faithfully making payments. Justin was kind enough to write about his experience, which we share with you here.

With all the general attention and news coverage regarding student loan forgiveness and loan forbearance during COVID, it can be a bit confusing. I would specifically direct prosecutors to seek loan forgiveness through the Public Service Loan Forgiveness (PSLF) Program, intended for individuals employed by governmental agencies and some nonprofits who have made 120 consecutive payments on qualifying federal student loans. The best source of information to get started with the application process is at https://studentaid.gov/pslf, where there is a PSLF Help Tool, FAQs, links to begin the application process, and the like.

The application will produce a single form that they will eventually submit. Part of that process will include employer verification, which is to be completed by applicable qualifying employer(s). For example, for me, the form produced four separate employer verifications that required me to contact two DA's offices, the Texas Senate, and the nonprofit where I'm currently employed. I contacted someone in Human Resources at each employer, and once I figured out to whom to send the form, I scanned the form, emailed it to that person, and s/he completed it and emailed it back to me. Once I gathered those four verifications, I included them with the rest of the form, and I mailed all of my information to the address on the form. That was in January.

Once the application was submitted, I monitored the status through the MyFedLoan.com portal. Documents and updates would be uploaded into the portal as they became available (i.e., that my former and current employers had all been verified, that they were verifying my 120 consecutive qualifying payments, etc.), but the updates were sporadic and not always clear about next steps. In fact, I had grown a little discouraged because progress seemed pretty stagnant the last few months. However, I was notified at the beginning of August that a document had been uploaded to my portal, and that's when I discovered that my loans had been forgiven, and it was reflected in my account information showing a zero balance (*yay*!). Other people have told me that the timelines from submission to forgiveness have been all over the place, but it sure seems like it has ramped up lately with more and more people receiving notice of forgiveness.

I had made many more payments than the required 120 (i.e., 220-plus), but the requirement is 120 consecutive payments. I went ahead and included *all* my qualifying employers because I wasn't sure when the clock starting ticking regarding the 120 payments—I know it was sometime after I started in prosecution in 2002. I have heard from some people who haven't quite hit their required 120 payments that they are waiting for the date that 120th payment registers before they start the application process.

Though I don't think someone would be penalized for taking advantage of forbearance during COVID, I don't know that that's for sure true. It's worth noting that I played it safe: I continued making payments on my loans throughout COVID until I applied for loan forgiveness. ❇

Photos from our Advanced Courses

Baylor School of Law and TDCAA celebrate 20-year partnership

Since 2002, Baylor Law has hosted TDCAA's Advanced Trial Advocacy Course during the "intersession" between summer and fall quarters. This summer, Baylor hosted two TDCAA educational programs: its Advanced Trial and Advanced Appellate Advocacy Courses. "Known statewide for preparing attorneys for the courtroom, Baylor Law is an essential part of the event's success," said Brian Klas, TDCAA's Training Director. "Starting at the top with Dean Brad Toben, the entire law school staff have always been gracious hosts. Our time at Baylor Law is always a pleasure."

"We are so proud of our decades-long partnership with TDCAA," stated Dean Toben. "It is a natural fit for us to host these servant prosecutors as they hone their trial skills, given our dedication to advocacy education and training. We are looking forward to a long future of serving our friends at TDCAA." *(This article is reprinted with the permission of Baylor University School of Law.)*

Photos from our Prosecutor Trial Skills Course

Lessons on family violence from working intake (cont'd from the front cover)

of her abuser. Internal factors, such as the threshold effect and learned helplessness, and external factors, such as financial concerns, separation from friends and family, and fear of what will happen if she leaves can create a barrier to prosecution that may seem insurmountable to a victim.[2]

It is also important to remember that the victim has an emotional connection to her abuser and may have significant history with him. Otherwise, you probably wouldn't be evaluating a *family* violence case. She loves him, and, in many cases, he is the father of her children and the breadwinner for the household. This dynamic can make it difficult for a victim to demand punishment when the person on the receiving end of said punishment is someone she loves and relies on.

It is important at this juncture to acknowledge my use of pronouns. We should all recognize that family violence victimizes both women and men. According to the Centers for Disease Control and Prevention, approximately one in five women reported severe physical violence from an intimate partner while one in seven men reported the same.[3] Anecdotally, any prosecutor who regularly handles family violence cases can confirm that the majority of victims are women. In recognition of that reality and to maintain consistency throughout this article, I have elected to present these lessons in the context of female victims and male abusers. However, that election is not intended to diminish the existence of male victims or imply that these lessons don't apply where the abuser is female.

A victim will never be as cooperative as she is immediately following an assault. Assuming that a victim will be uncooperative and training officers to make that same assumption encourages them to gather as much evidence as possible at the scene. To combat and overcome the challenges that a later-uncooperative victim presents, evidence-based prosecution is of utmost importance to hold an abuser accountable regardless of the victim's cooperation.[4] And if you ever find yourself second-guessing whether to prosecute a family violence assault case just because the victim is uncooperative, replace the words "family violence assault" with "murder" and ask why the answer to those two questions should be any different.[5] After all, when's the last time a murder case went unprosecuted just because the victim was uncooperative?

Lesson Two: Evidence-based prosecution requires evidence.

More fully stated, evidence-based prosecution requires evidence that proves each element of the offense beyond a reasonable doubt. Often an on-scene investigation will end shortly after getting a statement from the victim detailing the assault. However, that statement is probably testimonial and inadmissible without the victim testifying later at trial.[6] Assuming that the victim will be uncooperative and that statement can't be used as evidence, what is left? Potentially a lot if the investigation goes beyond just the victim's statement.

911 calls. It's a fair bet that most police responses to family violence assaults follow a 911 call. Get those recordings. They can be a treasure trove of information. If the victim made the call, what was her demeanor on the call? Was she having trouble breathing, scared, crying, coughing, or complaining of pain? What information did she give about the assault? Depending on the situation, the recording of the call may be admissible as a present sense impression, excited utterance, or other exception to hearsay. Those calls are typically nontestimonial and will not raise a *Crawford* issue.[7] And from an advocacy standpoint, it will be a rare occasion that the testimony of a victim from the witness stand, cooperative or not, will match the genuine emotion captured on that call.

It's not just 911 calls from victims that can be of use. I reviewed several cases where a neighbor called because they heard a physical confrontation or because the victim came to their residence to escape an assault. Just because a witness didn't *see* the assault doesn't mean they can't provide any evidence to help prove that an assault occurred. Moreover, many witnesses have no connection to the victim or her abuser and therefore aren't as susceptible to the defendant's pressure to drop the charges.

While we're on the topic of calls, train officers to ask a victim if she called anyone other than the police. Did she call her mom or sister after the as-

sault and tell them what happened? Excited utterances to police are generally testimonial and not admissible without the victim, but her excited utterances to friends or family could be admissible.

Witnesses. Witnesses can also be a treasure trove of information—if someone speaks to them. Get those statements. In addition to the information a witness can provide about the assault, they may have knowledge of prior assaults or relationship history. In the case of neighbors, the incident that prompted them to call 911 may not have been the first time they heard a physical confrontation or interacted with the victim after an assault. Family members may have never witnessed the victim be assaulted, but maybe they have noticed unexplained bruises or behaviors indicative of abuse that now make a lot more sense.

Some witnesses have an uncanny ability to be present during an assault but not see, hear, or remember anything. I handled a case where a defendant shot his girlfriend in the leg as she stood on her porch. Her neighbor took her to the hospital but left before police could speak to her. An officer spoke to the neighbor when she arrived home but was told that she didn't have much information about the assault. However, because the entrance to her residence was still behind crime scene tape, the officer had her wait in his patrol vehicle until the scene was cleared. Fortunately, the officer also turned on his in-car camera, which captured a phone call between the witness and someone else discussing what happened.

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Turned out, not only did the neighbor witness the shooting, but she also described the entire assault during that phone call. She'd been standing near the victim when the defendant shot her and had felt something fly past her own head during the shooting. When we met with her ahead of the trial, we showed her that video before ever asking her a question, and she turned out to be a key witness, albeit begrudgingly. Even "forgetful" witnesses can have epiphanies when presented with their statements.

Medical records. If medics responded to the scene or someone went to the hospital, victim or abuser, get those records. Medical personnel may observe signs of an assault that are not visible, especially in the instance of a strangulation. A victim may provide more details about an assault to medical personnel than she did on scene. After all, there's a logical reason Texas Rule of Evidence 803(4) exists. That same logic is also why prosecutors can call medical personnel to testify to what a victim told them.

In the case of the abuser, you may just learn that that injury he claimed was from the victim attacking him isn't all that fresh or the explanation for his injuries he gave to medical personnel is different from what he told officers. His statements are admissible as party-opponent admissions.

Jail calls. I am convinced that next to every inmate phone in the jail is a script for abusers to follow when calling their victims—it would be comical if not for the tragic circumstances. An "I'm sorry" followed by a gaslighting technique or two with an "I love you" sprinkled here, there, and everywhere to distract from his efforts to blame the victim for the assault. These calls usually end with the abuser donning the martyr's crown while lamenting that he's going away forever unless she drops the charges. Get those calls. A victim may be able to eloquently testify about her abuser's verbal and emotional abuse, but even the most eloquent testimony pales in comparison to hearing that verbal and emotional abuse come directly from the abuser's mouth, even when he knows he's being recorded.

Be forewarned, family violence abusers can be prolific jail callers. An abuser needs to control his victim, and his ability to do so is hampered while he takes up residence in jail leaving little else but phone conversations for him to exert that control. Focus on calls made shortly after the arrest and before and after important court settings. If a defendant is going to ignore the warning that his calls are recorded, it will most likely be on those occasions.

Photos. Photos can be either the best pieces of evidence or the most frustrating. They can show the redness, scratches, and finger impressions on a strangulation victim's neck that the officer observed on scene. They can also show none of the redness, scratches, or finger impressions that the officer observed on scene. Maybe it was poor lighting, a bad angle, or a smudged lens. Or, as is most often the case, it's simply because what we see with our own eyes is rarely captured as vividly in a photo. Regardless, get those photos. If they show the victim's injuries, you have powerful evidence. If the photos do not show the victim's injuries, you still have the officer's

observations of those injures. Sure, you'll have to address why the photos don't clearly depict what the officer clearly saw, but that doesn't mean the victim didn't have clear injuries or that the officer didn't clearly see them. Otherwise, why would the officer have bothered to take the photos?

Photos are important even when the victim is uncooperative on scene. It is not an uncommon occurrence to read in a report that no photos were taken because the victim refused to cooperate. Have officers take photos even if the victim tries to obscure or hide the injuries they're trying to photograph. If there's nothing to hide, what's she covering up? Even if those photos don't capture her injuries, they can help to capture the emotion of the situation.

An important grammar note: Photos is the plural form of photo. You want *multiple photos* of the victim's injuries and the scene. Gone are the days of Kodak Instamatic cameras with a flash stick or 12-exposure disposable cameras. So it would always confuse me when I received a case to review with scant photos as if there was a mandatory rationing of digital images I was unaware of. No one is asking or expecting officers to double as professional photographers, but we do need to impress on officers the need for multiple photos of the victim's injuries from multiple angles.

Same goes for photos of the scene. Photos preserve the scene and limit the ability of a defendant to later describe a scene different from the one responding officers walked into. Photos will show the hole in the wall where a defendant punched it with his fist or the dent where the victim was pushed into it; overturned furniture or knocked-over items that evince a physical struggle; or just the layout of the location where the assault occurred. If there are photos of the scene to show jurors, they have a single scene to picture rather than six or 12 different scenes created in the mind's eye of each individual juror.

I would be remiss if I didn't also mention photos of the victim taken in the days after the assault. Either taken by the victim, a friend or family member, or by someone during a follow-up interview, those photos will often complement the photos taken on scene. A reddish bruise the day of the assault may have turned purple or yellow. Scratches or lacerations may have scabbed over. Inflammation or swelling may be more pronounced. In addition to showing the progression of the victim's injuries, those follow-up photos are taken under far less stressful conditions for both the victim and photographer than those taken on scene, which can result in far better photos.

The more evidence you can gather, the better off you'll be—because you're going to hit dry holes. According to the American Oil & Gas Historical Society, despite advances in seismic surveys, geology, and petroleum engineering, more than one-third of modern exploration wells, each costing millions of dollars to drill, end up as dry holes.[8] Family violence prosecutors, too, will hit dry holes. A deleted 911 call, witnesses who didn't witness, medical records that say a lot but tell us nothing, a defendant who heeds the warning that all jail calls are recorded, or photos taken with the beer-goggle filter turned on. In these cases, the dry hole rate will probably exceed the one-third threshold. Keep drilling because you're not seeking profit, you're seeking justice.

Lesson Three: Photograph with a camera and paint a picture with words.

A picture can be worth a thousand words, but you need words too. This is especially true in strangulation cases. Many of the signs and symptoms of strangulation will never show up in a photograph. Difficulty or the inability to breathe, seeing stars, or an urge to urinate or defecate during an assault will never be captured in a photo. A raspy or hoarse voice, dizziness and headaches, or a loss of memory while speaking to an officer will never be captured in a photo. Yet all of those are important signs and symptoms of strangulation.[9] Painting a picture of a victim with words is important, particularly where outward injuries are minimal or non-existent.

This isn't limited to strangulation cases. The behavior and demeanor of the victim and abuser are important aspects of the investigation that cannot always be adequately captured in a photo. Was her voice quivering or did she break down crying as she recounted the assault? If her abuser was still on scene, did she continue to glance in his direction fearfully or to check if he could overhear what she was telling the officer? Did the abuser claim that he was the victim but act in a way inconsistent with someone who had been assaulted? These non-photogenic observations are

Family violence prosecutors will hit dry holes. A deleted 911 call, witnesses who didn't witness, medical records that say a lot but tell us nothing, a defendant who heeds the warning that all jail calls are recorded, or photos taken with the beer-goggle filter turned on. In these cases, the dry hole rate will probably exceed the one-third threshold. Keep drilling because you're not seeking profit, you're seeking justice.

the glue that connect the photos, videos, recordings, statements, records, and other items we naturally gravitate to as evidence to prove a case.

Lesson Four: Look people in their optic stems.

Whether it's a result of increased caseloads, a response to the events of the past couple of years, or a combination of the two, during my time in intake I noticed an uptick in the number of interviews conducted with victims, suspects, and witnesses alike over the phone. That uptick was accompanied by an uptick in the number of cases submitted for review that contained some variation of the following: "I called [X] and left a voicemail. I have not received a call back. I am now submitting this case for review."

On those occasions where phone contact was made, I always thought back to *The Office* episode entitled "The Secret." For those of you not familiar with that episode, Dwight Schrute is tasked with investigating whether one of his co-workers, Oscar Martinez, is faking sickness to get out of spring-cleaning day (in January) at the office. After calling Oscar multiple times, Dwight explains:

> There are several different ways to tell if a perp is lying. The liar will avoid direct eye contact. The liar will cover part of his or her face with his hand, especially the mouth. The liar will perspire. Unfortunately, I spoke to Oscar on the phone so none of this is useful.[10]

Despite our knowing that in-person interviews are far superior, phone interviews are becoming more and more commonplace. Surely no one would argue that a good investigative technique is to call a suspect in an aggravated robbery to ask if he is the person on the video with gun in hand pointing it at a teller demanding money from the register.

Despite our knowing that in-person interviews are far superior, phone interviews are becoming more and more commonplace. Surely no one would argue that a good investigative technique is to call a suspect in an aggravated robbery to ask if he is the person on the video with gun in hand pointing it at a teller demanding money from the register. Or to call a victim of sexual assault and have her describe over the phone one of the most violative acts that could be perpetrated upon a person. Should that same mentality not also apply to family violence cases?

As Dwight comically observed, so many investigative tools are useless during a phone interview. What nonverbal cues was the person giving? If speaking to a victim, was her abuser standing there telling her what to say or influencing how much information she provided? Did the suspect, who was no longer on scene when officers arrived, have any injuries that would corroborate the victim's statement?

There will be instances where an in-person interview is either not possible or not necessary, but the expectation should be that those instances are the exception, not the norm. Did I get pushback when I told officers I needed them to speak to people face-to-face before presenting their cases? All. The. Time. But I was always open about why that was my expectation. To the credit of many of those officers, they acknowledged the superiority of in-person interviews, especially when it came to family violence investigations, and they endeavored to speak to victims, suspects, and witnesses in person.

Another area where this lesson is important is victim contact by victim assistance coordinators (VACs). Victims often call our office asking to get family violence charges dropped, and our response has been to schedule a time for the victim to meet with our VAC in-person to discuss the case and sign a non-prosecution affidavit (NPA). This in-person meeting serves multiple purposes. First, you would be surprised how many abusers (or their mothers) "accompany" the victim to our office to get charges dropped, which we wouldn't notice if that meeting was done over the phone. Not to mention, if there are bond conditions that prohibit the defendant from having contact with the victim, there's now evidence of a new offense.[11]

Our VAC also uses this conversation as an opportunity to complete a standardized Family Violence Information Sheet. She doesn't challenge the victim on her answers but rather lets her tell her side of the story, both good and bad. The purpose of the conversation is not to guilt the victim into being cooperative or to build a false report case. It builds rapport and we learn what the victim's motivations are for wanting the charges dropped, and it often lets us know what the defense case will be.

On that note, do not be afraid of the NPA. An NPA doesn't mean the assault didn't occur. It doesn't mean the case can't be proven. It doesn't mean that the victim doesn't really want the case prosecuted. Our VAC often learns through her conversations with victims that they aren't motivated to sign an NPA because they don't want anything done. Often a victim is being pressured to sign an NPA and doing so can ease that pres-

sure. Signing an NPA allows her to tell her abuser that she's done everything she can to get the charges dropped and put the blame on our office for continuing to pursue the case. It can create some modicum of peace and safety in a situation where a victim hasn't left her abuser. An NPA can be a shield for a victim, so let her wield it.

Lesson Five: Remember the children (and witnesses) and come to your senses.

Show of hands, who's read something akin to this in a family violence report: "[Victim] said that her kids were in the house but didn't witness anything" followed by nothing about what the *kids* say they saw. Or heard. Or know.

In another case I reviewed, officers responded to an assault call and spoke to a witness who'd been staying at the house and heard the victim and defendant arguing downstairs. As he walked down the stairs, he heard the victim gurgling and making squeaking noises. However, by the time he made it downstairs the defendant had already walked away from the victim and she told the witness that the defendant had just choked her. The victim's son had also heard the argument and overheard the defendant tell his mother that he would kill her and put her in the ground. Neither person was an *eye*witness to the strangulation, but both provided valuable evidence that she was strangled.

Less than a month after the assault, the victim met with our VAC to get the charges dropped. She said that she started the fight by "poking the bear," that he was just trying to calm her down but didn't strangle her, and that what she reported on scene was said out of anger because she wanted the defendant to go away. Had the officers not spoken to the witnesses that evening and gone beyond asking about what they *saw*, it is less likely that this defendant would have been held accountable for assaulting his girlfriend. In part because they did, this defendant pled guilty, cannot have contact with the victim, and now has an affirmative finding of family violence.

Any parent knows that children pick up on far more than we realize. They see and hear things we thought were kept hidden from them. Often their honesty about what they have observed is delivered with straightforward, descriptive language that creates an image no camera could ever adequately capture.

Several years ago, I was in trial on an Evading with a Vehicle case connected to a family violence charge. The defendant had gone to his ex-girlfriend's house in violation of a protective order and taken their three kids, all under the age of 10. He piled them into the back of his van without any seatbelts or car seats and drove away. When officers located the van, the defendant evaded before wrecking into a ditch. The defendant's son testified at trial and described how his grandfather, who was recovering from a stroke, tried to stop the defendant from taking him and his sisters and said that his father had driven like a NASCAR driver. The jury had already seen the in-car video of the pursuit, heard the testimony of the grandfather and ex-girlfriend, and seen photos of the children crying in the back seat of a patrol vehicle, but even the defendant recognized the power his son's words had on the jury and asked to change his plea to guilty mid-trial.

Never underestimate the importance and power of the information a child, or any witness, has even if they didn't *see* the offense. And never forget that, while a child may not be a named victim in a family violence complaint or indictment, children are victims in family violence situations, too.[12] Give children (and witnesses) a voice and then listen to them.

Never underestimate the importance and power of the information a child, or any witness, has even if they didn't see the offense. And never forget that, while a child may not be a named victim in a family violence complaint or indictment, children are victims in family violence situations, too.

Lesson Six: What we fail to learn from history is that we fail to learn from history.

In my life before law, I was a high school history teacher. History is a subject that jockeys for first place with math on any most hated or most boring school subject list. Whether you hate it, are bored by it, or both, history is important. Important to know, important to learn, and important in family violence cases. Over 40 years ago, Dr. Lenore Walker wrote *The Battered Woman* in which she defined the cycle of violence. She wrote that there are three phases of the cycle—tension building, acute explosion, and honeymoon.[13] Law enforcement usually responds during the second phase. If we know the cycle, then we need to learn what happened during all three phases.

A useful guide for learning that history is the power and control wheel.[14] Is there a history of the abuser destroying the victim's property, isolating her from friends and family, or limiting or preventing her access to their finances? To be

fair, no officer will ever have enough time to do a deep dive into the history of the relationship while on scene. They're there to investigate an assault and make sure no one is in further danger, but that doesn't mean that they can't begin sketching an outline of the relationship history to be filled in later. This can be accomplished by having officers complete a standardized Domestic Violence Supplement and Lethality Assessment, which can provide useful information, such as whether there have been prior assaults, identifying information for any children or witnesses, and if the victim is in high danger. That information can then be used to guide any further investigation so that prosecutors and VACs can fill in that relationship history.

Another necessary step in learning from history is to review historical sources. In the family violence context, that means learning about the dynamics of the relationship and any prior criminal behavior of both the abuser and victim. Friends and family members, even if they've never witnessed an assault, may have important information about the relationship. Has their contact with the victim been limited or cut off since she began the relationship with her abuser? Does the abuser treat her more like a servant than a partner? Have they witnessed forms of abuse other than physical, such as belittling comments or mind games? Friends and family members are usually aware, or at least suspect, that a victim is in an abusive relationship before a physical assault is reported and can be good historians for those tension building and honeymoon phases. That information, as well as expert testimony about the cycle of violence and the power and control wheel, may be admissible under Texas Code of Criminal Procedure Art. 38.371.

Friends and family members, even if they've never witnessed an assault, may have important information about the relationship. Has their contact with the victim been limited or cut off since she began the relationship with her abuser? Does the abuser treat her more like a servant than a partner?

Prior reports can provide a historical record of the abuser's criminal behavior, particularly any prior assaults, but prosecutors also need to know whether the victim has anything in her past that could affect the case because rest assured that her abuser will let his attorney know. A victim with criminal history doesn't necessarily devastate the case, and it certainly doesn't make her any less a victim. Family violence abusers will seek out those they can control, and who better to control than a someone the abuser can readily discredit because of a criminal past? Both history and abusers tend to repeat themselves, so make sure to have the latest edition of the textbook.

Conclusion

Family violence cases can be some of the hardest and most frustrating cases to prosecute. There are only so many times you can bang your head against that wall before you start to question if any of your efforts matter. Applying these lessons won't make that wall any softer, but my hope is it'll help answer the question. To paraphrase a quote oft-attributed to George Orwell: Would-be victims can sleep safely in their beds only because police and prosecutors stand ready to visit justice on those who would do them harm. Stand ready. ❇

Endnotes

[1] Dr. Michael Vandehey & Shelly Wilbanks, "If she doesn't want to prosecute, why should we?," *The Texas Prosecutor* journal, September–October 2010.

[2] See *id*.

[3] Preventing Intimate Partner Violence, Centers for Disease Control and Prevention 1 (2021), www.cdc.gov/violenceprevention/pdf/ipv/IPV-factsheet_2021.pdf.

[4] See William Knight & Allenna Bangs, "Taking a closer look at intimate partner violence," *The Texas Prosecutor* journal, March–April 2021, at 18 ("[I]n the family violence realm, [evidence-based prosecution] refers to creating a case without a complaining witness").

[5] See Phyllis Niolon, PhD et. al., Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices, Centers for Disease Control and Prevention 10 (2017), www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf ("Data from U.S. crime reports suggest that 16 percent (about 1 in 6) of murder victims are killed by an intimate partner, and that over 40 percent of female homicide victims in the U.S. are killed by an intimate partner").

[6] *Davis v. Washington*, 547 U.S. 813, 822 (2006) ("[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events

Continued in the orange box on page 17

Protecting a Texas flock from a foreign wolf in sheep's clothing

A Smith County jury recently convicted a man who stole thousands of dollars from churchgoers in Flint, Texas.

By Emil Mikkelsen
Assistant Criminal District Attorney in Smith County

The defendant was a South African national, and much of the State's proof was in South Africa. While preparing for trial, prosecutors learned 1) how to prove a case when half the evidence and witnesses are on a different continent; 2) how to authenticate foreign business records; and 3) when and how witnesses are permitted to testify remotely at a jury trial. Through this article, the Smith County Criminal District Attorney's Office aims to help other Texas prosecutors and investigators by sharing how it worked through unique issues of international law in this case.

Meeting Livingstone Zitha

On an ordinary Wednesday in Flint, a man by the name of Livingstone Zitha stumbled into a small Baptist church in need of medical attention. Zitha said he was an evangelist from South Africa and was looking for a church he knew in the area, but he had discovered a donut shop in its place. The church promptly took him to the hospital, covered the cost of the ER visit, and paid for his prescriptions.

Zitha amazed churchgoers with stories of his fight against apartheid and powerful conversion to Christianity. He said he ran a large orphanage and pastored a megachurch in Johannesburg and had come to Texas to raise money for the orphanage. In many ways, Zitha seemed like an answered prayer for the small church, which already supported mission work in Africa. Church members put him up in a motel for two months, had him preach at a revival, and helped him book speaking events at other local churches. Whenever he told crowds that $250 could feed a child for a year, people gave generously.

Over time, church members grew wary of the once-charming Zitha, who treated waitstaff with disdain and had become increasingly demanding of women in the church. Why would a man on a fundraising mission insist on picking up the tab at restaurants? Shouldn't that money have gone to feed orphaned children? It was hard to get a straight answer out of Zitha, who alternately claimed to be 1) scraping by, and 2) independently wealthy by virtue of his marriage to a famous actress. After some online sleuthing, church members began to think of him as a wolf in sheep's clothing. Zitha left in a huff when he was confronted, but the next day he emailed what purported to be the orphanage's founding constitution and a nonprofit certificate of registration. Neither document appeared genuine, though, so they contacted law enforcement.

In the ensuing investigation, bank records revealed that Zitha spent the church's love offerings on fast food, Starbucks, and rental cars. No such orphanage was registered as a corporation in South Africa, and the U.S. Secret Service's field office couldn't verify its existence either. Zitha was arrested just as he was set to step into a pulpit in Dallas, and he was charged with third-degree theft of $10,000.

Even with strong evidence of theft by deception, our office had no experience prosecuting a case with roots halfway around the world. But with help from modern technology and investigators in South Africa, Livingstone Zitha is now incarcerated and can no longer charm his way into the fold.

How do you prepare for trial when witnesses and evidence are on another continent?

Conducting an international investigation is im-

possible without boots on the ground. You need someone who speaks the language, knows the culture, and understands the government. The U.S. Secret Service field office in South Africa was a great resource for us—its competent agents and investigators were interested in our case and willing to track down documents, find witnesses, visit the supposed locations of Zitha's church and orphanage, and analyze exhibits. During trial, they facilitated witness testimony from their offices. If you need help conducting an international investigation, the local U.S. Secret Service field office should be your first stop. If one isn't available, ask the U.S. embassy in that country for help. Remember, English might be your contact person's second language, and certain words or phrases could be misunderstood. Err on the side of formality in emails and use clear, specific language.

If you're using video-conferencing software, preparation pays off. We found Zoom invaluable for both witness prep and trial testimony. At trial, we preloaded electronic copies of all exhibits onto the State's laptop, and we showed them to remote witnesses using Zoom's screen-share function. From 9,000 miles away, our witnesses could see and testify effectively about the evidence. For the defense, Zoom was an unmitigated disaster during trial. Nobody had done a practice run to ensure internet connection speeds and video quality were up to snuff. It was nearly midnight in South Africa by the time their connection issues were finally sorted, and some witnesses were visibly struggling. They testified from smartphones, resulting in testimony that was somehow both pixelated and blurry.

During our investigation, the Companies and Intellectual Property Commission, a South African agency that registers companies, told us Zitha's orphanage did not exist in corporate form. Because an orphanage of its supposed size should have been incorporated, this was strong proof it didn't exist at all.

How do you get foreign business records admitted into evidence?

During our investigation, the Companies and Intellectual Property Commission, a South African agency that registers companies, told us Zitha's orphanage did not exist in corporate form. Because an orphanage of its supposed size should have been incorporated, this was strong proof it didn't exist at all.[1] At trial, we got the agency's lack-of-incorporation affidavit admitted into evidence as a self-authenticating foreign public document, under Tex. R. Evid. 902(3).

If you find yourself in a similar situation, there are three ways it can be done:

> (A) In General. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

We were thankful this onerous subsection didn't apply in our case. To be self-authenticating under 902(3)(A), a document needs *final certification* from a member of the U.S. diplomatic corps, who has certified that the foreign official's signature is genuine and the foreign official is who he says he is. Realistically, this happens only 1) if a foreign official signs the document in front of a U.S. diplomat; or 2) via a complicated certification chain where Person A signs a document in front of Person B, who then certifies A's signature is authentic. The process repeats itself when Person B signs a document in front of Person C, who then certifies B's signature is authentic. And so on and so on, until the document gets to a U.S. diplomat for final certification.

> (B) If Parties Have Reasonable Opportunity to Investigate. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
>
> (i) order that it be treated as presumptively authentic without final certification; or
>
> (ii) allow it to be evidenced by an attested summary with or without final certification.

Subsection (B) permits a judge to admit a foreign public document without a final certification if both sides have had time to investigate and good cause exists. There's no clear consensus on "good cause," though.

In *Jordan-Meier v. State*,[2] good cause meant a good reason to believe a foreign document was genuine. The State had offered what purported to be the defendant's criminal convictions from

Germany. On review, the First Court of Appeals approved of the trial court's decision to admit the evidence without final certifications because there was "good cause" to believe the documents were authentic: They contained Jordan-Meier's fingerprints, plus personal information about him that was consistent with the evidence that had been presented at trial.

In *United States v. McGowan*,[3] good cause meant a good reason to discard the usual rule.[4] Prosecutors tried obtaining final certification for Jamaican documents, but the Jamaican government was dragging its feet. Thus, the trial court had "a sound basis or legitimate need to take judicial action" and admit the evidence without final certification, under 902(3)(B).

If relying on 902(3)(B) for a foreign public document, be prepared to explain 1) your efforts to obtain a final certification and 2) why you believe the document is authentic.

But chances are, Subsection C will apply:

> (C) If a Treaty Abolishes or Displaces the Final Certification Requirement. If the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces the final certification requirement, the record and attestation must be certified under the terms of the treaty or convention.

Subsection (C) applies in cases where the U.S. and foreign country are parties to a treaty that has abolished the final certification requirement. The Hague Convention, to which both the U.S. and South Africa are parties, abolished final certifications in 1961.[5] Today, documents are authenticated via an "Apostille Certificate." Each country designates officials to attach *apostilles,* and a list of these officials is available online.[6] In South Africa, one agency and 15 courts can attach apostilles, and our affiant signed her affidavit in front of one of them.

With the apostille attached, the now self-authenticating document (reprinted on page 19) was mailed to Texas and ready for use at trial.

Can overseas witnesses testify remotely?

At the time our case was first set for trial, COVID-19 travel restrictions prevented South Africans from entering the U.S.[7] To get around the travel ban, a South African's entry into the United

potentially relevant to later criminal prosecution").

[7] *Id*. ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency").

[8] B.A. Wells and K.L. Wells, First Dry Hole, American Oil & Gas Historical Society (last updated Jul. 15, 2022), https://aoghs.org/technology/first-dry-hole.

[9] See Signs and Symptoms of Strangulation, Training Institute on Strangulation Prevention, www.familyjusticecenter.org/wp-content/uploads/2017/12/Signs-and-Symptoms-of-Strangulation-2017.pdf.

[10] "The Secret," *The Office*, NBC television broadcast Jan. 19, 2006.

[11] See Tex. Penal Code §25.07.

[12] See, e.g., Blake Griffin Edwards, "Alarming Effects of Children's Exposure to Domestic Violence," *Psychology Today* (Feb. 26, 2019), www.psychologytoday.com/us/ blog/progress-notes/201902/alarming-effects-childrens-exposure-domestic-violence.

[13] Step by Step Guide to Understanding the Cycle of Violence, https://domesticviolence.org/cycle-of-violence (last visited Jul. 27, 2022).

[14] Power and Control Wheel, Domestic Abuse Intervention Project, www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf. See a further discussion of prosecuting family violence cases and the Power and Control Wheel in *Family Violence* by Staley Heatly (TDCAA © 2020), available for purchase at www.tdcaa.com/product/family-violence-2020.

States needed to further "important U.S. law-enforcement objectives." A local theft prosecution in Smith County likely wouldn't have qualified, so we sought a workaround.

In our research, we came across a line of cases permitting video testimony when public policy, significant impracticability, or witness health prevents in-court testimony.

In *Paul v. State*,[8] a witness whose cancer diagnosis kept her from traveling testified via videoconferencing software; jurors watched it on a large video screen. On appeal, Paul argued the remote testimony violated due process and the Confrontation Clause. But the Twelfth Court of Appeals disagreed because the necessary characteristics of in-court testimony had been preserved: Jurors had a full view of the witness, and the sworn testimony was subject to cross-examination and had occurred under the defendant's eye.

In *Gonzales v. State*,[9] the Court of Criminal Appeals found due process wasn't violated when a child witness was allowed to testify by two-way closed-circuit system. The trial court's decision to allow this form of testimony was justified by a compelling State interest in safeguarding the child's psychological well-being.

In *Rivera v. State*,[10] an active-duty soldier testified from Iraq via live video conferencing. The Ninth Court of Appeals approved; the witness's military obligations made it reasonable to set aside the preference for in-person testimony.

In *Haggard v. State*, [11] a Sexual Assault Nurse Examiner testified from Montana via FaceTime. The State hadn't subpoenaed her, and the witness's financial status was the only reason the State gave for her not appearing in person. Because none of the usual reasons applied (health issues, overseas deployment, public policy, or witnesses outside subpoena power), the remote testimony was improper. Haggard's conviction was reversed and remanded.

In Zitha's case, our witnesses were allowed to testify via Zoom because an executive order kept them from appearing in person. They testified under oath from the U.S. Embassy in Pretoria, South Africa, remained subject to cross-examination, and were clearly visible on a 65-inch video screen.

Today, documents are authenticated via an "Apostille Certificate." Each country designates officials to attach apostilles, and a list of these officials is available online. In South Africa, one agency and 15 courts can attach apostilles, and our affiant signed her affidavit in front of one of them.

Conclusion

Prosecuting this case was an enjoyable change of pace, and the guilty verdict felt particularly rewarding, given all the hours spent studying international treaty law and South African corporate regulations. I hope the next prosecutor who faces similar issues will be able to use this article as a jumping-off point. If you have questions or would like to share your own experiences, feel free to email me at emikkelsen@smith-county.com. ❇

Endnotes

[1] In South Africa, a lesser form of legal-entity status can be secured by registering as a nonprofit with the Department of Social Development. At trial, Zitha produced an old nonprofit registration in the same name as his alleged orphanage and said it proved his innocence. But because our witness explained it was typical to register as both a corporation and nonprofit, jurors rejected Zitha's "proof."

[2] *Jordan-Maier v. State*, 792 S.W.2d 188, 190-92 (Tex. App.–Houston [1st Dist.] 1990, pet. ref'd).

[3] *United States v. McGowan*, 552 F. App'x 950, 955 (11th Cir. 2014).

[4] Tex. R. Evid. 902(3) mirrors Fed. R. Evid. 902(3).

[5] The full title of the treaty is: Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

[6] www.hcch.net/en/instruments/conventions/authorities1/?cid=41.

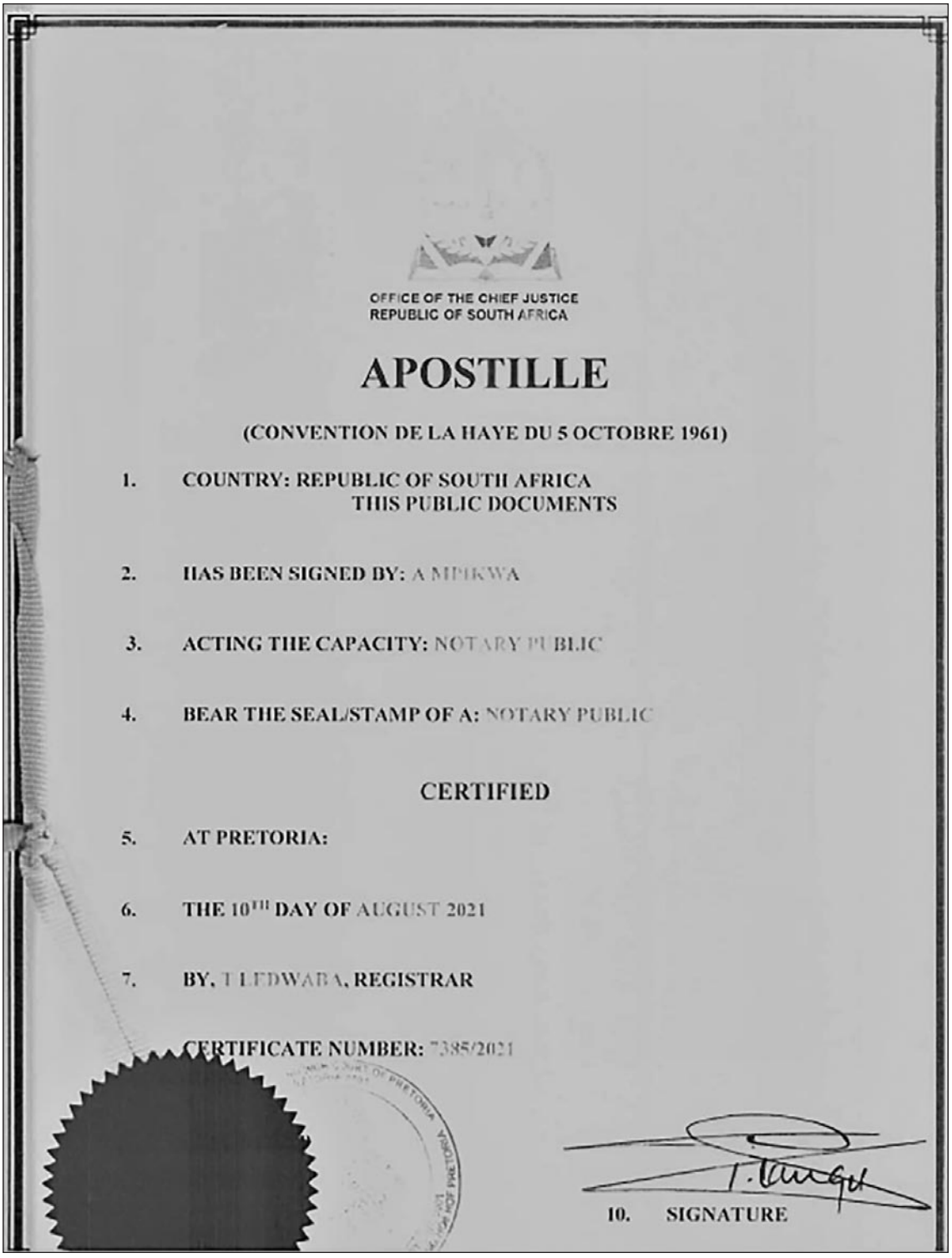
[7] The travel restrictions came from President Biden's Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease.

[8] *Paul v. State*, 419 S.W.3d 446, 459 (Tex. App.–Tyler 2012, pet. ref'd).

[9] *Gonzales v. State*, 818 S.W.2d 756, 766 (Tex. Crim. App. 1991).

[10] *Rivera v. State*, 381 S.W.3d 710, 713 (Tex. App.–Beaumont 2012, pet. ref'd).

[11] *Haggard v. State*, 612 S.W.3d 318, 328 (Tex. Crim. App. 2020).



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

APOSTILLE

(CONVENTION DE LA HAYE DU 5 OCTOBRE 1961)

1. COUNTRY: REPUBLIC OF SOUTH AFRICA
THIS PUBLIC DOCUMENTS

2. HAS BEEN SIGNED BY: A MPIKWA

3. ACTING THE CAPACITY: NOTARY PUBLIC

4. BEAR THE SEAL/STAMP OF A: NOTARY PUBLIC

CERTIFIED

5. AT PRETORIA:

6. THE 10TH DAY OF AUGUST 2021

7. BY, T LEDWABA, REGISTRAR

CERTIFICATE NUMBER: 7385/2021

10. SIGNATURE

The apostille certificate from our case

In memory of Carol Vance

Editor's note: Carol Vance, who served as the elected District Attorney in Harris County from 1966 to 1978, passed away in June at the age of 88.

Mr. Vance was seminal in the formation of the Texas District & County Attorneys Association, he served on the Texas District & County Attorneys Foundation's Advisory Committee from its inception in 2006 until his death, and he was ahead of his time when it came to training prosecutors, serving crime victims, and creating efficiency in the criminal justice system. Prosecutors across the state owe much to Carol Vance, his leadership, and his innovative ideas. We asked four of his former colleagues to write about their memories of him, not only as a prosecutor but also as a man and friend.

Carol Vance, former District Attorney in Harris County, photographed at a TDCAF fundraiser in his honor in 2010

Bert Graham
Former Assistant District Attorney in Harris County

I am honored to write about my former boss and good friend Carol Vance. I first met Carol when he hired me as an Assistant District Attorney in October 1969, and I worked for him until he went into private practice at the Bracewell & Patterson law firm in 1979.

Carol was one of those rare people who was intelligent, honest, ethical, decisive, and compassionate, and he was also a good politician. We at the office were happy for the last trait, although looking back, it seems we lived in a charmed time and place because I do not remember anyone ever asking which party I belonged to or feeling any pressure to support one party or the other.

"Just do what you think is right and don't only seek convictions" was what we were taught in Harris County, and that started at the top with Carol.

He lived up to that creed in the Joe Campos Torres case in 1977, which drew national attention. Houston Police Department officers were called to the scene of a disturbance where, during their attempt to arrest Torres, he received a cut on his shin. Rather than follow procedure by taking him to the hospital and then to jail, the officers took him to Buffalo Bayou, where they beat him and told him to swim for his freedom. They forced him into the bayou with his boots on, and he drowned. A rookie officer at the scene, greatly disturbed by his fellow officers' conduct, broke the traditional code of silence prevalent at that time and reported the crime to his Chief of Police, Pappy Bond, who then reported it to Carol.

Carol took the allegations very seriously and assigned the case to me as lead counsel with then-ADA Ted Poe's assistance. As the case progressed from indictment to trial, Carol was under intense pressure. On one hand, some in the Hispanic community adamantly believed that Torres had been intentionally murdered, and they were deeply skeptical that the DA would fully prosecute his law enforcement partners. On the other hand, some in the police department were concerned that Carol was scapegoating the accused officers to placate the Hispanic community.

Despite all these concerns, Carol was always supportive of Ted and me, never wavering from his guideline that we should do what we believed was right according to the evidence.

The case landed in Walker County on a change of venue where legendary Harris County prosecutor Erwin Ernst was the recently ap-

pointed District Attorney. Carol reached out to Ernie, his good friend and mentor, and secured his presence at our counsel table to enhance our credibility and effectiveness during the five-week trial. We asked the jury to convict the officers of murder, but the jury instead convicted them for criminally negligent homicide. It had been difficult to prove the officers' intent to kill because Torres had been alive and swimming without restraints after he went into the water, but he then went under before reaching the other side of the bayou.

In those days, it was tough to convict a peace officer for anything, so obtaining even a lenient jury conviction in the case opened a new era. Carol and Chief Bond's stalwart stand for justice in the landmark Torres case led to the creation of the Civil Rights & Police Integrity Divisions in our office and the Internal Affairs Division in the Houston Police Department. From then on, the Harris County District Attorney had immediate prosecutorial oversight of every incident in which a police officer used deadly force.

Carol came up through the ranks as a trial lawyer. As the elected district attorney, he had less time available for personally trying cases, but he made some exceptions.

In 1976, Garth Bates was the sitting judge of the 174th District Court in Harris County, and he was caught by our Special Crimes group taking a large bribe from a defendant in exchange for a lenient sentence. Carol tried that case as lead counsel with Johnny Holmes, who would become his successor as DA. They obtained a conviction from the jury and an eight-year penitentiary sentence. [Editor's note: Read more about that in Johnny Holmes's remembrance of Mr. Vance on page 24.]

While out of state attending a 1973 National District Attorneys Association conference, Carol got a call from ADA Mike Hinton back in Houston about what *The New York Times* called "the largest mass-murder of the century." Returning to Houston immediately, Carol assumed personal control of the investigation into the murder of 27 teenage boys in Harris County. Elmer Wayne Henley, Jr. and his accomplice, David Brooks, were indicted for murder. As lead counsel in the Henley trial, Carol obtained a guilty verdict from the jury that eventually resulted in six life sentences for Henley (the death penalty had been declared unconstitutional in Texas at that time). Brooks was tried later and also received a life sentence.

Carol also deeply cared about giving lawyers the opportunity to become career prosecutors. When I started at the DA's Office, most citizens and attorneys considered the job merely a training ground for young attorneys to obtain trial experience before quickly moving into private practice. Carol wanted good lawyers to stay, so in the early 1970s, he used his position and influence with big firms and civic leaders to convince the county commissioners to raise prosecutor pay significantly enough that it would modestly support a family.

When I started at the DA's Office, most citizens and attorneys considered the job merely a training ground for young attorneys to obtain trial experience before quickly moving into private practice. Carol wanted good lawyers to stay, so in the early 1970s, he used his position and influence with big firms and civic leaders to convince the county commissioners to raise prosecutor pay significantly enough that it would modestly support a family.

Carol noticed that we were mostly hiring people from Harris County law schools. Wanting to expand the pool of available talent and the diversity of our applicants, in 1977 he created a Deputy Chief of Misdemeanor position to serve as the office's hiring recruiter and assigned a young Rusty Hardin to fill it. Rusty suggested approaching some applicants in each Texas law school a year before they would graduate, just as the big civil firms did, and offering those considered the best a job in advance of graduation and the bar exam. Thus, the first "precommit" program for prosecutors was created.

When Carol saw inefficiencies in the criminal justice system, he fixed them. For example, there were no programs to assist victims and witnesses until Carol approved Jim Larkin and Suzanne McDaniel seeking a grant for Suzanne to become the first Victim Witness Coordinator in the state. After starting the state's first victim services program, Suzanne went on to become a leader in victims' rights in Texas, in the Attorney General's Office, and later as TDCAA's first Director of Victim Services before her death in 2012.

Carol also loved sports (probably fourth only to his faith, family, and country). He formed office teams in softball and football and maintained an office tennis ladder where he remained on top until he hired Mike McSpadden, who happened to be a Big Eight (now Big 12) Conference singles champion. Carol promptly made Mike his doubles partner and they ruled together for years. Carol was quick to explain to any skeptics that Mike was hired for his legal skills first and foremost, and Mike's record bears that out as he rose through the ranks to become a formidable chief felony prosecutor and a respected district court judge.

Carol was an exceptional athlete and competi-

tor and won many senior tennis championships as he grew older. He would not stop competing. We once had an office picnic where Carol insisted on playing a touch football game before supper. It was the felony prosecutors versus the misdemeanor prosecutors and Carol, of course, was the quarterback for the felony team. He pronounced that there would be no stoppage until one team was ahead by two touchdowns. As hunger ate at us and darkness approached, we played on and on. As probably the hungriest person on the field, I suggested we call it a draw, but Carol said no. I then went to the opposing misdemeanor huddle and asked them to throw an interception so we could eat. They rejected my offer, the game continued, and although I have forgotten the final score, Jack Frels says his misdemeanor team won. Regardless, there were no quitters on either team, although I tried.

In later years, Carol took up golf and quickly became a force to be reckoned with at our semi-annual Ted Busch Golf Tournament that Busch, Larkin, Tommy Dunn and I started in 1976. That tournament had a side benefit of including young new prosecutors each year and infusing their energy and fresh outlooks into the tradition of the old-timers. Carol always enjoyed the weekend, and the youngsters enjoyed his stories at dinner.

Carol accomplished so much in his professional life, and the profession of prosecution owes him much thanks. He was so driven to compete in all phases, but he did all that with such grace and honesty that he inspired those of us on his team to do our best for justice while leaving it all on the field. I feel forever grateful and lucky that Carol hired me, and especially that he did it before he dreamed up his hiring committee. Rest in peace, my good friend.

Ken Magidson
Former DA in Harris County & TDCAF Board President

In Harris County and throughout the state of Texas, Carol Vance's name takes on mythic proportions. However, it was not until his passing in June that I really considered the full impact of his life and legacy, both on the profession as a whole and on myself personally.

In 1976, Carol hired me as a fledgling member of the Harris County District Attorney's Office. Eager to try cases, I knew that the DA's office would provide me with the necessary experience and skills. What I quickly realized, though, was that the reputation and expertise of the office had less to do with the individuals who worked there and more a result of Carol's leadership. He cultivated an atmosphere of excellence where prosecutors strove to be at the top of their game. Like a coach leading a team, he encouraged detailed and complete preparation, healthy competition, and good sportsmanship among his lawyers. Carol was interested in cultivating the individual players as well. Never judgmental or angry, he mentored us and helped us to grow better as prosecutors. He expected us to perform at our best and to pursue excellence. We strove to meet his expectations, to elevate the office, and to well-represent the State of Texas. We never feared his censure or his anger—only that we would disappoint him.

As a result of his leadership, the courts knew that they could expect prosecutors at the top of their game, skilled in courtroom tactics, and ethical in their behavior. The public trusted him as well, electing him to office four times. Carol brought faith to the criminal justice system: If a case was brought by his office, it was because the facts and the law supported it, not because of political considerations, emotional reactions, or personal ambition. The public trusted that justice was being served and that all parties were represented fairly within it.

Carol Vance fostered openness and transparency before they were corporate tag phrases. He lived to "do the right thing, in the right way, for the right reasons." He believed that everything was done on the record and advised me to make each difficult decision as if Mike Wallace of "60 Minutes" had a camera in my face. That attitude and those words carried him throughout his

Carol Vance, at left, pictured with Ken Magidson, at right

years but also resonated throughout my own 41 years in public service.

In today's world where the criminal justice system and its fairness are open to question, DAs might well reflect upon Carol's example and remember the duty of all prosecutors: to secure justice, not convictions. Carol's leadership provided a model that I and others followed. The world is a better place because Carol Vance lived in it.

John Holmes, Jr.
Former District Attorney in Harris County

Carol Vance was a perfect example of what a district attorney should be. I am proud to have been an on-scene observer.

He served as an assistant district attorney for eight years before being appointed the elected official in 1966. One of the implementations he created during his service was a hiring committee. He assigned assistant district attorneys to this committee to interview applicants, answer their questions, and review their qualifications. The committee then recommended to Mr. Vance who should be hired as an assistant. Carol observed that this procedure was much more efficient than if he performed the task himself, and more importantly, the staff participated in whom they worked with as fellow employees. He felt that this was a most important factor and rarely overruled the hiring committee, although it was fully understood that he could certainly do so where he felt it appropriate.

John Holmes, Jr., speaking at a 2010 event honoring Carol Vance

Another Carol Vance innovation was the Harris County District Attorney Operations Manual. This was a lengthy manual that explained and described the rules with respect to the disposition of cases, recommendations, a prosecutor's discretion, and other matters that prosecutors deal with daily. One example was homicides. The manual provided that no prosecutor shall recommend probation in a homicide unless and until the district attorney approved the recommendation for good cause. Otherwise, probation was a jury or judge decision, not a recommendation of the State of Texas through the prosecutor. Where a rule didn't fit a particular case, the prosecutor was encouraged to seek supervisor approval of a change. There were plenty of other rules in this manual that provided stability and consistency in the disposition of criminal cases.

For ages, the practice of filing charges in the State of Texas, certainly including Harris County, was that a law enforcement officer would present his reasons to believe a crime had been committed to a justice court, and the court would cause a complaint to be filed and an arrest warrant to be issued. The downside of this practice was that the decision as to whether an offense had been committed and that probable cause existed to believe the person alleged was the offender was made not by the justice court, but rather by the judge's clerk. This circumstance did not ensure that a judicial official made the charging decision based upon probable cause, and the result was that the charged person was jailed and the case dismissed if probable cause did not exist. Mr. Vance believed this process was deficient and could be significantly improved.

His improvement became known as Central Intake. He created a 24-hour operation where prosecutors were assigned to screen cases that officers wanted to file against a suspect. The initial location of this process was the ground floor of the Houston Police Department. It was unpopular, at least initially, with peace officers, who now had someone grading their papers before anyone was charged or jailed. The result of this procedure was fewer cases dismissed at the trial level. One case that I specifically remember is a person who spent several days in jail for possessing a zipper bag of Tide detergent.

Once when I was an assistant DA assigned to the Special Crimes bureau, we got word of a possible bribery of a district judge. I began an investigation of the matter and ultimately made a case on District Judge Garth Bates. He wanted $60,000 to give a hijacker probation. We attempted telephone contact with the judge via the snitch, but the judge wouldn't talk to him about it. We put the money in a safety deposit box, and we were on the scene when the judge picked up the money—but there was a problem. I had gotten the money from our county judge, and it was in hundred-dollar bills. Rather than having to write down the serial number of each bill, I decided to photocopy them in the office before 5

a.m. of the drop day. While we were sitting at the bank where the judge was coming to get the money, I got a call on the radio. One of our special crimes prosecutors, who always came to the office early, asked, "Unit 30, did you leave something in the Xerox machine?" Apparently, I forgot to remove the last page of 10 $100 bills when I had completed copying, and thus we were $1,000 short of the $60,000 the judge was expecting in the safety deposit box.

It turned out to be fortunate because it gave us the opportunity to have the person bribing the judge to call and say that he had accidently shorted the safety deposit box by $1,000 but that he would replace it when convenient to the judge. That was the first time the judge let his hair down on the telephone and admitted to the elements of the offense. Of course the call was made in our offices and was completely recorded.

Carol Vance insisted that I try the case because I had worked so hard on developing it. This was not an unexpected position from him, and I frankly expected it. I told him that I would sit with him but that he should try the case because anyone other than the elected prosecutor trying the case might suggest that there was something wrong with it. He ultimately agreed with me, and we tried the case together. The judge was sentenced to time in the Department of Corrections (now TDCJ). His appeal didn't work either. So many elected prosecutors don't try cases. Carol was not that way.

There are many more examples of Carol's contributions to the criminal justice system, but time and space cannot include them all. Carol Vance was an outstanding district attorney, and I was very proud to be a part of his office.

Ron Woods
Former Assistant District Attorney in Harris County

I had the great privilege of working for two law enforcement icons: FBI Director J. Edgar Hoover and Harris County District Attorney Carol S. Vance. I was hired by Carol in 1969 after serving four years as a Special Agent and Legal Advisor in Hoover's FBI.

Carol was still a young man in 1969, having been appointed Harris County District Attorney by Governor John Connally three years earlier at age 32. Carol had been an assistant district attorney in the office for eight years prior to his appointment, so he knew what prosecution in a big city was all about, and he had his own ideas on what he wanted to do with the office and the policies he wanted to implement.

Carol was an extraordinary boss and leader. He was very friendly and laidback in his management style. He was not constantly looking over our shoulders. He hired quality lawyers, both male and female, and allowed them to handle their cases as they saw fit, always with his admonition of, "Do the right thing in the right way for the right reasons." He felt that he had hired good people who were mature and honest enough to make their own decisions.

As an administrator, Carol selected the most honest, respected, and experienced assistants to serve as supervisors as the office grew and new assistants came on board. Carol instituted "Prosecutor School" to teach the new assistants the proper way to handle cases, and it was always governed by honesty, integrity, and fair play. We were there to see that justice was done. Carol had no problem if an assistant believed a case should be dismissed because it was a "dog case" and should not be prosecuted. Carol's message, again, was "do the right thing for the right reasons."

Carol also sent his prosecutors to the new (at the time) National College of District Attorneys, which started in 1970. This college was initially located at the University of Houston Law School and subsequently moved to Columbia, South Carolina. The college had a full curriculum of courses on prosecution, forensics, direct and cross examination, substantive criminal law, etc. In addition, the National District Attorneys Association would conduct seminars in major cities across the country and Carol would send his assistants to learn the latest updates in prosecution. We all felt that we were properly trained and up-to-date on all substantive and procedural criminal law.

Carol instituted many new programs as the population of Harris County dramatically increased, the number of district and county criminal courts increased, and our office numbers increased. He sought a grant from the federal government to create a Special Crimes Division to investigate and prosecute crimes that the local

Carol hired quality lawyers, both male and female, and allowed them to handle their cases as they saw fit, always with his admonition of, "Do the right thing in the right way for the right reasons." He felt that he had hired good people who were mature and honest enough to make their own decisions.

Interestingly, Carol never drew an opponent in this elected position during his tenure. This goes to speak to the respect he had in the community.

police departments were not set up for nor experienced enough to investigate, such as white collar crime, organized crime, and large narcotics conspiracies. Carol received funds for separate office space, cars, communications equipment, and salaries for four assistants and staff to conduct such investigations. I was honored to be one of the initial members, along with Mike Hinton, Bob Bennett, and Warren White. The division has continued and grown to be a major part of the office today.

During this time, Carol was very active in the county and state bar associations and was chosen as Outstanding Young Man of Houston by the Houston Junior Chamber of Commerce, the Outstanding Young Lawyer in Texas by the Texas Young Lawyers Association, and Outstanding District Attorney in the U.S. by the National District Attorneys Association. Carol, along with his First Assistant Sam Robertson and Assistant District Attorney Mike Hinton, were also very involved with the Texas Legislature in drafting a new Texas Penal Code, which was adopted in 1974.

Interestingly, Carol never drew an opponent in this elected position during his tenure. This goes to speak to the respect he had in the community. By the time he left for private practice at Bracewell & Patterson (now Bracewell) in 1979, Carol had created a reputation for integrity, innovation, and leadership of a major law enforcement organization that was on par with that of FBI Director J. Edgar Hoover. A fun fact: Carol told me his name had been mentioned in the search for a new FBI Director after Hoover died in 1972 and his replacement, L. Patrick Gray, had been sacked for destroying documents in the Watergate investigation.

Many of the lawyers who trained under and worked for Carol went on to be criminal district judges in Harris County; prominent criminal trial lawyers in the state, such as Dick DeGuerin and Rusty Hardin; United States Attorneys for the Southern District of Texas, such as Ed McDonough, Henry Oncken, Mike Shelby, Ken Magidson, and myself; and one of his assistants even went on to be the CEO of Delta Airlines. The lawyers who trained under and worked for Carol Vance are some of the best people I have ever met. Many are still close friends. We all take great pride in the fact that we worked for one of the best district attorneys in one of the best DA's offices in the country. He made us all proud of being prosecutors and members of his office. The alumni who worked for Carol still get together and share memories and friendships.

One alumnus, Chuck Rosenthal, former District Attorney in Harris County, shared with the group an email he got from Carol in 2019—it was a reply to a message from Chuck telling Carol how much he appreciated working for him: "Chuck, Thanks for that nice note. I got appointed DA when I was 32 years old. That was a little scary, but I tried not to speak out unless I had something to say. The press and everyone in the office and out of the office seemed to want me to succeed. I was most fortunate. What a great bunch of lawyers who went through the office in my days. I loved being DA, much more than practicing law, although that was more fun than I first realized. Nothing is more fun than being a chief prosecutor and trying those Saturday night shootouts. I tried a lot of civil cases—got the highest verdict ever in Texas in a case against the *Dallas Morning News* and tried an antitrust case in London involving the big oil companies—but those Saturday night killings were the most fun to try. More excitement than I could stand at times. —Carol." ❇

Let the buyer beware of asphalt paving scams

"Hey, I was just paving your neighbor's driveway down the road, and I happen to have some asphalt left over. I can make you a real good deal if you let us pave your driveway today." And so the scam begins.

By Brandi Robinson (left)
First Assistant District Attorney in Austin County, and
Nancy Hebert (right)
Assistant District Attorney in Montgomery County

What is a paving scam, anyway?

Paving scams may be unfamiliar to some, but many rural prosecutors have dealt with this particular menace for decades. For a variety of reasons, scammers favor rural communities with numerous gravel driveways and a significant elderly population.

The scam works this way: The scammer shows up in a work truck and claims to have some leftover asphalt or sealant. He offers to pave or seal the victim's driveway for a fairly low cost and asks for payment up front. (Asphalt paving is the most common scam, but some scammers will offer to do other handyman-type work such as roof repair, insect extermination, or tree trimming.) If the scammer gets significant money in cash and is moving on from the neighborhood fast, he may simply leave and never come back to start any work.

Most paving scammers do a very small amount of poor work, especially if they intend to hit other houses in the same neighborhood. The scammer may, for instance, place a sticky, tar-like "sealant" on a gravel driveway that makes the driveway impossible to use without getting the black coating all over a vehicle. Then the scammer comes back and demands an unreasonable amount of extra money to lay down cheap asphalt to make the driveway useable again.

A particularly bold scammer might tell the homeowner that he wants a flat fee, say $2,000, up front for the entire job. After he puts down cheap black sealant, the scammer may come back and demand $10,000 instead of the agreed fee. Despite the poor performance and original deal, the scammer will try to shake down the homeowner for an additional $8,000.[1]

When a homeowner refuses to pay, the scammer typically curses, yells, and threatens to call the police or sue the homeowner. If the homeowner stands firm, the scammer may come back with more men to try to intimidate the victim. Generally, the pavers stop short of threatening physical violence. However, the harassment causes most victims, especially the isolated and elderly, to pay up anyway, thus completing the scam—or what we prosecutors like to call "theft."

An ounce of prevention

Any time we deal with organized criminal activity, an ounce of prevention is worth a pound of cure. Here, effective prevention requires two things:

1) early law enforcement identification of scammers, and

2) effective public outreach to educate potential victims.

Identification. A scammer's ability to pass himself off as legitimate and hide his true identity from law enforcement and potential victims is one of his strongest weapons. What are the

hallmarks that help distinguish these criminals from legitimate businesses?

Tools of the trade. A scammer typically carries at least some asphalt paving tools and raw materials with him in a professional-looking work truck. Some trucks even have logos that identify them as "county" vehicles, and those scammers may claim they work for the local road and bridge crew. Other work trucks proudly display company signs (which may be magnetic and easily transferrable to other vehicles). One thing scammer trucks rarely display is valid, in-state license plates. Instead, the vehicles have out-of-state plates, plates obscured by debris, plates that come back to a different vehicle, or no license plates at all.

One thing scammer trucks rarely display is valid, in-state license plates. Instead, the vehicles have out-of-state plates, plates obscured by debris, plates that come back to a different vehicle, or no license plates at all.

Scammers also carry professional-looking business cards to dupe homeowners. However, the name on the card may not match the person carrying it. And while a scammer's card may include the company name, a quick internet search often shows that associated social media accounts are for a company that is not based locally. Likewise, despite a scammer's claims that he just "happens to be in the area," any Texas address on his card may be hundreds of miles away, and the address may be for a P.O. Box, not a local physical storefront. Scammers count on the elderly to not look beyond the fake credentials.

Some scammers have even joined chambers of commerce or established Better Business Bureau accounts, only to opt out and then rebrand themselves once they have received a number of complaints. Because scammers are itinerant, they hide in plain sight before moving on once local law enforcement catches on to the grift.

Flight and family. A paving scammer's success relies on a transient lifestyle. They regularly travel to new towns, counties, or states to avoid investigation and prosecution. They often have an interconnected network of family and friends who travel and form brief bases across the country, sharing information and helping each other perpetuate these schemes.

Investigators and prosecutors should be aware that identifying one scammer is rarely the end of the road. Rather, we should look for other members of the family or group who may continue to operate even after the first suspect is caught. Also, be mindful that larger organized groups often share work trucks, vehicle registrations, fake IDs, business cards, and signs to help confuse law enforcement. For example, an officer may investigate Joe Smith with "Four Brothers Paving" for scamming people in one town, only to learn that the same man in the same vehicle is now calling himself Bill Jones with "Four Sons Paving" in the next town. Meanwhile, a fellow scammer will take on Joe Smith's identity in a new town of his own.

Partial performance. Paving scammers also rely, in large part, on our prosecutorial indifference. I mean, isn't this sort of case civil? After all, these cases differ from a simple no-performance case where the scammer takes the money and runs without doing any work. Likewise, these scammers largely avoid threats or violence that would make a clear-cut robbery. Instead, scammers attempt to work in the space between extremes, relying on intentionally poor performance as a shield against prosecution.

The scammer who charges an exorbitant price to put down a layer of cheap tar in some poor grandmother's driveway has succeeded in two ways. First, he has created a nuisance that he can then use to extort even more money from the victim to fix. Second, he can argue that he has, at the very least, partially performed their agreement. (A poorly performed contract is still a contract, right?) Especially if the scammer aggressively demanded more money but never physically threatened anyone to get it.

Our office has dealt with some scammer groups who keep a criminal defense attorney on permanent retainer specifically to make that argument when caught. This lawyer earns his keep by giving the State the usual spiel: "This is a civil matter; this was all a misunderstanding" and "Since my clients provided partial performance, you will never prove this case." At most, the attorney will ask how much restitution the scammers need to pay to get prosecutors to drop the case completely. It can be a tempting offer. If the victim is made whole, what better outcome could you expect from prosecuting the case, especially considering the significant backlog of trials on our dockets these days? The danger with this resolution is the welcome mat that it lays for additional scammers in your jurisdiction. You have just set the cost of doing business in your county for all like-minded members of this criminal organization if they get caught.

Education

A well-informed public is not only more likely to better identify and avoid scams; they are also

more likely to notify law enforcement as soon as scammers are spotted, which makes proving these cases that much easier.

A proactive office can take simple steps to protect the public. The elected DA in Austin County, Travis Koehn, routinely gives speeches to community groups where he informs citizens about common scams, including paving scams, and how to identify and avoid them.

You may consider issuing a press release warning the community about the scam and advising them to call local non-emergency law enforcement to report suspicious activity. If local newspapers are willing to publish the release, it can be tremendously helpful in educating the public. Also, if your agency has a Facebook or Twitter site, this is a great way to inform others and ask them to pass along warnings to older relatives.

Once you have a press release drafted, you can coordinate with local law enforcement agencies to put "alerts" on social media pages any time scammers are seen in the area. Alerts like these on community bulletin boards and social media pages can spread like wildfire and help prevent other victims.

Warning signs

Any community education should include warning signs that the public can use to identify potential scammers. These warning signs help them avoid being scammed and also alert them to valuable clues they can give law enforcement when questioned. The first red flags often include:

- door-to-door solicitation
- overly aggressive sales pitches
- the common catchphrase of "I just happened to be in the neighborhood with leftover material"

If pavers present themselves as local and claim they "just happened to be in the neighborhood," other common clues include:

- an out-of-state or non-local phone number on the card
- websites for an out-of-state or non-local company using the same phone number
- an out-of-state or non-local address on the card
- a P.O. Box rather than a physical business address on the card
- a work truck with either no license plates, obscured plates, or out-of-state plates
- a work truck they claim belongs to the county but which lacks local identifiers

If our offices educate citizens on how to identify scams early, we not only prevent them from becoming victims, we also turn them into more observant witnesses for law enforcement.

Prosecuting such cases

Prosecuting these complex cases requires special attention in three main areas: the pleadings, the proof, and the plan.

The pleadings

Theft and Fraud provisions. These can cover much of the conduct committed by paving scammers. Texas's Theft statutes (Penal Code §§31.01 and 31.03) provide a way to prosecute a defendant who intentionally promises things that he knows he will not provide in a scheme to induce an owner to pay him.

Put in overly simple terms, when a contractor makes promises he knows he cannot or will not keep to get a victim's consent, then the contractor likely has engaged in deception.[2] When the contractor then uses that deception to get a victim to pay him, and the contractor intends to deprive the victim of that property (money) through the deception, then the contractor likely has committed theft by deception.[3]

Put in overly simple terms, when a contractor makes promises he knows he cannot or will not keep to get a victim's consent, then the contractor likely has engaged in deception.

Deceptive Business Practices Act (DTPA).[4] The DTPA offers another charging option that could be useful. It is a Class A misdemeanor to represent the price of a service falsely or in a way tending to mislead.[5] When a scammer initially represents a single, flat fee for the entire service and later tacks on an additional undisclosed fee prior to completion, he likely runs afoul of this subsection.

It is also a misdemeanor to make a materially false or misleading statement of fact concerning the reason for, existence of, or amount of a price or price reduction.[6] Scammers who claim they run a local business and have extra materials from a neighborhood job easily meet this element if this information proves to be false. However, this may be difficult to prove, as it would require the State to show the scammer had not sold other services in the area.

Ch. 162 of the Property Code and Misapplication of Fiduciary Duty.[7] The Property Code contains a consumer protection statute that provides another possible charging avenue. Under certain circumstances, this statute defines

money given to persons who perform improvements to real property as "trust funds."[8] Improving a driveway would constitute an "improvement to real property." The statute also makes the holder of these funds a "trustee."[9]

The statute further states that the "trustee acts with intent to defraud when the trustee ... retains, uses, disburses, or diverts trust funds and fails to establish or maintain a construction account as required by Tex. Prop. Code §162.006" (for projects greater than $5,000.00) or fails to establish the accounting required under Tex. Prop. Code §162.007. The penalty ranges from a Class A misdemeanor to a Felony 3.[10]

Prosecutors are not limited to prosecuting under the Property Code. In fact, the Property Code actually allows for prosecution under other statutes.[11] This law allows prosecutors to consider Texas Penal Code §32.45, Misapplication of a Fiduciary Duty. This statute defines a "fiduciary" as "a trustee" or "any other person acting in a fiduciary capacity. ..."[12] As we see above, a contractor receiving funds to make improvements to real property can qualify as a "trustee" of those funds. Caselaw has also found contractors to be acting in a fiduciary capacity using the common understanding of the term.[13]

Encourage law enforcement to identify where the defendant has been staying. Canvassing local motels, RV parks, and trailer parks to look for vehicles involved in scams can be useful because scammers may set up temporary shop in these areas while they hit a county.

The statute defines "misapply" as dealing with property contrary to an agreement under which the fiduciary holds the property (money).[14] Caselaw has clarified that a written agreement is not even required—a verbal understanding is sufficient.[15] "Misapply" is also defined as dealing with property (money) contrary to "a law prescribing the custody or disposition of the property."[16] Chapter 162 of the Texas Property Code constitutes just such a law.

Misapplication of a Fiduciary Duty occurs when one "intentionally, knowingly, or recklessly misapplies property ... [held] as a fiduciary ... in a manner that involves substantial risk of loss to the owner of the property. ..."[17] The level of the offense is based on a value ladder similar to the theft statute. It even contains an enhancement for elderly victims.

The proof

Once you have a suspect and have decided on the appropriate charge, the real identification work often begins. Due to the transient nature of the scams, it is crucial for officers to positively identify the defendant. Scammers often have priors and warrants in other counties and states. Make sure to run a criminal history from across the country that includes a name and all possible aliases. A search of a vehicle incident to arrest or based on a warrant may turn up other possible identifiers.

Also encourage law enforcement to identify where the defendant has been staying. Canvassing local motels, RV parks, and trailer parks to look for vehicles involved in scams can be useful because scammers may set up temporary shop in these areas while they hit a county. This can help law enforcement identify targets for search warrants, as well as other people who may be living with and connected to the defendant and the schemes. These search warrants may provide a treasure trove of fake IDs, vehicle registrations, license plates, business cards, and work signs. Each of these items can identify other cases where a defendant may have been involved, other members of the criminal enterprise, and other counties he may have hit. Officers executing warrants may also find evidence of other criminal charges such as Fraudulent Possession of Identifying Information, forgeries, or bad check scams.

Also, because these defendants often work in family groups, it can be particularly helpful to identify anyone visiting or calling a jailed defendant. If you run these associates' criminal histories as well, you may learn that they match the descriptions of other scammers in the area or that they, too, may have pending warrants out for similar crimes. Paving scammers also may describe their schemes in jail calls, although they may use codes or even another language to hide what they are discussing. Note that some paving scammers we have encountered have spoken a Romani dialect on jail calls. Historically, Romani people, or "Roma," sometimes have been called "Gypsies," but many consider that term offensive and discriminatory. Be mindful of those pitfalls before using those terms, even if some defendants self-identify in that way.

Because scammers use various means to hide their identities, getting details from witnesses about the solicitors' vehicles, business cards, physical descriptions, identifying marks, and clothing is vital. Scammers sometimes wear flashy religious jewelry to help gain trust with religious homeowners, so identifying such jewelry can be particularly useful. Because scammers tend to hit several neighborhoods within a county in just a few days, the faster local agencies

share this information with each other, the better. Also, look for area electronic recordings from nearby businesses, Ring doorbells, or electronic home recording device footage. Tracking down and identifying evidence of conspiracy, organized crime, and past bad acts may form the keystone of a criminal case.

The plan

In the September-October 2019 issue of The Texas Prosecutor journal, Ty Stimpson, then an ADA in Tarrant County, wrote an excellent article describing "when civil liability gives rise to criminal prosecution."[18] Anyone considering prosecuting paving scammers should give it a look. One key point he made was this: "What tends to help prosecutors with 'partial performance' complaints is the contractor usually has a history of doing this to other people." When it comes to paving scammers, the payoff to identifying a defendant's background, as well as the backgrounds of his family and associates, is that their history often serves as a pipeline to prior acts that show a criminal predatory pattern rather than partial performance in a civil dispute.

Texas Rule of Evidence 404(b)(2) is a fast friend in these cases. Although prior bad acts are generally inadmissible to prove the character of the defendant, they may be admissible when used to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Evidence of other similar contract disputes or a recent trend of failure to perform can create a rational inference of a defendant's knowledge and intent to deceive a victim.[19] Depending on a given fact pattern, a case may rely heavily on proving this is a grander criminal scheme or plan instead of a civil matter. When you plan to use such evidence, remember to provide reasonable notice to the defense well before trial of the defendant's bad acts.

If paving scams are relatively common in your county, it is a good idea to make and retain a scammer file for your office, because many scammers pass through the same counties in cycles. In Austin County, each time a group of paving scam-

Protecting against the scam

What can we do to help our citizens? Unfortunately, the law does not require all contractors to be licensed.[1] For instance, a handyman, general contractor, or builder is *not* required to have a contractor license to operate in Texas. However, some local municipalities may have adopted local laws requiring paperwork or permits. Contractors who specialize in other trades—these include plumbers, electricians, and HVAC technicians, fire sprinkler installers, well drillers, mold remediation contractors, and those installing elevators and escalators—can be required to carry a state license. Failure to comply with licensing requirements is usually a misdemeanor under the Occupations Code. Keep in mind that even if the contractor does not consider himself an electrician, plumber, or HVAC tech, a license may still be required if he is performing those trades.

Here are the top 10 things the public can do to protect against scams:

1) If a license is required, check a contractor's license status at www.tdlr.texas.gov.
2) Get two to three bids—do not accept the first low bid.
3) Check two or three references.
4) Require a written contract.
5) Do not make a large down payment; make payments as performance is done.
6) Monitor the job in progress.
7) Do not make the final payment until the job is complete.
8) Keep all paperwork related to the job.
9) Photograph the progress of the work.
10) Contact the Better Business Bureau (BBB), either by searching for the company on BBB.org or by directly contacting a local branch of the BBB.

Remember: An ounce of prevention is worth a pound of cure. If something sounds too good to be true, it probably is. So, the next time someone just happens to be in the neighborhood and starts offering an unbelievable deal for that leftover asphalt, tell your family, friends, and neighbors to just say, "No!" ❇

Endnote

[1] See, 2022 Texas Businesses Licenses and Permits guide, published by the Governor's Office at https://gov.texas.gov/business/page/business-permits-office.

mers passes through, we gather all the information we can on the person or group, link up known associates and AKAs in our system, and put the hard copies in our main scammer file. Because these defendants tend to circle back to areas they find lucrative, this file helps us identify them more quickly when they return. You might even consider calling the district and county attorneys in neighboring counties that scammers could target to warn them. Quickly sharing information between all agencies is key in not only identifying these defendants, but also in proving the scheme and pattern of conduct that ultimately makes their actions criminal. ❇

Endnotes

[1] See *Boswell v. State*, 2012 WL 3629922 (Tex. App.–Austin 2012) (not for publication), for a textbook example of a common asphalt scam fact pattern.

[2] Tex. Penal Code §31.01(1)(A) or (E).

[3] Tex. Penal Code §31.03(b)(1); § 31.01(1)(e); See *Taylor v. State*, 450 S.W.3d 528, 535-40 (Tex. Crim. App. 2014); *Merryman v. State*, 391 S.W.3d 261, 272 (Tex. App.–San Antonio 2012, pet. ref'd).

[4] Tex. Penal Code §32.42.

[5] Tex. Penal Code §32.42(b)(9).

[6] Tex. Penal Code §32.42(b)(10).

[7] Tex. Penal Code §32.45.

[8] Tex. Prop. Code §162.001.

[9] Tex. Prop. Code §162.001.

[10] Tex. Prop. Code §162.032.

[11] Tex. Prop Code §162.033.

[12] Tex. Penal Coe §32.45(a)(1).

[13] See, *Berry v. State*, 424 S.W.3d 579 (Tex. Crim. App. 2014) (should use common meaning of fiduciary, but did not apply in this case); *Merryman v. State*, 391 S.W.3d 261, 270 (Tex. App.–San Antonio, 2012, pet. ref'd).

[14] Tex. Penal Code §32.45(a)(2)(A).

[15] *Gonzalez v. State*, 954 S.W.2d 98, (Tex. App.–San Antonio, 1997, no pet._; and *Merryman v. State*, 391 S.W.3d 261, 270 (Tex. App.–San Antonio, 2012, pet ref'd).

[16] Tex. Penal Code §32.45(a)(2)(B).

[17] Tex. Penal Code §32.45(b).

[18] www.tdcaa.com/journal/when-civil-liability-gives-rise-to-criminal-prosecution.

[19] See *Taylor v. State*, 450 S.W.3d 528, 535-40 (Tex. Crim. App. 2014); *Merryman v. State*, 391 S.W.3d 261, 272 (Tex. App.–San Antonio 2012, pet. ref'd).

A guide to bond forfeitures

Like every other office, ours became extremely backlogged during the COVID shutdown.

By Skyler Schoolfield
Assistant District Attorney in Brown County

I was tasked with reducing that backlog, and one area in particular was judgments nisi. I had heard of judgments nisi before, but I had no idea where to start or how to pronounce "nisi." When I looked for resources, I couldn't find any, so I had to piece together information from various codes, rules, articles, forums, prosecutors, and judges to figure out how to take a judgment nisi from start to finish.

To prevent other prosecutors from going through that same time-intensive process, I have compiled that information into an article to serve as a practical guide for prosecuting bond forfeitures so that any prosecutor can successfully take the judgment nisi from entry to finality. This article will address what happens in the criminal case when a defendant fails to appear, the process for initiating the action, resolving the action, and finally, post-judgment issues.

Failure to appear

As we all know, despite bonds, defendants still fail to appear, so what do prosecutors do when that happens? First, request that the bailiff call the defendant's name distinctly at the courthouse door.[1] If the defendant does not respond, request that the bond be forfeited, a capias be issued for the defendant's rearrest, and a judgment nisi be entered.[2] The court may also require the defendant pay a cash bond after he has been arrested on the bond forfeiture warrant.[3] If the judge grants the request for a judgment nisi to be entered, request a certified copy of the bond and bailiff's certificate.[4] They contain the information necessary to draft the judgment nisi.

Introduction to judgments nisi

A judgment nisi alone does not entitle the State to recover the bond.[5] A judgment nisi is a provisional judgment that may become final,[6] which means that requesting that a judgment nisi be entered is only the first step to forfeiting a bond. ("Nisi" is Latin for "unless," and a judgment nisi is an intermediate judgment that will become final *unless* a party appeals or formally requests the court to set it aside.) After the judge grants the request to enter a judgment nisi, the State must draft and file a judgment nisi with the clerk's office, which the judge will then sign.

The statute of limitations for filing a judgment nisi is four years after the defendant's failure to appear. The preferred approach is to file the judgment nisi as close to the failure to appear as possible because 1) working bond forfeitures as they arise prevents backlog, and 2) the number of days between the filing date and the defendant's rearrest impacts what the State can ask for at the final hearing.

When the bond forfeited is a surety bond, the parties to a judgment nisi are the State, the surety (the bondsman—a surety is someone who is liable for the debt or performance of another), and the principal (the defendant in the criminal case). When the bond forfeited is a cash or personal bond, the parties to the judgment nisi are the State and the principal (defendant).

Bond forfeitures use both civil and criminal law. The process is governed by Chapter 22 of the Texas Code of Criminal Procedure; however, filing a judgment nisi creates a civil lawsuit and civil rules govern the proceedings, including use of the civil standard of proof, the preponderance of the evidence.[7]

Service of process

After the judge signs the judgment nisi, the clerk will serve the citation on the surety and, in most circumstances, the principal.[8] The citation provides the defendants with notice of the suit. The citation includes a copy of the:

- judgment nisi,
- forfeited bond, and
- a power of attorney attached to the bond, if any.[9]

Texas Rule of Civil Procedure 99 governs the form of the citation. The citation will also inform the parties that they must appear and show cause why the judgment nisi should not be made final.[10] Although the clerk is the one who issues the citation, the State must make sure that the citation was issued correctly.

Serving the surety. Service of citation on the surety is done following the same rules as required in civil cases.[11] Typically, service is completed by mailing the citation to the surety by certified mail, return receipt requested.[12] If the surety is an individual, the citation is mailed to the individual.[13] More commonly, the bondsman will be a business.

Texas Code of Criminal Procedure Art. 22.13 lists five grounds for exoneration that operate as affirmative defenses; the surety and principal are limited to those five grounds. If the surety or principal intends to claim any of these grounds, they must specifically plead that ground for exoneration in its answer.

There are two types of bail bondsmen: a property bondsman and an insurance bondsman. A property bondsman is an individual doing business as a company name. The bonds are backed by a cash deposit or collateral accompanied by an oath of surety. If the surety is a property bondsman, the citation is mailed to the individual dba the bonding company name (i.e., Tina Bondsmen dba Bail Bonds).

An insurance bondsman is an insurance company that also operates as a bondsman. The agents of the insurance company will run the bonding business and take bonds, but the party is the insurance company, *not* the individual bondsman or agent that took the bond. (The agent is not liable for the bond.) The insurance company must have its registered agent (the attorney designated to receive service of process) on file with the Office of the Secretary of State and with the Bail Bond Board, if applicable. The party's name will include the insurance company, agent, and bond company name (i.e., Criminal Insurance by and through Tina Bondsmen dba Bail Bonds). If the bondsman is an insurance company, citation is mailed to the attorney designated for service of process.[14]

The surety may waive the service of the citation, or the surety may designate a person to receive the service of citation.[15]

Counties with a population of 110,000 or more are required to have a Bail Bond Board that regulates bondsmen licensing and other aspects of bail bonds.[16] The board maintains and posts the list of every licensed bondsman and their licensed agent in every court with criminal jurisdiction, where prisoners are examined, processed, or confined, and they must provide that list to local authorities that detain prisoners.[17]

Counties with a population under 110,000 are permitted but not required to have a Bail Bond Board. The sheriff's office handles the maintenance and posting of the list of the bail bondsmen if the county is not required or has not elected to have a Bail Bond Board.[18]

Serving the principal. The principal is not entitled to formal service of citation.[19] However, if the principal's address is on the bond, then the clerk must mail notice to the address that is shown on the bond or to the principal's last known address.[20] The principal need not receive the notice—even if the mail was returned as undeliverable, proof that the notice was mailed to the address on the bond or the principal's last known address is sufficient to comply with Art. 22.05.[21]

Serving principal of cash bond. When the principal posts a cash bond, the principal shall be served by mail to the address on the bond or to his last known address. The statute does not require that the citation be sent by certified mail, however, so the exact day that the principal received notice of the suit is unknown.[22] This adds three days to the principal's deadline to file an answer.[23]

Answer

The surety and principal must file a written answer "on or before 10:00 a.m. on the Monday next after the expiration of 20 days after the date of service."[24] Texas Code of Criminal Procedure Art. 22.13 lists five grounds for exoneration that operate as affirmative defenses; the surety and principal are limited to those five grounds. If the surety or principal intends to claim any of these grounds, they must specifically plead that ground for exoneration in its answer. If they have not pled a ground for exoneration, they may not rely on that ground at the final hearing.

The first ground for exoneration is that the bond is invalid. If the principal used an alias when signing the bond, the bond is not invalid.[25]

The second ground for exoneration is the death of the principal prior to the forfeiture. The

forfeiture is not the day the judgment nisi is made final.[26] If the trial court issues a judgment nisi and the principal subsequently dies, the death of the principal is not a valid ground for exoneration.[27] The forfeiture is still valid even if the surety is dead at the time of the forfeiture, and the surety will still be liable as long as the executor, administrator, or heirs (whichever applies) is served with citation.

The third ground is sickness or some other uncontrollable circumstances that prevented the principal from appearing and the circumstances were not the principal's fault. For this ground to be sufficient to exonerate the principal and surety, the principal must "appear before final judgment on the bond to answer the accusation against him, or show sufficient cause for not so appearing." Incarceration anywhere in the United States or in another country is an uncontrollable circumstance that exonerates the principal and surety from liability.[28] However, being deported is not an uncontrollable circumstance.[29]

The fourth ground applies if the failure to appear occurred before the presentment of an indictment or information. If the State does not obtain an indictment from the grand jury or file an information at the next term after the principal's failure to appear, the principal and surety are exonerated from liability for the bond forfeiture.

The fifth ground is the most frequently applied. In misdemeanor cases, if the principal is arrested within 180 days of the defendant's failure to appear, the surety and principal are exonerated from liability for the cost of the bond. In a felony case, the deadline is 270 days. Even if the surety and principal are exonerated from liability on this ground, they are still liable for court costs, transportation costs, and interest that accrued from the date of the judgment nisi to the date of the principal's rearrest. This is a valid ground for exoneration even if the surety had nothing to do with the principal's rearrest.

If the underlying criminal case is dismissed, the surety is still liable; however, this is a ground for remittitur.[30]

Remittitur

After the bond forfeiture but before the judgment nisi is final, the surety may file a motion asking for remittitur of the bond. If the principal is released on a new bail or the underlying criminal case is dismissed, the court must remit the cost of the bond to the surety after subtracting court costs, transportation costs, and interest. The court has the discretion to remit the bond after subtracting court costs, transportation costs, and interest if the surety shows other good cause. Remittitur is discretionary even if the surety shows that he incurred great expense in returning the defendant to custody.[31]

Settlement negotiations

Like any civil or criminal case, bond forfeitures can be resolved by an agreed judgment. This is how the majority of judgments nisi are resolved. There is no uniform way to conduct settlement negotiations, so how the State does it is up to the prosecutor and office policy. The most important aspect of negotiations is that the State is open with the bondsmen regarding the office's policy.

Like any civil or criminal case, bond forfeitures can be resolved by an agreed judgment. This is how the majority of judgments nisi are resolved. There is no uniform way to conduct settlement negotiations, so how the State does it is up to the prosecutor and office policy.

Below are two examples of settlement negotiation policies. The first is a simple settlement policy, and the second is a more structured one.

Example One: The office requests court costs, transportation costs, and interest if the principal is arrested within the exoneration time frame. The office requests court costs, transportation costs, interest, and 50 percent of the bond if the principal is not arrested within the exoneration time frame.

Example Two: The principal fails to appear, and the office sends a courtesy letter to the surety explaining that the principal failed to appear and that the office will file a judgment nisi if the principal is not arrested in 30 days.

If the principal is not arrested in 30 days, a judgment nisi is filed, and the surety answers. After the surety answers, the office will send out a settlement letter asking for court costs and transportation costs. If the surety does not respond within 30 days, the office sends out a second letter asking for court costs, transportation costs, and interest.

If the surety does not respond within 60 days, the office sends out a third settlement letter asking for court costs, transportation costs, interest, and a third of the bond. If the surety does not respond within 90 days, the office sets the case for a final hearing

After the State and the surety reach an agreement, the parties document the agreement in an agreed judgment and file it with the clerk for the court's signature.[32] This can be done before or

after the surety or principal (practically, the surety) pays, but preferred practice would be to file the agreed judgment after receiving payment. It is important that the agreed judgment includes a waiver of remittitur.

Final hearing

These cases are rarely resolved by a final hearing. If the case does make it to one, typically the State is the only party to appear. But it is still important to know how to conduct a final hearing.

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Setting the case. Defendants are entitled to at least 45 days' notice of the setting date.[33] Typically, the final hearing is a bench trial, but a party can request a jury trial as long as the party makes a written request and pays the jury fee within a reasonable time before the trial setting on the non-jury docket.[34] A request and payment less than 30 days in advance of the non-jury docket setting is unreasonable.

Burden of proof. As the plaintiff, the State has the burden of proof.[35]

Elements. The elements the State is required to prove are:

- the surety and principal executed a valid bond;
- the principal failed to personally appear in court when required;
- the principal's name was called distinctly at the courthouse door; and
- the principal did not have a valid reason for not appearing.[36]

The judgment nisi is prima facie proof that the principal's name was called distinctly at the courthouse door, that the principal failed to appear, and that there was not a valid reason for the principal's failure to appear.[37] Once the prima facie proof has been entered, the principal or surety has the burden to show that one of the statutory requirements has not been met.[38] Because of this, the bond and judgment nisi are viewed as the two *essential elements* of the State's case.[39]

Proof. Best approach is to admit a certified copy of the bond and judgment nisi into evidence. However, it is sufficient for the trial court to take judicial notice of the bond and the judgment nisi.[40] Even though the judgment nisi is prima facie proof of the principal's name being called and the principal's failure to appear, it is best practice to also admit a certified copy of the bailiff's certificate. If the bailiff did not do a certificate, the bailiff can testify at the final hearing that he or she called the principal's name at the courthouse door and the principal failed to appear. While it may not be essential to admit the bailiff's certificate or have the bailiff testify, it is better to win with more evidence than necessary than it is to lose knowing there was additional evidence that could have been used but was not.

After the State presents its case, the surety and principal may present their case to show cause why the judgment nisi should not be made final. It is important to review the answer *before* the surety and principal present evidence to ensure that they are presenting evidence of only pleaded defenses. The defense may present evidence of a ground for exoneration only if he included that ground in his answer. However, if he presents the evidence and the State does not object, the trial court will find that the ground for exoneration was tried by consent. This means the trial court can still consider that evidence in determining whether the defense has satisfied that ground for exoneration.

For example, the surety filed a general denial and did not specifically plead any of the five grounds of exoneration. At the final hearing, the surety attempts to introduce evidence that the bond was invalid. If the State does not object to evidence suggesting the bond was invalid, the State has consented to trying that ground of exoneration. This means that the court can consider the evidence that the bond was invalid as a means for exonerating the surety from liability even though the surety did not plead that ground of exoneration in its answer.

Monetary award. In addition to proving the elements of bond forfeiture, the State must also ask for the monetary amount that should be awarded to the state. If the principal has been arrested anywhere in the United States by the 270th day after he failed to appear for a felony court setting or the 180th day after the principal failed to appear for a misdemeanor court setting, the State may recover court costs, transportation fees, and interest from the date of the nisi to the date of the arrest.[41]

If the principal has not been rearrested or was arrested after those statutory deadlines, the State may recover court costs, transportation costs, interest from the date of the nisi to the date of the judgment, and the full bond amount.

Bond amount. If the defendant has not been rearrested within the exoneration time frame,

the State is entitled to recover the full amount of the bond.[42]

Court costs. Court costs are calculated by the clerk's office. Depending on the settlement negotiation policies, the State may already have the calculated amount. If so, then the State can ask the judge to award court costs for that amount. If the State does not know the court costs, it can simply ask the judge to award court costs.

Transportation costs. If the principal was rearrested in the same county, there likely will not be transportation costs. Generally, transportation costs need to be recovered only when the principal was arrested out of county or state and the sheriff's office had to travel to bring the principal back to the county.

If there are transportation costs associated with the principal, reach out to the person at the Sheriff's Office who is in charge of maintaining transport records. That person should have a restitution worksheet that provides the total transportation costs owed for that principal. He or she will also testify at the final hearing as to the transportation costs.

It is important to note that sureties are required to pay the transportation costs regardless of whether there is a final judgment nisi, so it is possible that the transportation costs will already be paid before the final hearing.

Interest. Interest on a judgment nisi accrues at the same rate as the prejudgment interest for civil cases, which is determined by Texas Finance Code Ch. 304.[43] Prejudgment interest is calculated in the same manner as post-judgment interest but is simple, non-compounding interest. The interest rate is the Federal Reserve's prime rate as published on the date of computation. However, if the prime rate is less than 5 percent, the prejudgment interest rate is 5 percent, and if the prime rate is more than 15 percent, the prejudgment interest rate is 15 percent. To find the applicable prime rate, go to www.federalreserve.gov/releases/h15.

To calculate interest, multiply the amount of the bond by the interest rate in decimals (8 percent is 0.08) and divide by 365 (the number of days in a year). The result is the interest accrued each day. If the principal has been arrested within the exoneration timeline, multiply the daily interest by the number of days between the day the nisi was filed and arrest. If the principal has not been arrested within the exoneration timeline, multiply the daily interest by the number of days between the day the nisi was filed and final judgment. The result is the amount of interest in dollars.

Impact of an outstanding judgment. If a final judgment against a surety is outstanding for more than 31 days, the clerk's office or Bail Bond Board must tell the Sheriff's Office.[44] That surety's bonds will not be accepted by the Sheriff's Office until the judgment is paid.[45]

Forfeiting a personal bond. The process for forfeiting a personal bond is generally the same as for forfeiting a surety bond. The primary difference is that it is highly unlikely that the State will ever recover any money because personal bonds are typically given to defendants who are indigent.

Forfeiting a cash bond. If the defendant has not pled guilty or nolo contendere, the process for forfeiting a cash bond is the same as the process for forfeiting a surety bond under Chapter 22 of the Texas Code of Criminal Procedure.

If the criminal case is in JP or municipal court and the defendant has pled guilty or nolo contendere, the process is governed by Art. 45.044 of the Texas Code of Criminal Procedure. Under this statute the court may forfeit the defendant's cash bond and use the amount of the cash bond to cover the costs of the defendant's fines and fees in the criminal case if two conditions are met:

1) the defendant must have "entered a written and signed plea of guilty or nolo contendere and a waiver of jury trial," and

2) the defendant failed to appear in court as required by the condition of his release.

After the judge enters the judgment of conviction and forfeiture, the court must give written notice by mail to the defendant's last known address that the judgment of conviction and forfeiture were entered against him, the forfeiture satisfies the fines and costs, and the defendant has 10 days to apply for a new trial.

If the defendant files in that timeline, the court must grant the motion and allow the defendant to withdraw the previously entered plea of guilty or nolo contendere. If the defendant mails the motion, the defendant must mail the motion on or before the due date. The clerk's office must receive the motion within 10 days after the due date, excluding Saturdays, Sundays, and legal hol-

It is important to note that sureties are required to pay the transportation costs regardless of whether there is a final judgment nisi, so it is possible that the transportation costs will already be paid before the final hearing.

idays. If the defendant does not file a motion for new trial, the judgment nisi and conviction are final.

Default judgment

If the surety or principal does not answer by the deadline and the return of service has been in the clerk's file for 10 days, not including the day of filing the return or the default judgment, the court enters a default judgment.[46] The State must certify to the clerk, in writing, the last known mailing address of the party in default.[47] This is typically done in the same document as the default judgment the State files with the clerk. After filing the default judgment, the case will be set for a hearing on the default judgment where the State will present evidence of damages.[48]

Getting the money

Writ of execution. The State may file a writ of execution to enforce the judgment and receive the monies owed.[49] The writ commands an officer to take property from the principal or surety to satisfy the judgment debt.[50] Texas Rule of Civil Procedure 629 dictates the requirements for a writ of execution, including the date of return.

The writ must also include the amount of money that is to be paid.[51] Chapter 42 of the Texas Property Code lists the property that is exempted from a writ of execution. The first place to look when enforcing the judgment is the collateral the bondsman put up with the Sheriff's Office.

Judgment lien. Another way to enforce the judgment is to place a judgment lien on the homestead exempt real property owned by the principal or surety (practically, it will be the surety's property).[52] To do this, file an abstract of judgment in the county clerk's office where the real property is located.

While judgments nisi are not as fun as some of the criminal cases that prosecutors handle (let's be real, they can be downright boring), they are an important part of the criminal justice process.

Appeal

Motion for new trial. Any party to the suit has 30 days after the judgment nisi is made final to file a written motion for new trial.[53] The trial court has the discretion to grant the motion for new trial based on good cause shown, for example, the damages awarded were too high or too low.

Appeal. The rules for appeal are governed by the Texas Rules of Civil Procedure in addition to the Texas Rules for Appellate Procedure.[54] Generally, a party does not have to file a motion for new trial to be able to appeal, but the Rules of Civil Procedure list five grounds the party is required to raise in a motion for new trial before the party is eligible to appeal:

1) "a complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

2) a complaint of factual insufficiency of the evidence to support a jury finding;

3) a complaint that a jury finding is against the overwhelming weight of the evidence;

4) a complaint of inadequacy or excessiveness of the damages found by the jury; or

5) incurable jury argument if not otherwise ruled on by the trial court."[55]

Generally, the party must file a notice of appeal within 30 days after the judgment nisi became final.[56] If the party files a motion for new trial, however, the deadline to file the notice of appeal is 90 days.

Special bill of review. A special bill of review is a way the surety can seek to remit part or all of the bond (after subtracting court costs, transportation costs, and interest) based on equitable grounds after final judgment. The surety has two years after the judgment nisi is made final to file a special bill of review. The trial court has the discretion to grant or deny it.[57] The following is a nonexclusive list of equitable grounds that the court may consider:

1) whether the accused's failure to appear in court was willful;

2) whether the delay caused by the accused's failure to appear in court prejudiced the State or harmed the public interest;

3) whether the surety participated in the re-arrest of the accused;

4) whether the State incurred costs or suffered inconvenience in the re-arrest of the accused;

5) whether the surety received compensation for the risk of executing the bail bond; and

6) whether the surety will suffer extreme hardship in the absence of a remittitur.[58]

Conclusion

While judgments nisi are not as fun as some of the criminal cases that prosecutors handle (let's be real, they can be downright boring), they are an important part of the criminal justice process. Pursuing bond forfeitures recovers county funds,

and when prosecuted regularly, it serves as motivation for bondsmen to get their principals to court so prosecutors can resolve cases. I believe that this article gives you everything you need to take judgments nisi from start to finish. As for how to pronounce "nisi," three different district attorneys I asked said it three different ways, so you are on your own there. ❇

Endnotes

[1] Tex. Code Crim. Pro. Art. 22.02. The courthouse door is the exterior door of the courthouse, not the courtroom door. *Caldwell v. State*, 126 S.W.2d 654, 655-56 (Tex. Crim. App. 1939). However, the Court of Criminal Appeals requires only substantial compliance with the requirements in Art. 22.02 and has held that calling the defendant's name in the hallway substantially complies with Art. 22.02. *Bennett v. State*, 394 S.W.2d 804, 807 (Tex. Crim. App.1965); see *Tocher v. State*, 517 S.W.2d 299, 300 (Tex. Crim. App. 1975).

[2] If your county has a pre-trial services program (the county's bondsman) and they bonded the defendant as opposed to a commercial bondsman, do not request that a judgment nisi be entered because the county posted the bond and is serving as a surety.

[3] Tex. Code of Crim. Pro. Art. 23.05(a).

[4] While a bailiff's certificate is not strictly necessary because you can prove the failure to appear by the bailiff's testimony, it is much simpler to prove the failure to appear by admitting a certified copy of the bailiff's certificate at the final hearing.

[5] *State v. Sellers*, 790 S.W.2d 316, 321 (Tex. Crim. App. 1990).

[6] *Safety Nat. Cas. Corp. v. State*, 273 S.W.3d 157, 163 (Tex. Crim. App. 2008).

[7] Tex. Code Crim. Pro. Art. 22.10.

[8] Tex. Code Crim. Pro. Art. 22.05.

[9] Tex. Code Crim. Pro. Art. 22.04.

[10] *Id*.

[11] Tex. Code Crim. Pro. Art. 22.05.

[12] Tex. R. Civ. P. 106. The other methods of service still apply and can be used, but this is the most common method.

[13] Tex. Code Crim. Pro. Art. 22.02(b).

[14] Tex. Code Crim. Pro. Art. 22.03(b)-(c).

[15] Tex. Code Crim. Pro. Art. 22.03(d).

[16] Tex. Occ. Code §1704.051.

[17] Tex. Occ. Code §1704.105.

[18] Tex. Code Crim. Pro. Art. 17.141.

[19] Tex. Code Crim. Pro. Art 22.05; *Smith v. State*, 566 S.W.2d 638, 540 (Tex. Crim. App. 1978) (the trial court did not err in granting final judgment against the surety even though the principal was not served with citation).

[20] Tex. Code of Crim. Pro. Art. 22.05.

[21] See *Rodriguez v. State*, 990 S.W.2d 438, 440–42 (Tex. App.–El Paso 1999, no pet.).

[22] Tex. Code Crim. Pro. Art. 22.035.

[23] Tex. R. Civ. P. 21a(c).

[24] Tex. R. Civ. P. 99(c); Tex. Code of Crim. Pro. Art. 22.11.

[25] *Lyles v. State*, 587 S.W.2d 717, 718 (Tex. Crim. App. 1979), cert. denied, 445 U.S. 951 (1980).

[26] *Hernden v. State*, 505 S.W.2d 546, 548 (Tex. Crim. App.1974).

[27] *Id*; see *McCarter v. State*, 442 S.W.3d 655 (Tex. App.–El Paso 2014, no pet.).

[28] *Smith v. State*, 561 S.W.2d 501, 502 (Tex. Crim. App. 1978); *Hill v. State*, 955 S.W.2d 96, 100 (Tex. Crim. App. 1997).

[29] *Allegheny Cas. Co. v. State*, 163 S.W.3d 220, 228 (Tex. App.–El Paso 2005, no pet.); see also *Castaneda v. State*, 138 S.W.3d 304, 310 (Tex. Crim. App. 2003) (did not reach the question of whether deportation was an uncontrollable circumstance because the surety did not prove the principal was actually deported).

[30] *Fly v. State*, 550 S.W.2d 684, 686 (Tex. Crim. App. 1977).

[31] *Gibson v. State*, 401 S.W.2d 822, 825 (Tex. Crim. App. 1966).

[32] Tex. Code Crim. Pro. Art. 22.125.

[33] Tex. R. Civ. P. 503.3(a).

Continued in the orange box on page 41

As for how to pronounce "nisi," three different district attorneys I asked said it three different ways, so you are on your own there.

Trying a case against a pro se defendant

We've all heard it before:

By Daniel Cox
First Assistant District Attorney in Henderson County

"Judge, my lawyer won't come visit me in jail or take my calls. I wanna represent myself."

"Your honor, my lawyer is working with the DA. I wanna be my own lawyer."

"My lawyer won't file the motions I want him to file. I wanna do it myself."

The vast majority of the time, the court is able to talk a defendant out of representing himself. But what happens when the defendant is persistent and the court allows the defendant to be his own attorney? A couple months ago, I had the opportunity to try a case against a defendant representing himself. The most valuable lesson I learned: Don't underestimate the pro se defendant.

Faretta admonishments

Faretta v. California[1] is the seminal U.S. Supreme Court case dealing with self-representation. Prior to *Faretta* in 1975, most states had a constitutional or statutory provision allowing for self-representation.[2] It was even codified in federal law prior to the ratification of the Sixth Amendment. In *Faretta*, the defendant asked to represent himself, and the trial judge initially allowed him to. But just before trial, the trial court imposed a public defender upon Faretta. He was convicted, and he appealed based on the court denying his request to represent himself. The question before the Supreme Court was, "Can the State impose a lawyer upon a defendant who doesn't want one?" The answer, obviously, was no.

The *Faretta* court did say that a defendant must knowingly and intelligently waive the right to counsel and must be advised of the dangers and disadvantages of self-representation so that the record establishes that the defendant knows what he's doing. This is where the so-called "*Faretta* admonishments" come into play.

The case in my county

In my case, the defendant was charged with Impersonating a Public Servant. He was arrested for running around Cedar Creek Lake dressed like a cop, with a gun, badge, and handcuffs, and compelling folks around the lake to do certain things based on him holding himself out as an officer. He also claimed that he was Special Agent Rambo with the FBI. I am not making this up.

Right off the bat, he was insistent on representing himself. The usual warnings from the court did not work. He was unfazed. We later found out that he had previously represented himself in another county and got a time-served plea as well as other unadjudicated cases rolled into the plea under Penal Code §12.45,[3] so he thought he was the next Ben Matlock.

Once it became apparent that this particular defendant could not be talked out of self-representation, it was time to make a record—going back to Faretta admonishments. The trial judge did a good job putting into the record the voluntariness and intelligence of the waiver of counsel. Among the questions asked—and that should always be asked—were about the defendant's education, his experience with the criminal justice system, his knowledge of the rules of evidence, and why he wanted to represent himself. It's imperative that the defendant be formally advised of the risks of self-representation. He must also be informed that there will be no special treatment because of his lack of experience or a law license. He will be expected to play by the same rules as the State.[4]

After the admonishments and warnings, the court will appoint standby counsel. I was under the impression going into this trial that standby counsel was not supposed to sit at counsel table with the defendant and was to intervene only when the defendant asked him to. But standby counsel in my case was much more involved than that, which we'll come back to in a minute.

I knew going into voir dire that I needed to impress upon the jury that the defendant had made this choice himself and he had to live with

the consequences. I made it clear that it was his decision, that the trial court found that he was competent to make that decision, and that he did so intelligently, knowingly, and voluntarily. I also made it clear that the defendant would be expected to play by the same rules as I was, and that if I needed to object to something he tried to do that wasn't allowed, I was going to object, regardless of how often I had to do it. I then asked if anybody would hold it against me if I had to object a lot. I followed that up by asking if anybody would feel sorry for him, hold him to a lesser standard, or hold me to a higher burden because of his self-representation. While a number of panelists spoke up to say they thought the defendant was making a mistake, that he was stupid, etc., I didn't lose a single panel member on the issue of self-representation.

The trial

So here is where I have to admit: The defendant wasn't a half-bad advocate. In fact, he was arguably more effective than some lawyers I've tried cases against. His cross examination was pretty effective. His voir dire was basically just a 30-minute nonsensical monologue, but once it came to questioning witnesses, he wasn't bad. Intentionally or not, he also came across to the jury as a fairly sympathetic figure.

That being said, he did get hung up and distracted by certain issues that did not matter. For instance, the foreperson of the grand jury that handed down his indictment had a signature that somewhat resembled the signature of the trial judge. This defendant was convinced that the judge signed his indictment, and he couldn't let it go.

He also decided that he needed to "talk like a lawyer." By that I mean he thought he had to use flowery, fancy verbiage that made him sound smart. It didn't work. A lot of witnesses couldn't understand what he was asking. The judge on numerous occasions had to tell him to just talk like a normal person.

He was also aided by a standby attorney who was probably more involved than he should have been. He sat at counsel table and told him the objections to make when the State tried to introduce evidence. In fact, he printed up a paper with large, bold type that said:

HEARSAY
SPECULATION
NON-RESPONSIVE
ARGUMENTATIVE
LEADING

[34] Tex. R. Civ. P. 216.

[35] *Kubosh v. State*, 241 S.W.3d 60, 63 (Tex. Crim. App. 2007).

[36] *Alvarez v. State*, 861 S.W.2d 878, 881 (Tex. Crim. App. 1992).

[37] *Id; Tocher*, 517 S.W.2d at 301.

[38] *Alvarez*, 861 S.W.2d at 881.

[39] *Kubosh*, 241 S.W.3d at 63.

[40] *Hokr v. State*, 545 S.W.2d 463, 466 (Tex. Crim. App. 1977) (the trial court may take judicial notice of the judgment nisi); *Kubosh*, 241 S.W.3d at 63 (the trial court may take judicial notice of the bond).

[41] Tex. Code Crim. Pro. Art. 22.13(b).

[42] *State ex rel. Vance v. Routt*, 571 S.W.2d 903, 908 (Tex. Crim. App. 1978); Tex. Code of Crim Pro. Arts. 22.02, 22.13(b).

[43] Tex. Code Crim. Pro. Art. 22.16(c).

[44] Tex. Occ. Code §§1704.204(a), 1704.2535(a).

[45] Tex. Occ. Code §1704.2535(b)-(c).

[46] Tex. Code Crim. Pro. Art. 22.15; Tex. R. Civ. P. 107(h).

[47] Tex. R. Civ. P. 239a.

[48] Tex. R. Civ. P. 503.1(a)(1).

[49] Tex. R. Civ. P. 621.

[50] Tex. R. Civ. P. 622.

[51] Tex. R. Civ. P. 630.

[52] Tex. Prop. Code §52.001.

[53] Tex. R. Civ. P. 320.

[54] *Aguirre v. State*, 399 S.W.2d 804, 804 (Tex. Crim. App. 1966).

[55] Tex. R. Civ. P. 324(a)-(b).

[56] Tex. R. App. P. 26.1.

[57] *McKenna v. State*, 247 S.W.3d 716, 719 (Tex. Crim. App. 2008).

[58] *Id*.

If we asked a question that might be objectionable, the attorney would sharply elbow the defendant in the ribs and point to which objection he should make—at which point the defendant would stand up and yell, "Objection!" followed by whatever word counsel's finger was pointing to. It was really like trying a case against half a lawyer. We're also pretty sure that standby counsel told the defendant what his best defense was, specifically the reliance element of Impersonating a Public Servant, which I'll get to in a minute. I strongly doubt that without standby counsel pointing him in the right direction, he would have figured out what his best defense was.

In addition to assigning quality, active, standby counsel, the trial judge was (understandably) very protective of the record. If trial counsel couldn't talk the defendant out of doing something stupid or opening a door to something dangerous, the trial judge usually did.

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On my end, I knew it was important not to come across as bullying the defendant. I also had to be very patient and watch my facial expressions when he was doing silly things–like accusing the judge of signing his indictment.

One of the elements of Impersonating a Public Servant is that the person to whom a defendant is holding himself out as a police officer must perform some act in reliance upon the false assertion of being a police officer. In our case, a trained lawyer could make a valid argument to a jury that nobody actually relied on the defendant's false assertion. Regardless of whether he picked up on this himself or if his standby counsel told him and helped craft his arguments, he made us sweat. The named complainant in one of the counts never actually did anything in reliance of his false assertion that he was a police officer. She was a vulnerable little old lady, but try as he might, he just couldn't get her to budge.

Like I said, don't take anything for granted, and don't underestimate the pro se defendant. In fact, in our three-count indictment, he got one "not guilty" on the little old lady who stood her ground and never actually performed an act or omission in reliance on his false assertion of being a police officer. I told my boss that if he got three "not guilty" verdicts, I was going to quit and find a new career because I couldn't handle being the guy who lost to the pro se defendant. Fortunately it didn't come to that. I can handle the "not guilty" on the one count because again, he arguably didn't coerce the named complainant into doing an overt act.

On the other two counts, he was found guilty. At sentencing, I waived open. He stood up in his opening statement and told the jury he'd never been in trouble before. Then I stood up and introduced his two pen packs for his state jail trips. The jury then handed him six years in the Texas Department of Criminal Justice. We spoke to jurors afterwards. They said they felt sorry for him and were probably going to go easy on him in punishment—but then he lied to them about his criminal history.

Conclusion

To sum up how best to try a case against a pro se defendant, ensure the trial court makes a good record admonishing the defendant on the risks of self-representation. The court should inquire into his educational background and experience with the legal system. The waiver of counsel must be freely, intelligently, and voluntarily made.

Once the court approves the waiver of counsel and allows the defendant to represent himself, educate the jury panel on pro se representation and the risks thereof. I would even go so far as to advise that the prosecutor pretend like the defendant has competent representation—meaning, don't think of him as a pro-se defendant. Don't be a bully, and most importantly, don't underestimate his abilities or knowledge. ❇

Endnotes

[1] 422 U.S. 806 (1975).

[2] In Texas, that right is found in Tex. Code Crim. Proc. Art. 1.05.

[3] Under Penal Code §12.45, with the prosecutor's consent, a defendant can have the judge essentially roll in other unadjudicated offenses in determining the sentence. If the court lawfully takes into account one of these unadjudicated offenses, later prosecution is barred for that offense.

[4] For a comprehensive 12-part admonishment about self-representation, see *Nowden v. State*, No. 07-12-00037-CR at *4-5, 2013 Tex. App. LEXIS 4713 (Tex. App.–Amarillo, April 11, 2013, pet. ref'd).

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