The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

September–October 2025 • Volume 55, Number 5

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

This witness could've been a Zoom call: rules for using remote testimony

One change that the Covid lockdowns ushered in was a new familiarity with Zoom and other videoconference technology.

By Andrea Westerfeld
Assistant County & District Attorney in Ellis County

It's no longer a tool of solely the young and tech-savvy, and everyone got a crash course in the world of web cams, microphones, and virtual backdrops. Even after the lockdowns ended, this new convenience seems to have stuck around. Why bring in witnesses from distant locations when they can testify remotely instead?

Remote testimony is nothing new in criminal law. Courts have been dealing with rules for closed-circuit television (CC-TV), recordings, and video testimony for more than 30 years. But with the surge of interest in remote options, it is important to review these rules to make sure we take advantage of the opportunities of modern technology while preserving the defendant's rights and maintaining the courtroom as a crucible for finding the truth.

Maryland v. Craig

The seminal case on remote testimony is *Maryland v. Craig*, a 1990 case from the Supreme Court of the United States.[1] Maryland, like several states at the time, had a law authorizing a child victim of certain crimes to testify via CC-TV. The procedure involved the witness testifying in a separate room with only the prosecutor and defense attorney present, while the defendant, judge, jury, and anyone else in the courtroom watched on a one-way CC-TV feed. The witness could not see or hear the defendant, but the defendant could electronically communicate with counsel, and the parties could make and obtain rulings on objections.

To justify the procedure, the State called several expert witnesses to testify that each of the four child witnesses would have "considerable" difficulty testifying in the defendant's presence, would stop talking and withdraw, or would become highly agitated and refuse to talk.[2] The trial court made a finding that the children would suffer serious emotional distress if required to testify in the defendant's presence and allowed them to testify.

[1] *Maryland v. Craig*, 497 U.S. 836 (1990).

[2] *Id.* at 843.

Continued on page 15

Table of Contents

About *The Texas Prosecutor*

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, staff, and TDCAA members.

Healing 'the Rupture'

In our previous issue, I spoke about what I call "the Rupture" that happened to our society around 2020 and how it affected prosecutors.

By Shannon Edmonds
TDCAA Executive Director in Austin

The resulting challenges to recruitment, retention, and reputation are still felt today, yet many of you are taking steps to improve morale within your offices and bolster your communities' external views of your offices. Here are some examples of the latter that I wanted to share so that others can benefit from our members' good ideas.

Office publications

The office of Tarrant County Criminal DA **Phil Sorrells** does a bang-up job of keeping that community up-to-date on how his office is serving citizens and keeping them safe. The office is active on social media, but I wanted to hold up its quarterly and annual publications as a great example of transparency and information. The office issues "The Docket" on a quarterly basis to highlight issues and specific verdicts, along with examples of community involvement and recognitions. The office also puts out an Annual Report chock full of data and other information culled from various issues of The Docket. Together, these publications give that community a window into the operations of their prosecutor's office and highlight the good work it is doing. Visit www.tarrantcountytx.gov/en/criminal-district-attorney.html to learn more about those publications.

Community relations

Many of you offer some variation of a "prosecutor academy" to educate constituents about what you do and how you do it. One successful example that I've long admired is run by Collin County Criminal DA **Greg Willis**. Offered twice per year, that academy covers the local criminal justice system from soup to nuts thanks to the active involvement of Greg and his staff, who work extra hours to educate and inform their constituents and address misconceptions they may have. For more on that program, visit https://collincountyda.com/citizen-prosecutor-academy. That office also runs a student internship program to help identify and train the next generation of criminal justice professionals, which is another great way to interact with your local community; you can find more information about that initiative on the office website as well.

Podcasts

I was thrilled to get an email a few months ago from Assistant County Attorney **Aaron Setliff** in El Paso alerting me to a new joint enterprise from The 915: a prosecution podcast! "Justice Matters" is a joint venture by El Paso County Attorney **Christina Sanchez** and 34th Judicial District Attorney **James Montoya**, who are both in their first terms in those offices. Co-hosted by Aaron from the CA's Office and **Stephanie Valle** from the DA's Office, the podcast offers unique insight into both offices' operations and helps to introduce to their community the men and women who serve there. If you've ever thought about launching a podcast—and frankly, who among us with a lengthy commute has not?—then check out Justice Matters Podcast on your platform of choice and listen to how our friends in El Paso have approached that medium.

Hotel reimbursement change

I wanted to alert everyone to an unforeseen change in our grant funding for FY 2026 that could affect attendees of future TDCAA conferences.

Unfortunately, the judicial court personnel grant training funds we use to put on such great conferences were cut by 20 percent for Fiscal Year 2026 (which starts on September 1 for us). After some emergency brainstorming sessions with TDCAA's Executive Committee, we submitted a revised application, which was approved. The primary impact of this slimmed-down fund-

ing is a reduction in hotel reimbursements for attendees of in-person conferences *other than the Annual and Elected Prosecutor Conferences*. In the recent past, we have reimbursed lodging costs using federal GSA rates ($110 to $181 per night depending upon the location), but going forward, we must cap those reimbursements at $85 per night for conferences other than the Annual and Elected Prosecutor Conferences. (By the way, $85 was also the maximum reimbursement during the pandemic, aka "The Rupture" we discussed last issue—see, you can't get away from it!)

We recognize that reducing hotel reimbursements on the heels of raising conference fees earlier this calendar year are an unwelcome one-two punch to some of your training budgets, but we believe that is the best way to meet our membership's needs without cancelling entire conferences. This new reimbursement policy will take effect after September's Annual Criminal & Civil Law Conference, so those of you currently in county budget negotiations can, we hope, factor that into your planning. If you have any questions about these changes, please don't hesitate to call or email me.

Jack Roady has been a living example to all of us of authentic servant leadership. He has not just talked the talk; he has also walked the walk.

Bon voyage

It's always bittersweet when a stalwart of our profession makes the difficult decision to move on. That emotional conflict hit us at TDCAA squarely in the feels when we learned that Galveston County Criminal DA **Jack Roady** was resigning at the end of September to accept a faculty position at Houston Christian University. Jack has served his fellow Texans as a prosecutor for almost 25 years, the last 15 of those as an elected prosecutor. In that time, he has served on darn near every TDCAA committee and board there is. In addition to volunteering for our Legislative, Nominations, Training, Long-Range Planning, By-Laws, and Finance Committees, he served multiple terms on our Board of Directors, including a leadership stint as President and Chairman of the Board. In these ways and others, Jack has been a living example to all of us of authentic servant leadership. He has not just talked the talk; he has also walked the walk.

And that walk is not done! By taking his talents to higher education, Jack will be directing the formation of the next generation of legal professionals. Like the examples cited above, this is another way that prosecutors can repair the societal damage sustained by our profession even after leaving that profession. I have no doubt that our good friend Jack will positively impact the lives of many young students, some of whom may even be inspired to follow their professor's footsteps into a career in prosecution. If so, we will be all the better for it, I have no doubt of that. Godspeed and bon voyage, Jack!

Looking ahead

We have some great content in this issue that will also help you in your important mission. We don't intentionally have "themes" for this journal, but if we did, "technology" might be the theme of this one. Inside you will find helpful discussions of the legal challenges surrounding remote testimony, the hurdles to be cleared to obtain remotely stored electronic data, and the latest guidance from the Court of Criminal Appeals on the use of geofence warrants. For all that high-tech talk and more, read on! ❇

Geofence warrants and the frontier of Fourth Amendment law

Are geofence warrants constitutional under the Fourth Amendment of the United States Constitution? The unsatisfying lawyer answer is always, "It depends."

By Richard Guerra
Assistant Criminal District Attorney in Bexar County

As state and federal courts grapple with the legal issues surrounding the technological advancements that facilitate these warrants, cautious prosecutors and law enforcement deal with numerous and sometimes conflicting opinions regarding their sufficiency and constitutionality. In *Wells v. State*, our Court of Criminal Appeals recently weighed in on the issue with thoroughly researched opinions that lacked a court majority.[1] Still, the opinions offer valuable insight for police and prosecutors to assemble an understanding of good practices regarding geofence warrants, at least for the time being.

Background

Here we have a brazen murder. It's around 3 o'clock in the morning. Four men loiter in a church parking lot, their presence captured by security cameras. Aaron Wells—our defendant—is among them. Their target is the house across the street. The house has a door camera, which captures footage of a woman named Nikita Dickerson as she exits the gate outside the front door. She carries a gun because the neighborhood is unsafe. She's meeting her boyfriend, Jimmy Giddings. He's a drug dealer.

As Jimmy gets out of his car, the four men rush toward him from the church. Masks cover the men's lower faces. They brandish pistols and a rifle.[2] Five gunshots strike Nikita. She drops her pistol. A masked man takes it. Meanwhile, Jimmy flees into the house. Two of the men chase after him. Another of the four marches Nikita—wounded but alive—into the house at gunpoint. The fourth man, who would eventually be identified as Aaron Wells, quickly follows them. One of the men shoots Jimmy—we don't know who. The men flee from the house—across the street—back to the church parking lot. They enter a vehicle and escape the scene.[3] Nikita survives. Jimmy dies. A bullet had entered his neck and severed his spine.[4]

The men were gone when the cops arrived. Police released stills of three of the men from the camera footage. They opened a public hotline for tips, but it generated no productive leads.[5] With no leads, the police obtained a geofence warrant.

The warrant sought Google LLC's records for information on devices that were located within four points of latitude and longitude, which encompassed a portion of the church, the victims' house, and the street between them. The timeframe for the search within this geofence was 25

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[1] *Wells v. State*, 714 S.W.3d 614 (Tex. Crim. App. 2025), *reh'g denied*, No. PD-0669-23, 2025 WL 1699563 (Tex. Crim. App. June 18, 2025).

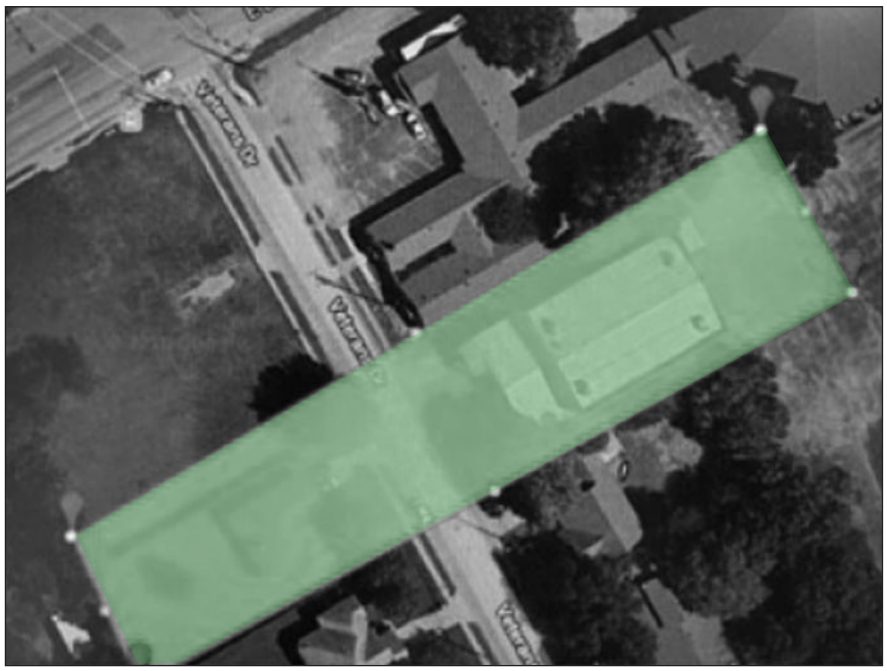
[2] *Wells*, 714 S.W.3d at 616.

[3] *Id.*

[4] *Id.*

[5] *Wells v. State*, 675 S.W.3d 814, 819 (Tex. App.–Dallas 2023), *aff'd*, 714 S.W.3d 614 (Tex. Crim. App. 2025), *reh'g denied*, No. PD-0669-23, 2025 WL 1699563 (Tex. Crim. App. June 18, 2025).

minutes—between 2:45 and 3:10 a.m. on the morning in question.[6] See the image below.



The geofenced area is in the green box, above.

Wells's cellular phone was identified as being at the scene. Police used his phone records and social media to identify the other three men involved in the offense.[7]

Wells filed a pretrial motion to suppress the evidence obtained through the geofence warrant. He argued that the warrant violated the Fourth Amendment of the United States Constitution because 1) it was an unconstitutional general warrant that failed to identify a particular suspect and would consequently invade the privacy of individuals who were uninvolved with the case, and 2) the warrant affidavit lacked probable cause to believe any of the four men had carried a cell phone with a Google account.

The trial court denied his motion to suppress the location history obtained from Google through the warrant.[8] Ultimately Wells was convicted of the capital murder (during the course of a robbery) of Jimmy Giddings. The State did not seek the death penalty.[9] Wells pressed his constitutional challenge to the Court of Criminal Appeals.

The geofence warrant

Google calculates the location of devices whose owners have enabled Google location services by utilizing cell towers, GPS, and signals from nearby WiFi networks and Bluetooth beacons.[10] Google retains information that can include the subscriber's name, address, telephone number, and other identifiers.[11]

The warrant in this case directed Google to turn over to the police "GPS, WiFi, or Bluetooth-sourced location history data" from within the above-described geofenced area, which was marked by four points of latitude and longitude. The warrant described a three-step procedure.[12]

Step One commanded Google to produce an anonymized list of the devices that were within the geofenced area during the 25-minute timeframe from 2:45 a.m. to 3:10 a.m. Google identified three such devices.[13] Police then analyzed this data to determine which devices were relevant to the capital murder investigation.

Step Two required Google to provide not more than 60 minutes of additional location history for the relevant devices. This step was to help police rule out any devices on the anonymized list to ensure that the identity of uninvolved individuals would not be revealed. Police used this data to determine that only one of the three anonymous devices belonged to somebody involved in the offense.[14]

Step Three ordered Google to reveal the identities of the owners of the devices that were deemed relevant to the investigation, meaning that they would be either a participant in or a witness to the murder. The warrant required disclosure of the device owner's name, email address, SMS account number, registration IP, subscribed-to services, and six months of IP history. Essentially, at this step, Google revealed Wells's identity.[15]

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[6] *Wells*, 714 S.W.3d at 616.

[7] *Id*. at 617.

[8] *Id*. at 619.

[9] *Id*. at 617.

[10] *Wells*, 675 S.W.3d at 821 (citing *United States v. Rhine*, 652 F.Supp.3d 38, 66-67 (D.D.C. Jan. 24, 2023)).

[11] *Id*. (citing *Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, 497 F.Supp.3d 345, 351 (N.D. Ill. 2020)).

[12] *Wells*, 714 S.W.3d at 617.

[13] *Id*. at 617, 619.

[14] *Id*.

[15] *Id*.

The geofence warrant's three-step process was conducted with a single district judge's signature. The police did not obtain incremental authorization throughout the process.[16]

As the judges saw it

The Court of Criminal Appeals released a plurality opinion written by Judge Yeary, a concurring opinion written by Judge Finley, and a concurring and dissenting opinion written by Judge Newell. Judge McClure dissented without writing an opinion. Presiding Judge Schenck did not participate.[17]

Judge Yeary's opinion

Like the Dallas Court of Appeals, Judge Yeary (joined by Judges Keel, Finley, and Parker) assumed—without deciding—that a search occurred under the Fourth Amendment when police obtained Google location history data from the geofenced area.[18] Because a search occurred, a warrant was required for this search to be "reasonable" under the Constitution. Here, the police obtained a geofence warrant. The search was therefore reasonable if 1) the warrant affidavit justified the search with probable cause and 2) the warrant itself set out the place to be searched and the things to be seized with sufficient particularity. The particularity requirement seeks to limit the officer's discretion, narrow the search's scope, and minimize the danger of searching the person or property of an uninvolved bystander. An overview of prior geofence caselaw indicated that "overbroadness"—casting too wide a net and thereby catching too many uninvolved bystanders within the search—was often the central issue with geofence warrants.[19]

In accordance with United States Supreme Court and Court of Criminal Appeals precedent as well as Art. 18.01(c) of the Texas Code of Criminal Procedure, a warrant affidavit must provide probable cause to support at least a "fair probability" or "substantial chance" that evidence of an offense will be found at the place to be searched. Here, the warrant affidavit established that an offense—the capital murder of Jason Giddings—occurred. This was not contested.

The primary issue was whether the warrant affidavit provided probable cause that Google's location history database would contain evidence of the murder.[20] The warrant affidavit claimed, "It is likely that at least one of the four suspects ... had an Android device on him during the commission of the offense," because home-invasion-type offenses commonly involve "someone outside of the residence ... to keep an eye out for responding police officers."[21]

The contested issue was whether this assertion was specific enough to show that one of the four men had carried a device with Google location services enabled. Relying on text from *Carpenter v. State* and *Riley v. California*, Judge Yeary recognized that people "compulsively carry cell phones with them at all times" and that cell phones "are such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy."[22] Based on the well-established fact of the ubiquity of cell phones, the magistrate who issued the geofence warrant had a substantial basis to conclude that there was a fair probability or substantial chance that at least one of the four men possessed a device that Google could locate within the geofenced area.[23]

The contested issue was whether this assertion was specific enough to show that one of the four men had carried a device with Google location services enabled.

The next issue was whether the geofence warrant provided sufficient particularity for the place to be searched and the things to be seized. The place to be searched was wherever Google stores its GPS, WiFi, or Bluetooth-sourced location history data. The thing to be seized was data generated from devices that were located within

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[16] *Id*. at 618.

[17] *Id*. at 614.

[18] *Id*. at 620.

[19] *Id*. at 623.

[20] *Id*. (Judge Yeary also noted that the warrant satisfied Texas Code of Criminal Procedure Art. 18.01(c), which requires that an warrant issued under Article 18.02(10) must contain probable cause that 1) a specific offense was committed, 2) the specifically described items to be searched for or seized constitutes evidence of that offense or that a particular person committed the offense, and 3) the items constitution to evidence to be searched or seized is located on or at the particular person, place, or thing to be searched.)

[21] *Id*. at 624.

[22] *Id*. (citing *Carpenter v. United States*, 585 U.S. 296, 311 (2018); *Riley v. California*, 573 U.S. 373, 385 (2014)).

[23] *Id.* at 624.

the geofenced area, on the specified date, and within the 25-minute time frame. As can be seen in the geofence diagram on page 6, the searched area included part of a church and church grounds, a small section of street, and the front yard and house where the murder occurred. Here, the area was small, the temporal window was short, and the time was the middle of the night. Judge Yeary observed that this was a small, low-traffic area, especially during the middle of the night. It was unlikely that—within this spatial and temporal window—there were bystanders who were not victims, witnesses, or perpetrators. An individual in the geofenced area who wasn't an eyewitness would have at least heard gunshots. Judge Yeary determined that the facts of this specific case satisfied the Fourth Amendment's particularity requirements for all three of the warrant's steps.[24]

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Concurring opinion

Judge Finley joined Judge Yeary's opinion, but he would not have reached the issues discussed therein because he found no reasonable expectation of privacy in Google's historical location data. First, Google's location history data is not as all-encompassing as the 127 days of cell site location information (abbreviated as CSLI) described in *Carpenter v. United States* because Google's data was much more limited in scope, making it akin to the less than three hours of real-time CSLI that the Court of Criminal Appeals analyzed in *Sims v. State*.[25]

Moreover, Carpenter's CSLI was not voluntarily "shared" as one normally understands the term because the user did not engage in an affirmative act to share the data beyond powering up his phone. Consequently, in *Carpenter*, there was no voluntary assumption of the risk of sharing CSLI. But in this case, Wells took affirmative steps on his device to enable sharing: He logged into his Google account and opted into location history services, which required him to click through several warning screens. These warnings notified Wells that Google would track his cell phone's location history and share it with third parties, i.e., advertisers.[26]

Concurring and dissenting opinion

Judge Newell (joined by Judges Richardson and Walker) concurred with upholding the first two steps of the geofence warrant. However, he would have held that Wells did not have a legitimate expectation of privacy in the limited information sought by the geofence warrant's first two steps, but he did have a reasonable expectation of privacy in the information sought by the warrant's third step, particularly the prior six months of IP history. Furthermore, Judge Newell would have held that the warrant in this case lacked probable cause to obtain six months of Wells's IP history.

Conclusory allegations are generally insufficient to establish probable cause. Police must demonstrate that there is a "nexus" between a cell phone and the commission of an offense to get into the contents of that cell phone. Here, there were no specific facts that connected six months of Wells's IP history to the murder of Jimmy Giddings other than the statement that one of the four perpetrators was likely to carry an Android phone. The geofence warrant affidavit suggested only that a phone was present during the offense, but not that it was used during or contained information regarding the crime's commission. Without this nexus, there was no probable cause to obtain Wells's IP history.[27]

The takeaway

At first glance, it might appear that the Court of Criminal Appeals's three separate opinions in *Wells v. State* are incongruent. But upon a close reading, they can be harmonized enough to allow prosecutors to extract some good practices regarding geofence warrants.

Prosecutors should presume that there is a reasonable expectation of privacy in Google's shared location history data—for now. However, should a geofence warrant be challenged in a motion to suppress, we should be prepared to argue that there is no reasonable expectation of privacy in Google's location data by distinguishing it from the CSLI discussed in *Carpenter*. We can do so by fashioning a record that demonstrates the hurdles and warnings that a person must bypass to opt into Google's location services.

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[24] *Id*. at 624–25.

[25] *Id*. at 629 (Finley, J., concurring) (citing *Sims v. State*, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019)).

[26] *Id*. at 629–30.

[27] *Id*. at 635–37 (Newell, J., concurring and dissenting) (citing *State v. Baldwin*, 664 S.W.3d 122 (Tex. Crim. App. 2022)).

Judge Newell expressed concern for the *Wells* geofence warrant's lack of a "nexus" between the offense and six months of Wells's IP history. But Judge Yeary observed that the *Wells* record did not suggest that the police obtained Wells's IP history pursuant to the geofence warrant. As such, Judge Yeary's opinion did not address that argument. Whether IP history is included on what courts consider "identifying information" is a vital issue. With this in mind, it might be prudent to exclude requests for IP history in geofence warrants unless the warrant affidavit can point to specific facts regarding the cell phone's usage in the commission of an offense. Besides, the information was not necessary in *Wells* for the police to identify the four killers.

With respect to probable cause, it's important to remember, as Judge Yeary noted in his opinion, that "probable cause for a search warrant does not require that, more likely than not, the item or items in question will be found at the specified location."[28] Instead, probable cause exists if, under the totality of the circumstances presented to the magistrate, there is at least a "fair probability" or "substantial chance" that contraband or evidence of a crime will be found at the specified location.[29] Lean on this language from *Flores* and *Illinois v. Gates* when arguing that there was probable cause to believe that a suspect has a phone with Google location services.

Another layer—in addition to the ubiquity of cell phones—is the ubiquity of Google. In a footnote, Judge Yeary drew attention to statistics from 2022 that indicated Google has location information on 55 percent of Americans. Consider how a magistrate's ability to rely on Google's ubiquity could change if, for example, Google is broken up into smaller companies, or competitors dilute Google's market share. These changes could affect whether courts are willing to uphold a geofence warrant in reliance on the prevalence of Android phones or Google location services.

Even with all the issues that they raise, geofence warrants likely won't be going anywhere for a while. Make sure that your requests in a geofence warrant are as limited in time and space as possible. As courts catch up with technology, technology will continue to advance and drag lawyers along with it.

This is indeed the wild west. ❇

Probable cause exists if, under the totality of the circumstances presented to the magistrate, there is at least a "fair probability" or "substantial chance" that contraband or evidence of a crime will be found at the specified location.

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[28] *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010).

[29] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

New enhanced penalties in impaired driving cases

Usually I read about new laws at the end of the legislative session with a sense of impending doom and cynical resignation.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

It is nice, while in that frame of mind, to find a change in law that shatters the gloom and suspicion and generates a heartfelt and out-loud declaration of, "What a great idea!" This happened for me this session not once but twice, and I feel compelled to share.

New intox manslaughter enhancement

SB 745 by State Sen. Lois Kolkhorst (R-Brenham) amends §49.09 (b-2) of the Penal Code to make intoxication manslaughter of "more than one person during the same criminal transaction" a first-degree felony. So, for offenses committed on or after September 1, 2025, causing the death of more than one person joins causing the death of a peace officer as a first-degree felony. For any prosecutor who has ever faced an intoxication manslaughter case with multiple victims, this probably sounds like great news. Now instead of filing multiple cases or counts, detailing all that to a jury, and trying to explain "stacking" to a bereaved family, filing a single first-degree felony seems so clear and easy. A new punishment range of five to 99 years or life will not simplify proving intoxication or causation, nor will it make these cases less complicated or easier to try, but it will give a much more realistic and fair range of punishment for those drivers who leave multiple bodies in their alcohol- or drug-impaired wakes. Credit for starting the ball rolling on this legislation goes to now-retired former Washington County DA Julie Renken, who first proposed it to Sen. Kolkhorst back in 2023. Thanks, Julie!

Charging this offense should look like and follow the same rules of pleading as §19.03(a)(7) (capital murder by killing more than one person). The statutory language is the same. In the last edition of this publication there was a great article by William Hix in McLennan County on reasons one might choose to charge impaired driving crashes resulting in death as something other than intoxication manslaughter.[1] While this new enhancement will not change any of the well-laid-out reasons to take an alternative charging route in the death of a single individual, this increased punishment range for multiple deaths might make it a far better choice.

Yes, this new law will put prosecutors in the position of "putting all of our eggs in one basket," but that is how most of us were proceeding already. And one last admonition: Get ready to qualify a jury on probation for killing more than one person. (Ah, there is the doom and gloom I usually start with!)

DWI in a school-crossing zone

From many jurisdictions, I have heard of a very troubling type of DWI case with unique proof issues. Here's how it often goes: Mom gets loaded on drugs and/or alcohol, then drives to get in line to pick up her children from school. Other parents and school employees notice her impairment and intervene, and prosecutors are left with just a Class B misdemeanor charge—and issues proving operation.

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[1] www.tdcaa.com/journal/how-to-charge-roadway-fatalities-involving-intoxication.

But isn't being impaired while waiting to pick up your kids as bad as driving them home impaired? Is there a worse place and time to drive intoxicated than the school pick-up or drop-off line?

Well, apparently the Texas Legislature agrees. SB 826 by State Sen. Tan Parker (R-Flower Mound) amends §49.04 of the Penal Code and makes DWI a state jail felony if "the person was operating the motor vehicle in a school crossing zone during the time the reduced speed limit applies to the zone." It seems to make perfect sense we treat DWI with a child passenger the same as DWI in a school crossing zone. What a great idea to protect kids both inside the impaired driver's car and crossing in front of the impaired driver's car. Or as we have repeatedly seen, headed to the impaired driver's car for their ride home.

Sign up now to host DWI training in 2026

As we have for the last several years, TDCAA will bring training on DWI and other intoxication-related topics to cities across the state. We can provide one-day training to your town (or one close to you) completely free of charge, both for prosecutors and peace officers.

If you want this training, you'll need to apply for it. We ask that you find us a free place to hold the course and maybe provide some coffee and snacks. We handle everything else: CLE and TCOLE credit, speakers, registration, free publications for attendees, and fun training with me and a hand-picked collection of the best prosecutors in the state who handle impaired driving cases. Our season for this training runs from December 2025 until June 2026.

To apply to host us, you can either track down me or Kaylene Braden at the Annual Conference in September and we can give you a paper application, or you can email Kaylene at Kaylene.Braden@tdcaa.com and she will send you an application. Applications should be available around the Annual (mid to late September) and are due to Kaylene by November 14.

We hope to see you in your county in 2026! ❇

Recent milestones

Appointment

In August, Governor Greg Abbott appointed Amy Wren as the district attorney in Angelina County (after Layne Thompson's retirement). Her term will last until December 31, 2026. Wren most recently served as the criminal chief in the DA's Office in Nacogdoches County.

Award

Tara Avants, an assistant criminal district attorney in McLennan County, was recently named the 2025 Baylor Young Lawyer of the Year. Dean Jeremy Counseller and other representatives from Baylor Law School surprised her with the announcement. Avants is the chief of the Crimes Against Children Unit, which has brought justice to hundreds of perpetrators and their victims.

Send us your news!

Do you have milestones to share? Please email them to the editor at Sarah.Halverson@tdcaa.com. ❇

The $25 for 2025 Annual Campaign is underway

Your Foundation Board of Trustees is proud to announce the $25 for 2025 Annual Campaign!

By Rob Kepple
TDCAF Executive Director in Austin

This is an opportunity for everyone to join together and support our profession with one goal: So the State is always ready.

Being able to nimbly jump in and support a project when other funding is not immediately available is a strength of the Foundation. Some recent examples of the Foundation coming through in times of need:

- When last-minute construction at a host hotel disrupted a TDCAA conference, the Foundation quickly came to the rescue, giving the additional funding needed to move the conference to a new (and even better) venue.
- The Foundation helped pay for filming and production for the mandatory online *Brady* course that every prosecutor must regularly take.
- With no other funds available, the Foundation provided each attendee of the January 2025 Prosecutor Trial Skills Course with a copy of TDCAA's *Family Violence Manual*.

As you know, the Foundation also continues to pay for core TDCAA training. In 2025 and 2026, we plan to support TDCAA in the following ways:

- funding production of a two-hour online ethics course; filming happened in mid-August,
- providing ongoing financial support for the critical work of TDCAA's Domestic Violence Resource Prosecutor position,
- paying for the travel and hotel costs for attendees and speakers at the Advanced Trial Advocacy Course in Waco,
- funding the travel, hotel, food, and staffing costs for those who attend our Train the Trainer course, and
- keeping the registration cost low for attendees at our Prosecutor Management Institute (PMI) training by subsidizing the course materials, speaker fees, and testing expenses.

As you can see, the Foundation contributes greatly to many of TDCAA's initiatives. But we can't do it alone—your continued support is vital to our mission and the profession.

If every member donated $25 this year, the Annual Campaign would raise over $100,000! Your $25 would go a long way toward supporting prosecutors across the state.

Please take a minute today to click on the QR code at left and make your tax-deductible gift of just $25 to the $25 for 2025 Annual Campaign. Thank you for supporting our membership and for your public service! ❇

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Photos from our Prosecutor Trial Skills Course

Photo from our Fundamentals of Management Course in Houston

Photos from our Advanced Trial Advocacy Course in Waco

This witness could've been a Zoom call: rules for using remote testimony (cont'd from the front cover)

An earlier Supreme Court case, *Coy v. Iowa*,[3] had found that the Confrontation Clause was violated when two child witnesses were permitted to testify from behind a screen, blocking the defendant's view. But in *Craig*, Justice O'Connor wrote that the Confrontation Clause's guarantee to a face-to-face confrontation of witnesses was not an absolute right and could be bypassed in some circumstances.[4]

The key distinction between *Coy* and *Craig* was the individualized nature of the protection. Iowa's rule in *Coy* involved a blanket law that applied to all child witnesses. The Supreme Court criticized this as a "legislatively imposed presumption of trauma."[5] But in *Craig*, the State put on specific evidence about the trauma that the specific witnesses in the case would face testifying live, with experts testifying how each specific child would be affected by testifying in front of the defendant.

The *Craig* court identified four key elements of the Confrontation Clause's protection:[6]

1) Physical presence of the witness. Face-to-face confrontation reduces the risk that a witness will wrongfully implicate an innocent person because it is "more difficult to tell a lie about a person to his face than behind his back";

2) Giving statements under oath. This impresses the witness with the seriousness of the matter and giving the protection of perjury against false statements;

3) Cross-examination. "The greatest legal engine ever invented for the discovery of truth"; and

4) Observation of the witness's demeanor by the trier of fact. A jury's ability to determine credibility of witnesses is enhanced by being able to view them in person.

Thus, the *Craig* court determined that the Confrontation Clause has a *preference* for face-to-face confrontation at trial, but that preference can give way to important public policy and necessities of an individual case. Denial of physical, face-to-face confrontation is permitted as necessary only to further an important public policy and, where the reliability of the testimony is otherwise assured, by ensuring the other goals of the Confrontation Clause are met.[7]

In the specific instance of *Craig*, the Supreme Court found that protecting minor victims of sex crimes from further trauma and embarrassment is a compelling interest. The State supported that interest with testimony specific to the witnesses in the case, not a general class of witnesses. And the other protections of the Confrontation Clause were met, because the witnesses were still placed under oath, the defendant was able to fully cross-examine them, and the jury was able to observe the witnesses' demeanor.[8]

What is a compelling interest?

The most important factor in determining whether remote testimony will be allowed is whether the interest being protected is a compelling public policy interest. *Craig* and later decisions by the Texas Court of Criminal Appeals (CCA) have laid out some guidelines to consider when establishing a compelling interest.

One factor is whether the witness is a child or an adult. The *Craig* court noted that protecting children from being further traumatized and embarrassed is an obvious interest, and one of the CCA's main cases on remote testimony involved child witnesses.[9] By contrast, adults "are generally considered to be made of sterner stuff and capable of looking after their psychological well-being."[10] Adults wishing to testify remotely will thus need to provide more justification of their need than a child. An adult who was a victim of the offense will be able to justify that more

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[3] 487 U.S. 1012, 1021 (1988).

[4] *Craig*, 497 U.S. at 845.

[5] *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

[6] *Craig*,497 U.S. at 846.

[7] *Id*. at 851.

[8] *Id*. at 856-57.

[9] See *Marx v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999).

[10] *Romero v. State*, 173 S.W.3d 502, 506 (Tex. Crim. App. 2005).

than one who was merely a witness, as a victim is presumed to have significantly more trauma in facing the defendant.[11]

In addition to protecting emotional needs, the CCA has considered the physical protection of witnesses as well. In one case, *Romero v. State*, the CCA found that a witness had not shown a significant enough reason where he was merely afraid of the defendant based on the offense.[12] But in *McCumber v. State*, a witness reported that she had experienced threats and break-ins soon after reporting the victim's outcry to law enforcement.[13] She believed that they were related to the case and attributed it to the defendant's associates. She was so afraid that she had fled the state before the trial, and she refused to voluntarily return to testify. The court concluded that she had shown a legitimate fear of retaliation and could testify remotely.

The key distinction between the Romero *and* McCumber *cases was the legitimacy of a potential danger to the victim.*

The key distinction between the two cases was the legitimacy of a potential danger to the victim. The *McCumber* victim had received specific threats and been so afraid of them that she fled the state and refused to return. But the *Romero* witness could not articulate any threats or anything the defendant had done beyond the offense itself. A witness wanting to testify remotely should articulate any specific or implied threats by the defendant *or* those associated with him. Note that the threats in *McCumber* were merely by the defendant's "associates," and the *Romero* court noted that the defendant was *not* part of any organization or street gang "from which retaliation might be anticipated."[14] It is therefore not only the defendant who can cause a legitimate fear of retaliation in a witness.

Finally, practical considerations can be a compelling interest to justify remote testimony. Lower courts have approved of remote testimony for witnesses who were:

- in the hospital with a heart attack;
- suffering from Stage IV cancer and whose doctors said travel would be dangerous to her health;
- in a high-risk pregnancy and advised not to travel;
- elderly, living out of state, and suffering from serious heart problems; and
- in active-duty military currently deployed overseas.[15]

Several of these lower-court cases were favorably cited by the CCA in a recent case, *Haggard v. State*, as potentially legitimate justifications for remote testimony.[16] But the CCA also drew a strong line that only an important public policy can justify remote testimony, not mere inconvenience or preference. In *Haggard*, the SANE nurse moved out of state before trial but agreed to return for trial as long as the State paid her expenses. But the Friday before trial, she changed her mind. She cited not being paid by her employer or the State and inconvenience (because she would need to travel to Texas again a week later) as her reasons for not wanting to testify in person. The CCA noted that the State could have subpoenaed her but chose not to, and "mere inconvenience to a witness" was not enough to justify discarding face-to-face confrontation.[17]

In all, reasons that have been found as important public policy to justify remote testimony include causing trauma to child witnesses and possibly adult victims, fear of specific retaliation

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[11] *Id*. at 506 (noting, among other reasons, witness had not shown adequate reason was that he was merely a bystander rather than a victim).

[12] *Id*.

[13] *McCumber v. State*, 690 S.W.3d 686, 692-93 (Tex. Crim. App. 2024).

[14] *Romero*, 173 S.W.3d at 506.

[15] *Lara v. State*, No. 05-17-00467-CR, 2018 WL 3434547, at *4 (Tex. App.–Dallas 7/17/18, pet. ref'd) (not designated for publication) (heart attack); *Paul v. State*, 419 S.W.3d 446 (Tex. App.–Tyler 2012, pet. ref'd) (cancer); *Acevedo v. State*, No. 05-08-00839-CR, 2009 WL 3353625 (Tex. App.–Dallas 10/20/09, pet. ref'd) (not designated for publication) (pregnant); *Stevens v. State*, 234 S.W.3d 748 (Tex. App.–Fort Worth 2007, no pet.) (elderly); *Rivera v. State*, 381 S.W.3d 710 (Tex. App.–Beaumont 2012, pet. ref'd) (military).

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

[17] *Id*. at 326-28.

or danger from the defendant or his associates, serious medical issues, or a witness being out of the country or out of the State's subpoena power. Mere discomfort, generalized fear, and inconvenience are not sufficient.

Setting up your case for remote testimony

If you have a case with an important public policy reason, what do you need to do to ensure that remote testimony is actually permitted (and upheld on appeal)?

First, see if a particular statute applies or if you are making a general necessity request. In Code of Criminal Procedure Art. 38.071, child witnesses in certain cases, including murder and sexual offenses, may testify via closed-circuit television if the trial court finds that the victim is "unavailable to testify in the presence of the defendant."[18] This required finding saves this statute from Confrontation Clause violations, unlike *Coy*'s general rule applicable to all child victims.[19] Additionally, Art. 38.076 provides for testimony of a forensic analyst by videoconference. However, this provision applies only if the use of videoconferencing is approved by all parties and the court.[20]

Whether proceeding under statute or a general request, the most important thing is to have *case-specific findings* made by the trial court. In *Craig*, these were findings both that the procedure was necessary to protect the specific witness testifying *and* that the child would be traumatized by the defendant's presence rather than the courtroom generally.[21] In *McCumber*, the CCA held that these findings do not need to be factually detailed. The court does not even need to explain the specific reasons on the record.[22] The requirement for "case specific findings" simply means that the finding must be that this particular witness needs an accommodation rather than a generalized finding, such as that all child witnesses would be traumatized by face-to-face testimony.[23]

For a court to make case-specific findings, it needs to have evidence before it. Some form of evidence should be put on, as opposed to the attorneys simply summarizing the need. This could include the witness personally explaining why she is afraid to appear in person or what medical issues she might have. It could also include testimony from a doctor or other expert on the witness's medical condition or the psychological effect of testifying in front of the defendant on the witness stand. An investigator could also explain why a witness could not be subpoenaed before the issue arose. Remember, as a preliminary ruling on the admissibility of evidence, the Rules of Evidence do not apply.[24]

In addition to explaining the public policy reasons for remote testimony, be sure to put on the record how the remote testimony will actually occur so as to preserve the other elements of Confrontation Clause protection—being under oath, being subject to cross-examination, and the jury being able to observe the witness's physical demeanor.[25]

First, the witness should be placed under oath and impressed with the importance of his testimony. The judge can warn the witness that he is still under oath and bound by the penalties of perjury even though he is not physically present in the courtroom.

Second, the witness must be subject to cross-examination. This includes not only that the defense attorney is able to ask questions but also that the defendant is able to communicate with his attorney about any questions he needs to ask. With Zoom and other videoconferencing technology, the witness typically appears on a screen in the courtroom and everything otherwise proceeds as normal. In other cases, the defendant may be in a separate room. The proceeding outlined for child witnesses in Art. 38.071, for example, places only the judge, court reporter,

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[18] Tex. Code Crim. Proc. Art. 38.071, §1.

[19] *Coy*, 487 U.S. at 1021.

[20] Tex. Code Crim. Proc. Art. 38.076(b).

[21] *Craig*, 497 U.S. at 855-56.

[22] *McCumber*, 690 S.W.3d at 691 (trial court's statement "there is a necessity shown" was sufficient).

[23] *McCumber*, 690 S.W.3d at 692; compare to *Coy*, 487 U.S. at 1021 (holding state law authorizing remote testimony for all child witnesses was not valid).

[24] Tex. R. Evid. 104(a).

[25] *Craig*, 497 U.S. at 846.

attorneys, and witness in the room. But the defendant must be allowed to communicate with his attorney, either contemporaneously or during periods of recess.[26] Outline the exact procedure that will be followed in your particular case.

Finally, the witness must be able to be seen clearly enough by the trier of fact to evaluate the witness's demeanor. It would be helpful to explain on the record—for the benefit of appellate justices who will not see your courtroom or how the remote testimony occurs—exactly how the set-up will work. If there is a large, well-lit screen where the witness can be easily seen by everyone in the courtroom, that is ideal. If the witness will be on a very small screen or has connection problems that would make it difficult to be seen and heard, consider other options that will make him more easily viewable.

While the Covid-era emergency orders are no longer in effect, the Lira *decision is an important reminder that Article 27.18 is mandatory for the court to have authority to take a plea.*

Special rules for the defendant

There are a few special rules and applicable statutes if the defendant is the one who will appear remotely. Generally speaking, a defendant has the right to physical presence at all critical phases of trial, which includes not only the trial itself but also plea proceedings.[27] This is a right under both the Confrontation Clause and the Due Process Clause, which extends it to apply not only to trial proceedings but also to revocation or adjudication hearings.[28] Additionally, in Texas there is a statutory right for the defendant to be physically present at trial for all felonies and any misdemeanors where jail is a potential punishment, unless he voluntarily absents himself from the trial after entering a plea in a bench trial or selecting a jury in a jury trial.[29]

There are two statutes that specifically provide for videoconferencing. Article 15.17 of the Code of Criminal Procedure permits magistration to be done by videoconference and treats it the same as an in-person magistration.[30] Because this is not a trial proceeding, the Confrontation Clause guarantee to physical presence is not yet in play.

The second statute is for any plea or waiver of rights that is required to be done in "open court." Article 27.18 provides that these proceedings can be done via videoconferencing so long as the State and defendant file written consent to do so.[31] The videoconference procedure must allow for simultaneous video and sound between the judge, attorneys, and defendant, and the defendant must be able to communicate privately with his attorney upon request. This is a procedure some counties commonly use to take pleas from jail rather than going through the expense and time of physically transporting inmates to the courtroom. It can even be used to take a plea remotely from another county.[32] An Art. 27.18 waiver should be made part of the plea papers in the case. Because consent by the defendant is required, it does not run afoul of any constitutional protections.

During the Covid lockdowns, emergency orders from the Texas Supreme Court authorized courts to modify court procedures, including requiring anyone in a hearing, deposition, or proceeding of any kind to participate remotely.[33] However, the Court of Criminal Appeals held in *Lira v. State* that the emergency order could not grant the trial court authority where none existed. A trial court has authority to enter a felony conviction only if a defendant appears "in person and in open court" to enter his plea *or* waives his rights pursuant to Art. 27.18. Because it is a matter of the trial court's authority to act, the emergency order did not permit the trial court to force the defendant to appear remotely.[34]

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[26] Tex. Code Crim. Proc. Art. 38.071, §3(a).

[27] *Lira v. State*, 666 S.W.3d 498, 511 (Tex. Crim. App. 2023).

[28] *Id*. (Confrontation Clause); *Hughes v. State*, 691 S.W.3d 504, 519 (Tex. Crim. App. 2024) (Due Process).

[29] Tex. Code Crim. Proc. Art. 33.03.

[30] Tex. Code Crim. Proc. Art. 15.17(a).

[31] Tex. Code Crim. Proc. Art. 28.17(a).

[32] Tex. Code Crim. Proc. Art. 28.17(d).

[33] Supreme Court of Texas, First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket Nos. 20-9042, 596 S.W.3d 265, 265–66 (Tex. 2020).

[34] *Lira*, 666 S.W.3d at 511-13.

While the Covid-era emergency orders are no longer in effect, the *Lira* decision is an important reminder that Art. 27.18 is mandatory for the court to have authority to take a plea. Any future emergencies or a trial court's preference cannot overcome this constitutional and statu- tory protection. If pleas are taken via videoconferencing, make sure the defendant has waived his rights pursuant to the statute.[35]

The right to be physically present is a waivable-only right.[36] That means a defendant does not have to object if he is prevented from being physically present. He must instead affirmatively waive the right to be physically present. Nothing is more frustrating than everyone going along with a procedure and the case later being reversed on appeal because no one remembered to just ask the defendant if he waived his right to be present in the courtroom!

Remember that a defendant voluntarily absenting himself from trial is considered "a waiver of that right by action"—the defendant's actions of being disruptive or choosing not to return to trial amount to an affirmative waiver.[37] If a defendant acts disruptively, having him appear remotely may be a less restrictive way of stopping the disruption without entirely removing him from trial. Just make sure in that case that the judge makes very clear findings on the record. Also ensure that the defendant has the ability to consult with his attorney even while appearing virtually.[38]

Conclusion

In the modern world, videoconferencing has become ubiquitous. We use it regularly, whether for work or for pleasure. It can be a valuable tool in trial for witnesses who cannot appear in person. But this value must be balanced against the defendant's statutory and constitutional rights. Remote testimony can always be agreed to by the parties. But if the defendant objects, it must be limited only to the most important public policy reasons, not a mere matter of inconvenience or preference by the witness or the parties. By keeping these goals in mind and following the rules laid out here, remote testimony can become an effective part of your trials in the future. ❇

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[35] The *Lira* court indicated that the failure may be harmless if the record is clear that the defendant did waive his rights and there was simply an incorrect written form. *Lira*, 666 S.W.3d at 518-19. It is the defendant's waiver that is required for the court to have authority to act, not necessarily the form.

[36] *Hughes v. State*, 691 S.W.3d 504, 515 (Tex. Crim. App. 2024) (constitutional rights); *Tates v. State*, ___ S.W.3d ____, 2025 WL 1812826, at *5 (Tex. Crim. App. July 2, 2025) (not yet published) (statutory rights).

[37] *Tates*, 2025 WL 1812826, at *5.

[38] *Id*. (criticizing trial court requiring defendant to appear virtually and muting him for outbursts without giving him any ability to consult with his attorney during the trial).

Do you even know who I am? The relationship between investigator and prosecutor

Many DA and CA investigators come to a prosecutor's office after a full career in law enforcement.

By Sergeant Investigator Anthony J. Rodriguez
Criminal DA Investigator in Bexar County

Imagine leaving behind your profession as a police officer—years of experience, a full arsenal of war stories, and a respectable rank—only to become the new guy in an office staffed and supervised by... dun dun duuuun! Lawyers.

That feeling of personal inadequacy hits every new DA or CA investigator. Trust me, I know. I lived it. You could summarize that first day with just two words: impostor syndrome.

I've now been a DA investigator for just over 13 years, following 12 years as a deputy with the Bexar County Sheriff's Office. It took time to understand why I felt like an outsider and why I struggled to feel like a valued part of the team.

From police officer to prosecutor's investigator

As a police officer, you start fresh—a novice stepping into the world of law enforcement. Academies last for months, bonds are formed, and foundations are laid. You graduate with a clear understanding of where you are, where you're headed, and how to get there. Everyone starts on relatively equal footing.

I found my niche in a field almost exclusive to law enforcement: criminal street gangs. My time as a gang officer reminds me of a quote by Vincent van Gogh: "I put my heart and my soul into my work and have lost my mind in the process." My wife would agree. That passion—and the subculture that came with it—consumed my life for nearly a decade. Ironically, it was this very passion—my gang expertise—that led the local DA's office to take a chance on a young officer.

Most DA or CA investigators aren't hired for their rank or titles but for their experience and, with luck, the contacts they've built. These make an investigator valuable to prosecutors. Some, like me, are brought in for specialized knowledge. The problem is many new investigators don't understand how their expertise fits into the legal world. There's confusion, doubt, and an unshakeable question: "What am I here to do?"

I remember the day I got the job offer. I immediately searched, "What is a DA investigator?" The internet was (of course) not helpful, providing only a vague job description: "A district attorney investigator is a law officer who works for the government within the judicial system, specifically in the district attorney's office. They investigate felony and misdemeanor offenses and play a critical role in the prosecution of criminal cases."

'We're like translators'

It wasn't until I spoke with my mentor, Mark Gibson (a retired DA investigator), that I gained real insight. He put it this way: "We're like translators. We take law enforcement's work and explain it to the prosecutors." We see incoming cases through the eyes of experienced officers. We recognize the structure of an investigation, understand why certain reports exist—or don't—and reconstruct what happened based on our knowledge. This is where a DA investigator becomes an immeasurable asset, where we become essential to a prosecutor's decision-making process.

We also know how to follow orders. We understand chains of command. We find fulfillment in completing a prosecutor's request, even simple tasks such as obtaining judgments or serving subpoenas. It feels good to be needed, to contribute. But too often, our role is reduced to just those basic tasks. Some prosecutors simply don't real-

ize the full potential of their investigators. Many of us were once detectives, crime scene analysts, intelligence officers, or patrol supervisors, so why limit us to picking up witnesses or delivering paperwork?

Maybe prosecutors hesitate to involve us because teaching us seems daunting. And to be fair—I'll admit it—cops are the hardest to teach. Here's why: We're trained to be alphas. To take control and to fix the problem. We've operated under that mindset for decades. Now, we're in a completely new environment, surrounded by lawyers, intellectuals, experts in the law. Suddenly, those of us who were trained to lead must learn how to follow, how to ask for help.

That's the paradox. And it's something many DA and CA investigators quietly wrestle with.

I was lucky. Early in my time at the DA's office, I worked with a patient, understanding prosecutor, Tanner Neidhardt. I was assigned to a court with three prosecutors and quickly bonded with him. I remember sitting in his office and admitting, "I don't know what I'm supposed to do here. Can you teach me?" Tanner took the time to walk me through the entire process of how criminal cases move through the system—from law enforcement submission, to indictment, and finally to trial preparation and resolution. Some cases were dismissed, others rejected, and the rest moved forward to trial. I remember going to court with Tanner and watching him litigate. Afterward, we'd talk through everything that happened in court, and he'd break it all down in detail.

When it came time to find, interview, and serve witnesses, Tanner didn't just delegate—he came with me into the field. We spent countless hours tracking down witnesses and preparing them for upcoming cases. Through that experience, I learned how crucial it is to locate victims and witnesses, conduct thorough interviews, and ensure their recollections match their original statements.

During this period of my life, I learned much more than just the mechanics of a job. First, prosecutors aren't the punchline of some tired lawyer joke (though we all know a few good ones!). They're people—just like me—committed to justice. Yes, they're highly educated, but they also have families, lives, and goals. And they, too, struggle with doubt. They're trying to stay afloat in a system that's just as complex for them as it is for us. I had to let go of my ego—the stereotypical police arrogance. I had to be teachable. Once I was, those mental barriers fell away. I built strong working relationships with prosecutors. Those relationships are everything.

Building up trust

Every prosecutor has his or her own style. Some are hands-on, and others trust their staff implicitly. But regardless of approach, the foundation of a successful relationship between prosecutor and investigator is one word: trust. I knew I had to earn that trust before I could earn respect. I tried to become a partner, not just a subordinate, which meant I had to understand how a prosecutor prepares a case. And honestly, most cops don't know what happens after the DA accepts a case, let alone once it goes to trial. We grew up watching cop movies that end with the bad guy in cuffs—there's no courtroom scene. No cross-examination. No discovery process. Just a stereotypical Hollywood scene of a black and white cop car driving away as the camera pans up over the city in the dead of night.

We are police officers who are accustomed to learning how to do the job from instructors in a structured classroom setting. There's no academy for DA investigators. We must learn this complex duty while on the job.

I remember my first time testifying in court. I was still with the sheriff's office. I walked into the courtroom lost, unsure of where to go. A bailiff quietly pointed me toward the witness stand. I approached it with fear and trepidation. Later, as a new investigator, I was asked to sit in on a witness interview. The prosecutor and witness stared at me, waiting for me to begin—only I had no idea how. I even struggled with serving a subpoena. The document looked like it was written in a foreign language. It reminded me of the famous quote from Benjamin Franklin: "Tell me and I forget; teach me and I may remember; involve me and I learn."

Ultimately, I took the initiative and began immersing myself in complex investigations. I discovered that prosecutors welcomed thoughtful input and valued my inquisitive, analytical approach to the cases.

One example stands out: I worked on a challenging murder case involving a young woman who was tragically killed with a knife in a local park. The weapon had never been recovered. Over the course of 18 months, I returned to that park—during work hours and on my own time. I

Continued on page 23 in the green box

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Juvenile specialty courts

In the May–June 2018 edition of *The Texas Prosecutor*, two articles discussed specialty courts in Harris and Guadalupe Counties.[1]

By Kathleen Takamine
Assistant Criminal District Attorney in Bexar County

They both outline the general concept of specialty courts and how they are created and implemented. I highly recommend them for a basic understanding of such courts.

To summarize, in the juvenile world, specialty courts are created to tackle the issue of high-risk juveniles for whom regular supervision would not be sufficient. Each specialty court addresses specific issues and needs for juveniles where they will be closely monitored by the probation department and juvenile court. These types of courts are always non-adversarial in nature, with the judge, probation officers, defense counsel, and prosecutor working together to monitor each participant. All the courts I discuss in this article, with one exception, require that the juveniles and their parents participate voluntarily. If they do not, then they will not receive the specialty court's services. Ultimately, the goal of these courts goes back to the main purpose of the juvenile justice system: to provide for the welfare of the juvenile, the juvenile's family, and the community.[2]

To date, Bexar County has nine specialty courts to deal with the special needs of certain juveniles. These are:

- pre-adjudication drug court
- post-adjudication drug court
- mental health dockets: MIND Court and Crossroads
- human trafficking: Restore Court
- gang court: GRIT Court
- Crossover Court
- Family Enrichment Court (FEC)
- Strive Court
- Re-entry Court

I will briefly discuss them and address the difference between the courts outlined in the earlier articles (though overall, they function pretty much the same).

There is one important point to keep in mind. Sometimes juveniles could fit into several of these courts, but it is not practical for someone to participate in more than one at a time. The task is to tailor the outcome to that specific juvenile and find the best possible court to address the child's most pressing need. Any other needs can still be provided within that specialty court.

How the courts are organized

Before going into the description of the specialty courts, I should outline the set-up. In Bexar County, there are three juvenile district courts: the 289th, 386th and 436th. There is also an associate judge assigned to all the courts whenever there is need for assistance in conducting detention hearings, taking a plea in certain cases, conducting certain hearings in certain cases, and running a specialty court if a district court so chooses.

In this setting, each specialty court (with one exception) is assigned to a particular district court. All of them have a Re-entry Court for reasons we will discuss later. The 289th District Court runs the human trafficking court (called Restore Court), the Family Enrichment Court (FEC), and the 289th Re-entry Court. The 386th District Court runs Strive Court, Crossover, the

[1] See "Specialty courts for juvenile offenders" at www.tdcaa.com/journal/specialty-courts-for-juvenile-offenders and "Juvenile drug courts are not just for big counties" at www.tdcaa.com/journal/juvenile-drug-courts-are-not-just-for-big-counties.

[2] See Texas Family Code §51.01.

post-adjudication drug court, and the 386th Re-entry Court. The 436th District Court runs MIND, GRIT, and the 436th Re-entry Court. The pre-adjudication drug court is assigned to the associate judge.

Even though each court is assigned a specialty court, that does not mean that only the juveniles in that court are eligible for the specialty court. For example, even if a juvenile has a case set in the 289th, if the probation officer, defense attorney, and prosecutor agree that he will benefit by participating in the 436th MIND Court, then the juvenile will be staffed to participate in that specialty court. That child's case could possibly end in that court. If the juvenile is removed from that specialty court, the case could either be kept in the 436th or sent back to the 289th. It will be up to both judges' discretion. All three district courts may send their cases to the pre-adjudication drug court run by the associate judge.

Application and acceptance

The process of getting into each court is pretty straightforward. Any party in a court—a probation officer, the juvenile's defense attorney, or the prosecutor—can indicate that the juvenile would benefit from participating in the specialty court. All three parties, along with the juvenile, his family, and the judge, must agree to sending the juvenile to be staffed for the specialty court. Once agreement occurs, the case is presented to the staffing committee[3] for that specialty court. The committee discusses whether to accept the juvenile or not. If accepted, a probation officer and the specialty court's defense attorney go over the contract with the juvenile and his family.

This type of acceptance is the same in every specialty court except Re-entry Court. Once accepted, the juvenile is expected to follow the court's rules. Once or twice a month, the staffing committee will meet to discuss the juvenile's progress. If there is a need to change a part of his treatment program and all the committee members agree, the changes are implemented. The juvenile is scheduled to come to court after

[3] The staffing committee consists of the presiding judge of the district court, probation officers assigned to that specialty court, a prosecutor assigned to that district court, and a defense attorney specifically assigned to the specialty court (this defense attorney does not necessarily represent the juvenile in the criminal case).

tracked down the defendant's friends and acquaintances, following every possible lead. After a year and a half of persistent effort, I found the knife.

Another example comes to mind. I was working a murder case where the victim's girlfriend—a key witness—was missing. She was transient and struggled with addiction, which made locating her incredibly difficult. Her whereabouts were constantly changing and leads often went cold. But over the course of several months, I persisted, and eventually, I was able to track her down and secure her testimony. Her account proved critical to the case, and ultimately, the defendant received a life sentence.

Over time, things changed. My confidence grew. My old war stories with the sheriff's office were slowly replaced by new ones in the DA's office. Yes, I made mistakes. But those were overshadowed by dedication and hard work. The more I was involved, the more I understood. Did I finally figure out how to be a DA investigator? Strangely, I realized I always knew—I just didn't know how to bridge the gap between myself and the prosecutor. Once I developed that confidence—and realized how closely our worlds overlap—it all clicked.

Please forgive the cliché, but it's true: We are two wings on the same bird, and we are learning to fly. To every new investigator starting out and to every veteran still searching for purpose: Be the link between the streets and the courtroom. Don't feel out of place. The badge may be different, the mission more nuanced, but the purpose remains the same.

And to every prosecutor reading this: Remember that your investigator is a willing participant in your case. Don't be afraid to teach the process. Don't hesitate to explain the steps. We want to know. We come from different worlds, shaped by different training, responsibilities, and experiences. But when we work together—when we communicate, trust, and teach each other—we become a unified force. The investigator brings the street. The prosecutor brings the courtroom. And justice lives in the space where those two meet.

At our best, we're not just colleagues—we're collaborators. Partners. Because it's not about who finds the witnesses or who makes the arguments in court. It's about finding the truth, together. ❇

the staffing committee meeting, and the judge will address him and scold him if needed. There have been times when the judge deems it necessary to take the juvenile into custody (i.e., the juvenile is engaging in more criminal activities or is running away from home).

We will discuss each court next.

Drug courts

In Bexar County, the drug specialty court docket is divided between two courts, pre-adjudication and post-adjudication. Both courts have the same general criteria: nonviolent offenses, indication of a drug or alcohol problem, and the willingness of the juveniles and their parents to participate. Drug issues tend to crop up in almost all juvenile cases. Most juveniles will indicate that they have used drugs and/or alcohol at some point. These courts address those whose histories show an extensive drug or alcohol issue.

In Bexar County, the drug specialty court docket is divided between two courts, pre-adjudication and post-adjudication. Both courts have the same general criteria: nonviolent offenses, indication of a drug or alcohol problem, and the willingness of the juveniles and their parents to participate.

How we assess their needs comes mainly from juvenile probation. Juvenile probation officers have opportunities to interact with the juvenile that a prosecutor does not have. They can interview the juvenile and his family; they are privy to any past hospitalizations or problems at school, and they can obtain hospital and educational records. The defense attorney will often provide information from the family and can report if a lot of the juvenile's issues come from substance abuse. As a prosecutor, there are times when I can glean information from the police reports that there is a likelihood of a substance abuse problem—for example, if the juvenile was arrested for fighting and was found to be intoxicated by alcohol or drugs. Vape pens and THC have been an increasing concern in Bexar County. In the past, crime labs have had trouble testing these, but now, there are effective methods to test for these substances, and the cases will be coming in fast. Therefore, the need to address the problem of drug and alcohol use will be a long-standing issue. We all hope that these specialty courts will curtail the rising problem.

Pre-adjudication is offered without the need for the juvenile's adjudication for the case. In this way, juveniles can avoid a formal finding of delinquency, as their cases can be nonsuited if they successfully complete the court, very much like pretrial diversion offered in adult courts. This is a viable solution for those who do not have any prior juvenile referrals and who are charged with minor offenses, such as nonviolent misdemeanors or minor drug possession.

The post-adjudication court program allows the judge more intensive judicial supervision. Often, participants are charged with felonies or have prior juvenile referrals that indicate the juvenile needs more services and supervision.

The services would be similar in either court in terms of drug counseling. With pre-adjudication, if the juvenile is not cooperating with services, the court can only remove the juvenile from the program and return him to the court where the case was originally assigned, and the process begins all over again. This is similar to having a deferred contract closed out and the case reactivated.

For post-adjudication drug court, if a juvenile is removed from this court, the case is sent back to the court of origin and the juvenile is likely to face a motion to modify probation. Violating post-adjudication drug court conditions is usually a violation of a condition of probation. It is similar to a Motion to Revoke Probation in adult court. The consequences could be more serious for the juvenile.

Mental health courts

As with the drug court, the mental health specialty court is separated into two courts, this time divided by gender. Crossroads is offered to female youth, and MIND (Males in Need of Direction) Court is offered to the young men. The general criteria for these courts include a diagnosis of a mental illness, being charged with a nonaggravated offense, and willing participation from the juveniles and their families. The emphasis of these courts is to make sure the juvenile continues to be stabilized with medication and counseling and that the family has support and resources for him. The probation officers assigned to this court make sure that the juveniles have continuing access to psychiatric counseling through the probation department or in the community, such as the Alamo Area Council of Governments (AACOG) or the Center for Health Care Services.

Human trafficking court

For victims of human trafficking or those juveniles who are vulnerable to sexual exploitation, Bexar County offers Restore Court (short for Restore Hope Court). The juveniles who might be helped with this program are often hard to discern as they are not forthcoming about their backgrounds. In dealing with this population, we have found that it generally takes several people

to detect this threat to a juvenile and, even once it is detected, the youth will not want to cooperate.

Once they are ready and willing to participate, this court is best equipped to handle such cases. Regular probation is generally not enough to supervise these juveniles, and they generally have more than one need that must be addressed. For example, human trafficking victims tend to have substance abuse problems too. Such issues can still be addressed within Restore Hope with substance abuse counseling or rehabilitation, if necessary. It can also assist juveniles with vocational and educational needs. Probation officers work closely with the juveniles, often being available at all hours should the youth feel the need to contact someone. Each juvenile is required to officially appear once a month for the specialty court. Numbers of participants vary, going from seven to 15 juveniles at any given time.

Gang court

Bexar County's counterpart to Harris County's YESS[4] is GRIT, or Gang Resistance in Teens. As with juvenile victims of human trafficking, experience has taught us that it really boils down to how willing the youth are to leave the gang lifestyle. This population also tends to require a more intensive supervision than regular probation can provide. Also similar to juveniles in Restore Court, juveniles in GRIT usually need more than support away from gang activities; they tend to also need substance abuse and trauma counseling. This can be a difficult court to maintain because it deals with juveniles who have gang affiliations who must be actively trying to leave that life behind. Participants in this court range from three to eight members at any given time.

Crossover Court

I will mention Bexar County's Crossover Court briefly as it was addressed in another article in this journal, "Crossover Court helps juvenile offenders with open CPS cases."[5] These cases involve juveniles facing delinquency charges who are also under the supervision and care of the Texas Department of Family and Protective Services (TDFPS). The basic idea of Crossover Court is to avoid duplicating services and avoid conflict between TDFPS and juvenile district courts. In Crossover Court, the juvenile judge, prosecutor, defense attorney, and juvenile probation officer are kept aware of the juvenile's TDFPS case. Please consult the article for more information on this court. Because this court deals with juveniles within CPS, the number of participants is fairly large, between 40 and 50 on average.

Family Enrichment Court (FEC)

FEC was created to deal with juveniles who are exposed to violence within the family setting. Often, these children come in with family violence cases, such as assault causing bodily injury to a family member. Oftentimes, juvenile probation will find out that CPS had been involved in the juvenile's family. If CPS is still closely involved with the family, the juvenile usually does not need the services of this specialty court as CPS can provide the same counseling and services that probation offers.

Participation requires that the juvenile and his parents or guardians voluntarily participate in family counseling, allow frequent in-home visits, and appear in court monthly. If needed, substance abuse and mental health counseling can also be provided.

The defense attorney is a particular attorney assigned specifically to that court and may not have been the juvenile's attorney appointed to the criminal case. He or she is assigned to FEC by the judge who presides over the court. However, this attorney has the same duties to act in the best interest of the juvenile as if he or she were assigned to the criminal case.

The Bexar County juvenile probation officers assigned to FEC create a treatment plan for each juvenile. They keep track of all the progress (or lack of progress). Each report is sent to the core team to consider any changes to the juvenile's plan.

Regular probation is generally not enough to supervise juveniles with gang history, and they generally have more than one need that must be addressed.

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[4] YESS stands for Youth Empowerment Services and Supervision. See "Specialty courts for juvenile offenders" at www.tdcaa.com/journal/specialty-courts-for-juvenile-offenders for more information.

[5] www.tdcaa.com/journal/crossover-court-helps-juvenile-offenders-with-open-cps-cases.

STRIVE

STRIVE Court was originally created to address the educational needs of and mentoring for juvenile offenders, but it has expanded to include employment skills, support with housing, and assistance in obtaining needed items for the transition to adulthood. STRIVE is really geared towards older youth who are 16½ years or older. Not everyone is eligible for this court. It could be useful for most kids, but it still requires a juvenile to participate.

Re-entry Court

Re-entry Court is the only specialty court where the juvenile does not have a choice to participate or not. If the judge orders it, the juvenile must join.

Once juveniles have been found "true" in engaging in delinquent conduct, they can be placed on a court-ordered deferred contract, placed on probation, or sentenced to the Texas Juvenile Justice Department (TJJD). When a juvenile is placed on probation, the judge can order him to be placed on probation at home or be removed from the home and placed in a secured placement facility.[6] If the judge orders the juvenile to probation and removed from the home, he will be ordered to participate in the Re-entry Court once he is released from placement.[7]

The whole concept of helping juveniles transition back into regular life makes sense: A youth who has spent several months in a secured placement will need more than the usual support he would receive on regular probation.

The purpose of Re-entry Court is to support the juvenile's transition from a secured placement to his own community—basically, re-entry into society. The whole concept of helping juveniles transition back into regular life makes sense: A youth who has spent several months in a secured placement will need more than the usual support he would receive on regular probation. During time in placement, the juvenile would have gone through intense counseling alone and with the participation of his family. He will need such support once released, too, but will lose the intensity of counseling in a secured facility.

Among the support they receive is continuing with drug or mental health counseling, help with their education up to and including college, and employment and/or vocational training. The most important goal is to prevent the juvenile from lapsing into bad habits that caused him to be sent to placement in the first place.

Conclusion

It is really easy to develop a truly cynical attitude as a prosecutor. You just see the worst in human nature. There have been many times when I thought, "Why bother?"

But then, you see and hear of juveniles who manage to turn their lives around within the system. That is the purpose of these specialty courts. Will everyone take full advantage of the programs and come out on top? No. But there is always a chance that someone will overcome his challenges and fulfill his highest potential. We had a young lady in Re-Entry Court who successfully finished the specialty court and went on to college. A young man worked his way through his drug and legal issues and managed to graduate high school. He invited the judge who oversaw his case through Re-entry Court to his graduation. That is what we juvenile prosecutors aim for. That is why I have lasted so long as a prosecutor in the juvenile system.

This is the last article in this series on juvenile law. By researching and writing these articles, even after so many years as a prosecutor in the juvenile system, I find myself learning something new. I am also reminded of why the system is structured the way it is. I hope that these articles will help or encourage you on your journey as a prosecutor. ❇

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[6] Texas Family Code §54.04 (Disposition Hearing).

[7] For the sake of convenience, I will refer to a secured placement facility as simply "placement."

Remotely stored electronic data

The amount of digital multimedia evidence is growing exponentially, not just quantitatively but qualitatively.

By Diane Beckham
TDCAA Publications Director in Austin

Excerpted from Chapter 6 of Warrants (TDCAA © 2025), available for purchase at www.tdcaa.com/books

This article discusses information available from a variety of sources, including social media websites, GPS, geofencing, cloud data, email, websites visited, text messages, photos, and metadata.

James Madison and his 1789 contemporaries could have had no inkling of the current evidentiary value of intangibles, such as information invisibly lodged in silicon chips. Nevertheless, protection of "papers and effects" in the Fourth Amendment can reasonably bring within constitutional purview "electronic customer data," as well as a seemingly unlimited cache of information generated, transmitted, and retained electronically.

New and different types of information are continually being added to the world's digital library, so law enforcement personnel should not be limited by their prior practice, the narrowly drawn categories that the legislature has established, or this article. They should use their imagination to look for additional sources of information and be prepared to use a combination of new and old methods to obtain it. Nowhere is this truer than in the search for evidence on the internet, in the still-evolving marketplace for information and digital consumers.

Generally, federal and state statutes dealing with the transmission of data or the storage of transmitted data are more protective than the Fourth Amendment. Therefore, as a practical matter, the search and seizure of transmitted data raises many statutory issues, but few constitutional ones.

As a matter of practice, most providers of electronic communications or remote computing services will comply with requests for information if those requests are sufficient under the federal Stored Communications Act (SCA).[1] This makes business sense for those providers—they do not want to hire legal experts for all 50 states. Therefore, they often assume that state law enforcement is complying with state law and will produce the data as long as the request complies with federal law. But this is a trap for Texas law enforcement because Art. 38.23 of the Code of Criminal Procedure requires the suppression of all evidence obtained in violation of the laws of Texas.[2] And the laws of Texas regarding access to stored communications are not the same as the federal SCA. Therefore, Texas officers must comply with the laws of Texas even if providers are disclosing information in response to a legal procedure that falls short of that standard.

The Texas statutory framework for accessing remotely stored data takes a stair-step approach, with more due process required as more detailed data is sought by an authorized peace officer, as follows in this chart:

[1] 18 U.S.C. §2703.

[2] Tex. Code Crim. Proc. Art. 38.23(a); but see Tex. Code Crim. Proc. Art. 18B.553 (statutory violations of Chapter 18B are not subject to suppression under Art. 38.23); *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019) (not all warrantless tracking of a cell phone constitutes a "search" under the Fourth Amendment, and the inquiry turns on whether the State searched "enough" information to violate a legitimate expectation of privacy); *Wells v. State*, 714 S.W.3d 614 (Tex. Crim. App. 2025) (geofence warrants that are confined in time and space are generally constitutionally sound).

Requirements for obtaining remotely stored electronic data

Information sought	Provider	Document required	Notice?
Only the name of the subscriber of record	Telephonic communications service	No document required, but authorized peace officer must provide the published telephone number to the provider.	No
Only subscriber listing information (name, address, and telephone number or similar access code) that is publicly available or used in emergency dispatch	Telephonic communications service	No document required.	No
Only identity of customers and customer's use of the service	Electronic communications or a remote computing service provider	• Grand jury subpoena • Administrative subpoena • Search warrant under CCP Art. 18B.354 • Court order under CCP Art. 18B.352 • Customer consent (which often also requires a court order under CCP Art. 18B.352) • As otherwise permitted by applicable federal law (Stored Communications Act, 18 U.S.C. §2703)	No
Identity of customers, customer's use of the service but not cell-site location information (with notice to customer)	Electronic communications or a remote computing service provider	• Grand jury subpoena • Administrative subpoena • Search warrant under CCP Art. 18B.354 • Court order under CCP Art. 18B.401	Yes
All electronic customer data (includes identity of customers, customer's use of the service, cell-site location information, identity of recipients or destinations of a communication sent to or by the customer, contents of any communications sent to or by the customer, and any data stored by or on behalf of the customer)	Electronic communications or a remote computing service provider	Search warrant under CCP Art. 18B.354	No

Warrants under CCP Chapter 18B

The Texas Legislature has singled out certain types of stored digital evidence for special statutory treatment. Specifically, Art. 18B.351 provides that an authorized peace officer may require a provider of an electronic communications service or a provider of a remote computing service to disclose electronic customer data that is in electronic storage by obtaining a special warrant.[3] If a judge approves, the warrant will issue under Art. 18B.354.[4]

A remote computing service is generally a third-party provider that supplies computer storage or processing services to the public by electronic means, which includes wire, radio, and electromagnetic systems.[5] Therefore, Art. 18B.354 covers the data stored by most third-party providers of remote computing services such as Microsoft, Apple, Google, and Amazon. Those warrants also cover the data stored by many corporations, such as Coca-Cola and InBev, which maintain their own remote data storage facilities, not because they are remote computing service providers but because they are providing an electronic communications service.

Article 18B.001(7)(B) provides that electronic customer data is data or records that are in the possession or control of those providers and contain:

- information revealing the identity of customers;
- information about a customer's use of the service;
- information that identifies the recipient or destination of a communication sent to or by a customer;
- the content of a communication sent to or by a customer;
- any data stored with the applicable service provider by or on behalf of a customer; and
- location information.[6]

Therefore, warrants under Art. 18B.354 could theoretically encompass almost every type of data that is not being stored on a discrete device in the possession of law enforcement. It can include documents, photos, video, emails, text messages, GPS coordinates either of the device or in the metadata of other files and cell tower usage—and the list keeps growing.

Subsection (ii)—a customer's use of the service—refers to everything short of individual call or communication details. Some providers store only basic usage data, such as name and minutes used. Other providers store basic and expanded usage data, which can include email addresses, billing information, IP authorization logs, other numbers on the account, and sub-subscribers on the account. Officers should ask for all the expanded usage data that is available. If it is not requested, the data may not be produced. Large providers often maintain an online law enforcement guide that will explain the types of customer data kept in storage so that officers can incorporate those specific categories into the warrant or court order.

Subsection (iii)—identification of the recipient or destination—is often called transactional data. It is akin to the name and address on the outside of an envelope. Subsection (iv)—content—is the letter, pictures, or other documents that are inside the envelope. While the envelope metaphor is conceptually useful in understanding the different types of data, it is not useful when attempting to analogize caselaw. That is because, as stated previously, the law of searching envelopes is a product of the constitution, but the law of searching stored data is primarily governed by statutes.

Subsection (vi)—location information—refers to "data, records, or other information that is created by or accessible to a provider of an electronic communications service or a provider of a remote computing service and may be used to identify the geographic physical location of a

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[3] Tex. Code Crim. Proc. Art. 18B.351(a).

[4] Tex. Code Crim. Proc. Art. 18B.354.

[5] Tex. Code Crim. Proc. Art. 18B.001(12); Tex. Code Crim. Proc. Art. 18B.001(6).

[6] Tex. Code Crim. Proc. Art. 18B.001(7)(B).

communication device," including current, real-time, or prospective physical location.[7]

With the rapid advance of encryption software, making it more difficult to overcome the security of digital devices,[8] it is often easier to obtain the data stored on a device from the backup file stored on a remote server of some third-party provider rather than from the device itself. Of course, not every device backs up to a cloud. And even devices that do have a backup on a remote server do not necessarily send every file to the backup. Also, the data on the remote server is only going to be as current as the most recent backup. So there are limitations to relying on warrants under Art. 18B.354 as a substitute for a copied image of the device itself.

A geofence warrant allows law enforcement to search location history data for compatible mobile devices located within a specified area during a specific period of time.

On the other hand, data obtained from cloud providers often far exceeds what would be available on the personal digital device. For example, many cell phone companies are now advertising a cloud as a form of virtually unlimited memory extension of the phone so that photos, music, and many other files would not be stored on the device. Moreover, for most social networking applications, all the important content remains on the servers of the third-party providers, not on the consumer's personal device.

Geofencing

While cell-site location information (CSLI) was initially the most common location tracking search used, with information obtained from a cell service provider, geofence warrants have become more common. "There is a relative dearth of caselaw addressing geofence warrants,"[9] with Google receiving its first geofence warrant request in 2016.[10] Few Texas cases have addressed geofencing warrants, but notably, there is a split between the Fourth and Fifth federal circuits on the constitutionality of their use.[11]

A geofence warrant allows law enforcement to search location history data for compatible mobile devices located within a specified area during a specific period of time.[12] A geofence warrant "is essentially the reverse of a global positioning systems (GPS) warrant which allows a search of location data generated by a specific device belonging to a person known or suspected to

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[7] Tex. Code Crim. Proc. Art. 18B.001(9-b); *Wells v. State*, 675 S.W.3d 814 (Tex. App.–Dallas 2023) (geofence warrant satisfied Fourth Amendment because it established probable cause to search every person found within the geofence area and the defendant did not argue that it was objectively unreasonable for the detective to rely on the geofence warrant to obtain his location history) aff'd, 714 S.W.3d 614 (Tex. Crim. App. 2025); see also *Melson v. State*, 2024 Tex. App. LEXIS 4086 (Tex. App.–Beaumont June 12, 2024, no pet. h.) (not for publication) (location data supported trial court's finding of reliability); but see *United States v. Smith*, 110 F. 4th 817, 2024) (use of geofence warrant violated the Fourth Amendment, although law enforcement relied in good faith on the warrant).

[8] Caleb Downs, "FBI agents can't crack Texas church shooter's cell phone, officials say," *San Antonio Express News*, November 7, 2017, www.mysanantonio.com/news/local/crime/article/FBI-agents-can-t-crack-Texas-shooter-s-cell-phone-12338438.php.

[9] *United States v. Chatrie*, 590 F.Supp.3d 901, 906 (E.D. Va. 2022), *aff'd* 107 F.4th 319 (4th Cir. 2024).

[10] *United States v. Smith*, 110 F.4th 817, 821, n.2 (5th Cir. 2024) (citing Geofence Warrants and the Fourth Amendment, 134 *Harv.L.Rev.* 2508, 2512-13 (2021) (companies such as Apple, Lyft, Snapchat, and Uber have all received geofence warrant requests, but Google is the most common recipient and "the only one known to respond"). Note that Google has more recently announced changes to its maintenance of location data, such as "auto-delete" and "Incognito mode," to give users "even more control over this important, personal information." See blog.google/products/maps/updates-to-location-history-and-new-controls-coming-soon-to-maps ("Your location information is personal. We're committed to keeping it safe, private and in your control").

[11] *Smith*, 110 F. 4th at 833 ("geofence warrants are general warrants categorically prohibited by the Fourth Amendment"); *United States v. Chatrie*, 107 F.4th 319 (4th Cir. 2024) (no Fourth Amendment violation in obtaining two hours' worth of defendant's location information because he voluntarily exposed that information to a website).

[12] *Wells*, 675 S.W.3d at 821, citing *In re Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation* ("*Arson*"), 497 F.Supp.3d 345, 351 (N.D. Ill. 2020).

have been involved in criminal activity. ... With a geofence warrant, police investigators identify the geographic area in which criminal activity occurred and seek to identify device users at that location when the crime was committed."[13] Google calculates the location of a device that has enabled Google location history using input from cell towers, GPS, and signals from nearby wireless internet networks (Wi-Fi) and Bluetooth beacons.[14] Because Google location history includes multiple inputs, it is more precise than other types of location data. For each device, Google retains subscriber information that may include the subscriber's name, address, telephone number, and other identifiers.[15] Law enforcement uses a geofence search warrant to seize this data using a multi-step process to identify criminal suspects and potential witnesses to the crime.[16]

In *Wells*, a detective submitted a warrant application outlining a three-step search process:

1) asking Google to create an anonymized list of all devices located within the target location during a specified 25-minute time period on a specific date. The detective defined the target location by using four latitude and longitude coordinates and included a visual reference image of the search area. The search area was limited to the house where the offense occurred and a portion of church property across the street.

2) after reviewing the list, analyzing the data by law enforcement to identify users who may have witnessed or participated in the crime (in this case, a capital murder). For users identified as relevant to the investigation, Google would then provide additional location history outside the target location for a period of no more than 60 minutes before and after the last timestamp associated with the device within the target location. This enabled law enforcement to eliminate users who did not appear to fall within the scope of the warrant. For all remaining relevant accounts, Google would then provide the subscriber information, including the user's name and email address.

3) including background information on Google's location services, the prevalence of Google accounts on cell phones, and a probable cause statement laying out the basic facts of the offense.

But can a geofencing search be constitutional? The Fourth Circuit—the first federal circuit to address whether geofencing is a "search" subject to the Fourth Amendment[17]—held that that location history data did not implicate a privacy interest because the user had voluntarily turned over location information to Google, and the information retrieved was "far less revealing" than a search of CSLI[18] or information obtained through a GPS tracking device.[19]

In *Smith*, postal inspectors used a three-step process similar to that used in *Wells* to obtain geolocation information from Google, but the Fifth Circuit concluded while "the results of a geofence warrant may be narrowly tailored, the search itself is not. A general warrant cannot be saved simply by arguing that, after the search has been performed, the information received was narrowly tailored to the crime being investigated. These geofence warrants fail at Step One—they allow law enforcement to rummage through troves of location data from hundreds of millions of Google users without any description of the particular suspect or suspects to be found."[20] The Fifth Circuit also disagreed with the idea that Google users had truly voluntarily abandoned their right to privacy: "As anyone with a smartphone can attest, electronic opt-in processes are

But can a geofencing search be constitutional? The Fourth Circuit–the first federal circuit to address whether geofencing is a "search" subject to the Fourth Amendment–held that that location history data did not implicate a privacy interest because the user had voluntarily turned over location information to Google, and the information retrieved was "far less revealing" than a search of CSLI or information obtained through a GPS tracking device.

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[13] *Id*.

[14] *Id*.

[15] *Arson*, 497 F.Supp.3d at 351.

[16] *Wells*, 675 S.W.3d at 321-22 (citing *In re Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F.Supp.3d 62, 69 (D.D.C. 2021)); see also *McDonald v. State*, 676 S.W.3d 204, 212 (Tex. App.–Houston [14th Dist.] 2023, pet. ref'd) (an affidavit is not required to explain what geolocation data is).

[17] *United States v. Chatrie*, 107 F.4th 319 (4th Cir. 2024).

[18] See *Carpenter v. United States*, 585 U.S. 296 (2018); *Johnson v. State*, 682 S.W.3d 638 (Tex. App.–Tyler 2024, pet. ref'd) (search warrant affidavit to seize CSLI does not require the State to establish a nexus between the defendant's phone and the offense).

[19] See *United States v. Jones*, 565 U.S. 400 (2012).

[20] *Smith*, 110 F.4th at 837–38.

hardly informed and, in many instances, may not be voluntary."[21]

Until the U.S. Supreme Court settles the split, proceed with caution—if at all—on these searches and establish particularlized probable cause. In *Wells v. State,* the Court of Criminal Appeals upheld a geofence warrant that was limited in time and space(discussed in an article on page 5).[22]

A district court judge can issue an Art. 18B.354 warrant regardless of whether the customer data is held at a location in Texas or another state. Just as with a search warrant under Art. 18.02, the application for a warrant under Art. 18B.354 must demonstrate probable cause and be supported by the oath of an authorized peace officer.

State vs. federal warrants

A district court judge can issue an Art. 18B.354 warrant regardless of whether the customer data is held at a location in Texas or another state.[23] Just as with a search warrant under Art. 18.02, the application for a warrant under Art. 18B.354 must demonstrate probable cause and be supported by the oath of an authorized peace officer. The sworn affidavit must show "sufficient and substantial facts" that a specific offense has been committed, that the electronic customer data sought constitutes evidence of that offense or evidence that a particular person committed that offense, and that the data is held in electronic storage by the service provider on which the warrant is served.[24] Article 18.01 requires only "sufficient" facts to issue a search warrant.[25] So an Art. 18B.354 warrant for stored electronic customer data arguably requires more evidence than any other type of search warrant.

In the alternative, officers could proceed under §2703 of the federal Stored Communications Act, which also sets forth the mechanism necessary for a governmental entity to obtain data stored by a provider of electronic communication services.[26] One of the methods that may be used to obtain the data in question is by obtaining a warrant "issued using State warrant procedures ... by a court of competent jurisdiction." If the judicial officer signing the search warrant has authority to issue the warrant under state law, then the provisions of the Stored Communications Act are met.[27] Further, these warrants are generally not limited to the territorial jurisdiction of the issuing authority.[28] Therefore, whether the officer proceeds under Code of Criminal Procedure Art. 18B.354 or §2703 of the federal Stored Communications Act, the officer must still obtain a search warrant from a Texas district court judge. ❇

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[21] *Smith*, 110 F.4th at 836 ("Not to mention, the fact that approximately 592 million people have 'opted in' to comprehensive tracking of their location itself calls into question the 'voluntary' nature of this process. In short, 'a user cannot simply forfeit the protections of the Fourth Amendment for years of precise location information by selecting "YES, I'M IN" at midnight while setting up Google Assistant, even if some text offered warning along the way'" (quoting *Chatrie*, 590 F.Supp.3d at 936)).

[22] *Wells*, 714 S.W.3d 614.

[23] Tex. Code Crim. Proc. Art. 18B.354(a). But note that issuing a warrant for a foreign location and enforcing it are two different things.

[24] Tex. Code Crim. Proc. Art. 18B.354(b).

[25] Tex. Code Crim. Proc. Art. 18.01(b).

[26] See 18 U.S.C.A. §2703(a).

[27] See *Lozoya v. State*, No. 07-12-00142-CR, 2013 WL 708489, at *2 (Tex. App.–Amarillo Feb. 27, 2013, no pet.); *United States v. Orisakwe*, 2013 U.S. Dist. LEXIS 128323 (E.D. Tex. 2013) (under Nevada law, Facebook fit the definition of a provider of network service); *Hubbard v. MySpace, Inc.*, 788 F.Supp.2d 319, 323–24 (S.D.N.Y.2011).

[28] Clarifying Lawful Overseas Use of Data Act (CLOUD Act) §103(a)(1), amending 18 U.S.C. §2701 et seq. ("A [service provider] shall comply with the obligations of this chapter to preserve, back up, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, *regardless of whether such communication, record, or other information is located within or outside of the United States*") (emphasis added).

Expert or amateur?

Remember that scene in *My Cousin Vinny*, where Marisa Tomei's character, Mona Lisa Vito, owns the stand (and steals the show) as an expert witness?

By Rehana Vohra
Assistant District Attorney in Harris County

The prosecutor, Jim Trotter, challenges Ms. Vito's qualifications as an expert in automobiles, thinking she's just an "out-of-work hairdresser." After the judge grants Mr. Trotter's request to take Ms. Vito on voir dire, the fireworks begin.

Mr. Trotter asks Ms. Vito, "What would the correct ignition timing be on a 1955 Bel Air Chevrolet with a 327-cubic-inch engine and a four-barrel carburetor?" which Ms. Vito expertly explains is a trick question. "'Cause Chevy didn't make a 327 in '55—the 327 didn't come out till '62. And it wasn't offered in the Bel Air with a four-barrel carb till '64. However, in 1964, the correct ignition timing would be four degrees before top dead center." Mr. Trotter has to sheepishly concede: "Well, uh, she's acceptable, Your Honor."

If every defense expert presented like Mona Lisa Vito, I would not feel the need to write this article. But the Mona Lisas of the courtroom are rare.

Challenging a defense expert's qualifications to render opinions can be intimidating. However, it is absolutely necessary when their opinions mislead or wade into unreliable territory. Accredited laboratories that employ forensic analysts in Texas are beholden to regulatory entities such as the Texas Forensic Science Commission. However, private experts employed by the defense bar are often beholden to no one. Therefore, it is up to us as prosecutors to make sure junk science is not getting through the courthouse doors without testing it. To quote the Honorable Kevin Yeary in a recent concurring opinion: "Our adversarial system works better when the parties actually serve as adversaries."[1] I could not agree more with Judge Yeary on this issue.

The basics

Texas Rule of Evidence 702 is a good place to start: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." The key takeaway in this rule is that the expert should help the judge or jury *understand* the evidence or determine a *fact in issue*. This is where a lot of the attack can occur from a rational standpoint. I've noticed that defense experts like to address issues that are common sense and do not require certain qualifications to explain to a judge or jury. For example, a psychologist for the defense in a child sexual assault case may want to tell the jury that children can lie. But a general statement such as this really does not require any specialized knowledge from a Ph.D. to explain or to understand.

Texas Rule of Evidence 705(c) further provides, "An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion." In *Vela v. State*,[2] the Court of Criminal Appeals examined the appellate court's holding that the trial court abused its discretion when it excluded the testimony of a defense expert, who was a "certified legal nurse consultant." In a sexual assault case, this expert

[1] *Ex Parte Horvath*, No. WR-88,478-01, 2025 WL 1699335, n.2 (Tex. Crim. App. June 18, 2025) (Yeary, J., concurring, Parker, J., joining).

[2] 209 S.W.3d 128 (Tex. Crim. App. 2006).

would have testified that if there is no physical evidence, then no rape occurred.[3] The Court of Criminal Appeals faulted the appellate court's analysis related to the trial court's determination of whether this testimony was reliable. On remand, the appellate court held that the trial court did not abuse its discretion when it held that this expert's opinion was not reliable, and the appellate court affirmed the conviction.[4]

It is well-settled law, after *Kelly v. State*,[5] that scientific evidence must also meet three criteria to be reliable:

"(a) the underlying scientific theory must be valid;

"(b) the technique applying the theory must be valid; and

"(c) the technique must have been properly applied on the occasion in question."

The *Kelly* Court went on to explain that a nonexhaustive list of factors that could affect a trial court's determination of reliability included the following:

"1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;

"2) the qualifications of the expert(s) testifying;

"3) the existence of literature supporting or rejecting the underlying scientific theory and technique;

"4) the potential rate of error of the technique;

"5) the availability of other experts to test and evaluate the technique;

"6) the clarity with which the underlying scientific theory and technique can be explained to the court; and

"7) the experience and skill of the person(s) who applied the technique on the occasion in question."[6]

A note, here, that *Nenno v. State*[7] recognized that the reliability inquiry may require a more flexible approach when evaluating the admissibility of a "soft science," such as psychology, as opposed to a "hard science" (mathematics) under the *Kelly* standard above.

Texas Rules of Evidence 402 and 403 are the last pieces to consider in terms of your attack. The expert's proposed testimony must still be relevant to the facts of the case. Even if the testimony is relevant, it may still not be admissible under 403 if the probative value of the evidence is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

How to prepare

I once encountered a software engineer attempting to give his opinion about the unreliability of forensic DNA testing in a case. He had never worked in a forensic lab, nor had he analyzed DNA before. These are the types of defense experts we should not be afraid to challenge, even if that person is ultimately permitted to testify in your case. If you go in with disqualification on the brain and lose the battle, you can still win the war in cross-examination because you will have already discovered the weaknesses and limitations of their opinions.

Once you receive notice from the defense attorney that he intends to use an expert at trial, ask him for an updated copy of the expert's curriculum vitae or résumé. He may say no, which is fine (and that could be a part of your cross-examination later). But if he produces it to you or you find it publicly available on your own, spend time reading it from top to bottom. Look up the expert's published articles and actually read them. Look up her presentations and study them. Search for her on YouTube giving talks and watch how she presents herself. You can learn a lot about an expert by carefully studying and researching her professional works. You may realize that she's been working on her master's degree for more than 10 years (that's a long time). You may discover that even though she is critiquing your medical examiner's work, she has not conducted an autopsy in 15 years. You may find that she is not actually qualified in the area in which the defense attorney seeks to use her. You may see that she authored an unhinged piece of work for some wacky publication. You may also find out that she did little to no work on the articles she is credited on. If the expert's name appears anywhere other than the first author listed on a publication, you should find out what she ac-

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[3] *Id.*

[4] *Vela v. State*, 251 S.W.3d 794 (Tex. App.– Corpus Christi–Edinburg 2008).

[5] 824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

[6] *Id.*

[7] 970 S.W.2d 549, 560-61 (Tex. Crim. App. 1998).

tually contributed to the publication itself. The first author is typically the one who made the most significant contribution, and the level of contribution decreases with each successive author listed.

Maybe it's just me, but I really enjoy reading prior testimony from defense experts as a part of my preparation. You should promptly enter the expert's name in Westlaw or LexisNexis and see whether (and when and where) she has testified previously. You can find out if her testimony has ever been excluded by a court (and that should also be a question you ask during your voir dire examination of the expert). You can ask other jurisdictions to share a record with you based on your searches. By reading prior testimony, you get to study how the expert answers questions. You might also quickly figure out if she is going to be antagonistic or not. You get to see how she comes across on a record. You also get to see how your peers frame questions and what points they make on cross-examination, which is helpful for when it's your turn. You can learn from their mistakes, but you can also borrow from their questioning. Even if you don't learn anything that you can use substantively in your case, you will at least learn about the expert's courtroom persona and how she operates under questioning by both sides.

To prepare to effectively voir dire the defense expert, you should outline your questions. Your research about the expert will help structure them in a flow that is persuasive to the fact-finder. I find that getting the expert witness in a rhythm of saying "no" to questions about her qualifications is an effective way to present a case for disqualification. For example, if you know that the expert has not reviewed your case, you can structure a line of questioning that will result in the witness having to say "no" to your questions about whether she reviewed a litany of important evidence in your case.

Also during your voir dire examination, try to nail down whether any written materials have been produced by the expert in connection with your case. Once your questioning establishes that this expert has notes or a report, ask the court to order the expert to produce it to you under Texas Rule of Evidence 705(a) and (b). Beware that some seasoned defense experts know not to write reports or take notes because they realize this is discoverable information by the State. If they don't have anything to produce or say that they "forgot the file at the office," you can still use their lack of note-taking or report-writing to demonstrate incompetence, incredibility, or evasiveness.

Going the extra mile

Remember that you cannot communicate with a member of the defense team, including any of their experts, without permission from defense counsel.[8] But consider asking the defense attorney if you can talk to the expert before trial. On two different occasions, I wanted to talk to the defense expert, and I was glad the two different defense attorneys granted that permission. Now, this happened for me in a post-conviction context, but it can translate pretrial as well. I can tell you that it was very helpful for me to speak to these two experts beforehand. One was a forensic pathologist who seemed legitimate, and I genuinely wanted to understand the position she had taken on a case. When we spoke, her opinion was a lot more watered-down than I expected. I was satisfied that she was not going to do any harm to my case.

The other expert was a psychologist whom I knew to do credible work. I also knew that he was frequently used by the State on competency and sanity issues. In my case, the defense was using this psychologist to support the theory that the defendant had been diagnosed with Factitious Disorder Imposed on Another (FDIA), better known as Munchausen Syndrome by Proxy. After I spoke to the psychologist, he was able to level with me on some of his opinions. This discussion provided a basis for me to later argue to the court that his testimony was a double-edged sword for the defendant.

Keep in mind that you don't want to do this on every case because you don't want to waste your time. My instincts told me that these two experts might be open and honest with me based on my prior research of their work, and I am thankful it paid off in both cases.

Conclusion

One of the best parts of being a prosecutor is knowing that all you have to do is the right thing. There's a sense of internal peace and freedom when this is our one and only job—we are beholden to the truth and to justice. So while it may seem daunting to challenge a defense expert in her area of expertise, take comfort in knowing that you have the facts and the evidence on your side. Let that be your guide. ❇

Maybe it's just me, but I really enjoy reading prior testimony from defense experts as a part of my preparation. You should promptly enter the expert's name in Westlaw or LexisNexis and see whether (and when and where) she has testified previously.

[8] Tex. Disciplinary Rules Prof'l Conduct R. 4.02 (b).

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