The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

My 2018 New Year's resolution: better trial preparation

"Failure to prepare is preparing to fail."[1] This is one of my favorite quotes from legendary UCLA basketball coach John Wooden because it applies so perfectly to trial work.

By Bill Wirskye
First Assistant Criminal District Attorney in Collin County

All the successful trial prosecutors I know embody this maxim. They are fanatical and obsessive about thorough case preparation, and their results reflect it. I've been fortunate throughout my career to observe, learn from, and try cases with or against some of these great prosecutors. They've taught me a lot. And because the start of a new year is a great time to take stock of yourself and look for areas to improve in, I've decided that in 2018 I'm resolving to be better-prepared for trial.

In support of this broad resolution, I've identified three specific New Year's resolutions that I need to focus on to become a better prosecutor next year. Whether these resolutions resonate with you or not, my hope is that they will make you think about the topic and challenge you to be better prepared the next time you announce: "State's ready."

Resolution 1: "I won't let advocacy distract me from preparation."

Experienced trial prosecutors know that proper preparation will beat superior trial advocacy almost every time. To explain the difference, I'll say that advocacy is a command of the courtroom. Preparation is a command of the facts. Juries will forgive poor advocacy but not poor preparation. But preparation and advocacy are not unrelated concepts. On the contrary, a properly prepared case is the foundation on which effective trial advocacy is built. Preparation is not only a prerequisite for advocacy; it is the most effective type of advocacy, in my opinion. Yet there can be a tension between the two concepts for prosecutors of all experience levels. Too much of a focus on advocacy can distract us from proper preparation. Let me explain.

An over-emphasis on advocacy is common in rookie prosecutors. They haven't learned how to prepare yet, and they just don't realize how important it is. New prosecutors

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Prosecutors helping prosecutors with Hurricane Harvey disaster relief

When Hurricane Harvey came to visit and just wouldn't go away, our phones here at TDCAA lit up with people asking, "What can we do to help?"

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

So many people lost their lives and their homes! Our profession was in need, and y'all were anxious to help.

That is where the Board of the Texas District and County Attorneys Foundation stepped in. The Foundation is an educational foundation, but IRS rules allow such an existing organization to serve as temporary home for charitable donations aimed at disaster relief. Within no time, the Foundation created the Hurricane Harvey Disaster Relief Fund. The fund was a vehicle for donations to support Texas prosecutor office staff impacted by Harvey, with 100 percent of the donations going directly to those in need. The Fund accepted donations through October 31, and relief checks have been distributed. By the end of December, the fund closed with a zero balance.

A list of all those who donated to the fund is on the back cover of this journal. These folks in very short order donated $37,455 to help our friends restore their lives. Thank you to everyone who reached into their own pockets to help—that is what the Foundation is about. I want to give special recognition to a few folks: **Rusty Hardin**, who started us off with an anchor gift of $5,000; Travis County Attorney **David Escamilla** offered a $5,000 matching challenge at TDCAA's Annual Update, which was enthusiastically met by our membership; and the **Criminal Justice Section of the State Bar of Texas** generously donated $5,000.

I also want to thank our friends from around the country. The **Cajun Navy** sailed to Houston to offer help on the ground, but the **Cajun DA's Association** showed up big time—East Baton Rouge Parish District Attorney **Hillar Moore**, his assistant **Mark Dumaine**, Calcasieu District Attorney **John DeRosier**, and Louisiana District Attorneys Association staffers **Pete Adams** and **Roxie Barrios Juneau** (plus many other Louisiana prosecutors) kicked in. And Hillar, Mark, and John all came to Texas to help in cleanup efforts. Prosecutors from many other states—**North Carolina, Virginia, Oklahoma, New York, Indiana,** and **Colorado**—also donated. (Thanks to Staten Island Executive Assistant District Attorney **Timothy Koller**, who not only donated but called to check how everyone was.) The **National Association of Prosecutor Coordinators** kicked in $1,000, and the **National District Attorneys Association** added $2,500.

Finally, I want to give a shout-out to the entire staff of the **Bessemer Cutoff (Alabama) District Attorney's Office**, led by **Lynneice Washington**. At the very end of the donation period, we received a check that represented a collection from the entire staff. I'm humbled that they took the time to help those in our profession a couple states away.

Though the aid the Foundation offered cannot make everyone whole, it is part of the healing process, and we should all be proud that when our friends needed help, we stepped up. ❇

Texas District and County Attorneys Association

505 W. 12th St., Ste. 100
Austin, TX 78701 • www.tdcaa.com

About *The Texas Prosecutor*

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"Setting the Record Straight on Prosecutorial Misconduct"—five years later

Five years ago, the Texas District and County Attorneys Association issued a groundbreaking report titled "Setting the Record Straight on Prosecutorial Misconduct."

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

(If you haven't read it, I highly recommend that you do. Search for it on our website.) It was ground-breaking because it represented the product of a self-examination of our profession that hadn't happened anywhere in our country. As prosecutors, we all are used to keeping our heads down and doing the job, but there was a growing sense that our profession was a step behind—on exonerations, wrongful convictions, the use of developing forensic science, and responding to attacks on our core functions.

It was time for introspection. The TDCAA leadership appointed a committee whose job was to investigate prosecutors' role in preventing wrongful convictions and make recommendations on how our profession could take the lead in bolstering the public's confidence in the criminal justice system. The committee examined exonerations based on forensic science, eyewitness misidentification, and prosecutorial misconduct (including failure to disclose exculpatory evidence). They interviewed prosecutors, defense attorneys, law professors, and law enforcement officials in their quest to better appreciate the problems in these areas and to look for ways TDCAA might enhance training and other support services for the benefit of the profession. We were determined to go where the investigation led us.

In the end, the committee made 10 findings and followed up with a number of recommendations to restore our profession to a leadership role in the criminal justice profession.

How have we done in these last five years? Here are some key advances.

Conviction integrity

Prosecutors recognize that—with no bad intentions—a person can be wrongfully convicted. We have spent a lot of time re-examining cases in light of new science, and everyone has taken a second look at eyewitness identification (more on both of those in a bit). Prosecutors rolled up their sleeves and led the way in conviction integrity, even on a national level.[1] Additionally, prosecutor offices in Bexar, Dallas, Harris, Tarrant, and Travis Counties have established conviction integrity units to examine past cases. Even without an established "unit," modest-sized and small offices have devoted time and energy to reviewing cases that deserve attention.

Forensic science

Advancement in the science of DNA has allowed us to take a closer look at past cases. In the last few years, prosecutors have not shied away from DNA testing when it can make a difference in evaluating a prior conviction. Indeed, when scientists raised questions about the proper interpretation of "mixture DNA" evidence, Texas prosecutors took the lead in a statewide review of every conviction that may have been supported by a mixture DNA analysis. You might recall Galveston County CDA **Jack Roady** speaking at a number of TDCAA courses about the need to get in front of this issue and be proactive. (You can read an article about the topic from his first assistant, **Kevin Petroff**, at www.tdcaa.com/journal/changing-state-dna-analysis.) That process is still ongoing, and prosecutors continue to be involved.

Texas prosecutors have taken a leadership

role in forensic science. We are lucky to have the Texas Forensic Science Commission, which advances the use of science in our courthouses in an organized fashion. Prosecutors, including Brazos County DA **Jarvis Parsons**, have been deeply involved in the commission's work.

Eyewitness identification

The Innocence Project and others have argued that up to 80 percent of wrongful convictions were due at least in part to inaccurate eyewitness identifications. As a result, TDCAA continues to train on eyewitness identification protocols and best practices. In addition, prosecutors were very involved in recent statutory changes that enhance the courtroom scrutiny of eyewitness testimony. House Bill 34 (85th Regular Session) was the culmination of the Timothy Cole Exoneration Review Commission's efforts. **Staley Heatly**, the DA in Wilbarger, Hardeman, and Foard Counties, sat on the commission and was instrumental in developing the bill's language regarding procedures and protocols for eyewitness identifications. Importantly, the bill as passed reflects the evolving science surrounding eyewitness testimony, and it would not have received proper scrutiny without prosecutor involvement.

Discovery

The committee recognized that although prosecutorial misconduct was rare, most claims were based on assertions that the prosecutor had not disclosed exculpatory or impeaching evidence. At the time, TDCAA committed to doubling down on our **Brady** training efforts (which had been in full swing for five years before our report was issued), and we committed to examining best practices and laws around the country.

In 2013, the Legislature passed a bill drafted by then-Bexar County Criminal District Attorney **Susan Reed** mandating that every prosecutor take a course on **Brady** every four years. TDCAA implemented that mandate in 2014 when, with funding from the Texas District and County Attorneys Foundation (TDCAF) and the Criminal Justice Section of the State Bar, we produced an hour-long **Brady** training available to all lawyers on our website free of charge. (That course remains online [you can view it at http://tdcaa.litmos.com/online-courses], but now that we're at the four-year mark, we'll be updating it sometime this year to reflect the Michael Morton Act and cases interpreting it.)

Speaking of, that same year, the Texas Legislature also passed sweeping discovery reform known as the Michael Morton Act. The act goes well beyond **Brady** in its requirements for disclosure, and it is behind only the discovery law in North Carolina in its breadth. Texas prosecutors participated in the development of that statute, and although the implementation has not been without challenges, we have earned praise from **Michael Morton** himself for our dedication to effective discovery for the defense.

Many of you were in the audience at TDCAA's Annual Update in 2013 when Mr. Morton delivered the keynote address. He humbly observed that the job you do is important—wryly noting that he had spent 27 years locked up with scary people who had been rightfully convicted—and that prosecutors had to be dedicated to doing their jobs right. As you recall, we gave him a standing ovation. I believe our profession took his words to heart.

Cognitive bias

Another recurring theme in wrongful convictions is cognitive bias. "Cognitive bias" means that people tend to believe what fits their preconceived notions. It's not bad; it's actually how we learn. But it can lead to inaccurate beliefs when our notions are so strong that we discard ideas and evidence to the contrary. We can see how this is dangerous in prosecution: If a law enforcement officer or prosecutor comes down with a bad case of "tunnel vision" early in a case, he risks ignoring evidence that points to innocence, and he might not recognize something exculpatory staring him right in the face.

To be forewarned about this danger is crucial, and we have had the benefit of presentations by **Alafair Burke**, a professor at Hofstra School of Law and former prosecutor, on the subject. Professor Burke has argued that too often prosecutor conduct has been "viewed through the lens of fault, blame, and intentional wrongdoing."[2] Instead, Burke believes the present climate presents "an opportunity for prosecutors themselves to counter the traditional fault-based narrative and to become partners in the emerging movement to prevent wrongful convictions." It ap-

pears that Texas prosecutors are embracing that approach. We agree with Professor Burke that training on the dangers potentially posed by cognitive bias is essential. You will be seeing more of it in the future.

Accountability

During its research phase, the committee spent quite a bit of time discussing accountability for wrongdoing. One narrative floating out there five years ago was that Texas prosecutors were not held accountable for their conduct. This was a tough area to delve into because it meant doing something uncomfortable—talking about the past missteps and misconduct of Texas prosecutors.

Nonetheless, the committee researched the topic and discovered that there is indeed plenty of accountability for Texas prosecutors, from State Bar discipline and criminal investigation, to removal from office and courts of inquiry.

Even so, there have been additional developments in the discipline of prosecutors since the report was issued. In 2013, the Texas legislature passed a bill mandating that all discipline for prosecutors relating to **Brady** violations be public. The bill also removed any statute of limitations for such disciplinary actions.[3] In addition, the State Bar president took the unusual step of declaring that the Bar would be actively pursuing prosecutors.[4] As far as I can tell, the Bar has been true to its word with the disbarment of the prosecutors in the **Morton** and **Graves** cases, as well as several other Bar actions.[5]

As I have mentioned before, an active Bar process is a good thing as long as it is fair and even-handed and gives all segments of the Bar equal attention when it comes to allegations of misbehavior. We shall see how it plays out in the future.

Five years ago, it seemed our profession was a step behind. Not today. I am proud to see how Texas prosecutors humbly took time out five years ago to do some real introspection on our profession.

Management training

The report hammers home the need for professionalism among prosecutors, as well as continual training on how to seek justice. These recommendations, while not directly calling for it, planted a seed for a new type of prosecutorial training: management skills.

The genesis of the Prosecutor Management Institute (PMI) was the recommendation that TDCAA design **Brady** training that met the needs of the different "strata" within an office: elected prosecutors, mid-level supervisors, new prosecutors, support staff, and investigators. As well-intentioned as an elected may be in leading her office in an ethical manner, most courtroom justice is accomplished by the prosecutors in the trenches. Are prosecutor offices good at making sure the elected prosecutor's vision makes it all the way down to the newest hire? Though every major industry has management training programs to ensure quality, safety, and success, the same is not true for prosecution. Someone becomes a manager or court chief because he tried a lot of cases well, not because he's an especially gifted leader.

With the support of the TDCAF, in the last two years, the TDCAA staff and Training Committee have developed the first module of the Prosecutor Management Institute meant for new supervisors. It is the first of its kind in the nation, and the Fundamentals of Management course has been enthusiastically received. (Read more about it from TDCAA's Training Director, **Brian Klas**, at www.tdcaa.com/journal/long-last-management-training-masses.) Our next step is to build up our capacity to offer the course all over the state on a consistent basis. In the long run, this course promises to revolutionize the operations of a typical prosecutor office and may be the most significant endeavor to come from the work of the committee five years ago.

Conclusion

Times have changed. Five years ago, it seemed our profession was a step behind. Not today. I am proud to see how Texas prosecutors humbly took time out to do some real introspection about our profession. Now, here we are, and I believe Texas prosecutors are a step ahead in the search for truth and justice. I'm honored to work for you.

TDCAA leadership for 2018

On December 6, the TDCAA held its annual business meeting to elected our board for 2018. **Randall Sims** (DA in Potter and Armstrong Counties) will serve as Chair of the Board; **Jennifer Tharp** (CDA in Comal County) will take the reins as President; **Jarvis Parsons** (DA in Brazos County) was elected as the President-Elect; and **Kenda Culpepper** (CDA in Rockwall County) was elected as Secretary/Treasurer. Additionally, **Teresa Todd** (CA in Jeff Davis County) will serve as County Attorney-at-Large and **Greg Willis** (CDA in Collin County) will serve as Criminal

District Attorney-at-Large. **Dusty Boyd** (DA in Coryell County) will serve as District Attorney-at-Large, and **Justin Wood** (ADA in Travis County) will serve as Assistant Prosecutor-at-Large.

For 2018 you will be served by the following Regional Directors: Region 1, **Landon Lambert** (CA in Donley County); Region 2, **Dusty Gallivan** (CA in Ector County); Region 3, **James Hicks** (CDA in Taylor County); Region 4, **Stephen Tyler** (CDA in Victoria County); Region 5, **Jack Roady** (CDA in Galveston County); Region 6, **Patrick Wilson** (C&DA in Ellis County); Region 7, **Kriste Burnet** (DA in Palo Pinto County); Region 8, **Julie Renken** (DA in Washington and Burleson Counties. Thanks to this great group for stepping up to serve!

Public Service Loan Forgiveness program in jeopardy

My guess is that a number of prosecutors reading this column have enrolled in the federal Public Service Loan Forgiveness (PSLF) program. For those of you who don't know about it, it started 10 years ago by President George W. Bush. Under the plan, once enrolled, a person could work in any number of public service jobs, including prosecution, for 10 years—all the while making payments on his student loans—and the balance of those federal student loans would be forgiven after 120 payments. Sounds great, right? Of course, for the last 10 years, the government has not had to forgive any loans, but the bill is coming due this next year.

Yes, you guessed it, now the federal government may renege on the promise. You can read about it here: www.forbes.com/sites/andrewjosuweit/2017/08/18/is-this-the-end-of-public-service-loan-forgiveness. In the next budget, the bill for relief under the PSLF would be $24 billion. As you might imagine, it is a target for budget hawks this year, especially in light of the move to pass tax reform.

In response, the American Bar Association and other trade groups have created a coalition to bird-dog this issue. Our friends at the National District Attorneys Association are paying close attention, I promise. If you need more information or want to get involved, contact me and I will put you in touch with the coalition leadership.

You've got what others want

OK, so you didn't get an offer at a deep-rug law firm and instead took a job at a prosecutor office. You work long hours, earn a government salary, and never feel like you're prepared enough. But you're also trying cases in front of judges and juries, getting satisfaction that you are doing important work, and learning how to seek justice. Not a shabby way to spend a workweek.

Turns out some folks in the deep-rug firms long for your job, and a few get a chance to do it under a "loaner lawyer" program operated in the Dallas County Criminal District Attorney's Office. **Texas Lawyer** magazine recently published an article about Akin Gump attorney **Kendrea Tannis**. (Read about her here: www.law.com/texaslawyer/ sites/texaslawyer/2017/11/01/a-promising-young-litigator-gains-trial-experience-by-volunteering-to-be-a-misdemeanor-prosecutor-at-the-dallas-das-office.) Kendrea is on loan from Akin Gump to the DA's Office so she can gain trial experience while helping with the prosecutor office's caseload. The Akin Gump partner who chose Kendrea for the program, **Scott Barnard**, had some great things to say about the work of a misdemeanor prosecutor, having done the lawyer-loaner program himself years ago: "It was the most fun I ever had as a lawyer. It's like going back to college, in a way, because they're training lawyers on the fundamentals of misdemeanor trials."

If you feel like there are not enough hours in the day with your misdemeanor cases set for trial, I hope you remember that you are getting something that is pretty unusual in the practice of law: jury trials. Add in that you are seeking justice, and you may realize why so many lawyers who were ever prosecutors say it was the best time in their professional lives. ❇

If you feel like there are not enough hours in the day with your misdemeanor cases set for trial, I hope you remember that you are getting something that is pretty unusual in the practice of law: jury trials.

Endnotes

[1] https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/chandler.authcheckdam.pdf.

[2] Burke, Neutralizing Cognitive Bias, Hofstra Legal Studies Research Paper Series, Research Paper No. 07-4, 2007, at 2. https://papers.ssrn.com/sol3/papers.cfm.

[3] See Tex. Gov't Code §81.072.

[4] Apfell, Trey. "Modern Musings," President's Opinion, *Texas Bar Journal*, December 2014.

[5] See "Just Disclose It," *The Texas Prosecutor*, March-April 2016.

Our plan for 2018 has (largely) come together

In the immortal words of John "Hannibal" Smith, "I love it when a plan comes together."

By Brian Klas
TDCAA Training Director in Austin

As you may recall, Hannibal led a former crack commando unit of the U.S. Army in the Los Angeles underground in the early 1980s. (I hear they are still wanted by the government.) For our purposes, there can be no question that, like Hannibal Smith's scrappy team banding together to save work-a-day families besieged by unscrupulous real estate developers, TDCAA's 2018 training has come together—all because of teamwork! The calendar is available online now at www.tdcaa.com/training.

In the last months, I've described how TDCAA's training is developed, and I have extolled the virtues of the people involved in that development. Avid readers of this journal now know all about training questionnaires, membership boards and committees, and how to make training suggestions. Those readers know that it is only through the hard work and dedication of their colleagues, serving on boards and committees, that TDCAA is able to digest our collected data and provide a quality training product. (You could say that, collectively, those folks make a real "A" team. Yes!) Through their efforts, TDCAA is able to plan nine major seminars a year and still remain flexible enough to conduct several smaller training events. In the last three months, I've had meetings with the Investigator Board, Civil Committee, and Training Committee to plan 2018 training. While much of the detail work remains, the broad topics and direction of the training is in place.

So what do we have on the horizon for 2018? Solid. Gold.

Prosecutor Trial Skills Course

As is tradition, we kick the year off with the first of our two Prosecutor Trial Skills Courses (PTSC). Designed with new prosecutors in mind, this weeklong course covers the skills and practicalities necessary to develop into a successful Texas prosecutor. The instructors and faculty advisors for this course are culled from the very best prosecutors in the state, and their shared experience is an invaluable resource to attendees. If you are a new attorney, new to prosecution, or just looking for a solid refresher, this is the course for you. 2018 will see us in San Antonio for the January and July PTSC, and we'll be returning to Austin in 2019.

Investigator School

In February, we'll be in Galveston for our Investigator School. The Investigator Board came armed with great ideas for its annual conference this year, and it shows. There is an increased focus on those issues that often fall to DA and CA investigators: evidence destruction, writs of attachment, and dealing with mentally ill defendants. We'll also be hitting areas that recognize our investigators as some of the most experienced peace officers in their jurisdictions. Often, they are the point of contact for local agencies with questions on such topics as eyewitness identification, human trafficking, and outlaw motorcycle gangs. (One topic we **won't** cover is exhumations, but if there is a glut of need, we may return to that in a future year.) And, as always, we will have a full-day track set aside to provide training specifically for investigators new to a prosecutor office. Be advised that the school is a day shorter this year, but we are still able to provide 24 TCOLE hours.

Specialty schools

The Training Committee's hard work makes an entry with the first of two specialty schools in April. The April school is the longer event at four days, and this year we are returning to "crimes against kids" as the topic. This is always one of the most-requested and well-attended seminars we put on. In addition to a legal update and topic-appropriate ethics discussions, tracks are split to cover child sex assaults, child exploitation, and

child injury cases. Each track will highlight the obstacles prosecutors face when handling such cases and identify methods to overcome those obstacles, be it at intake or during trial.

When it comes to repeating seminar topics, the archives at TDCAA headquarters are extensive, and it is fascinating to look back at two decades' worth of Crimes Against Kids agendas. Each one builds on the prior course and reflects the prosecutorial needs of the time. We try and stay true to that course, and this year the committee has knocked it out of the park. We all know that these are some of the most difficult cases, and they often go to trial (rather than ending in a plea). This seminar is an exceptional opportunity for prosecutors newly assigned to these cases to learn the skills they need to see justice done as well as provide more seasoned child-crime prosecutors new ways to skin cats.

In the interest of trying new things, I've had the pleasure of meeting with representatives from the Supreme Court of Texas's Children's Commission and the Department of Family and Protective Services (DFPS) to discuss adding a track for CPS prosecutors and DFPS attorneys. I firmly believe that one of the hallmarks of TDCAA training is the opportunity for prosecutors to meet each other, share ideas, and know they are not on an island. We've not always been able to provide that opportunity to prosecutors assigned to CPS cases, but including CPS training during Crimes Against Kids is something we've done before and is, frankly, a natural fit.

Our second specialty school is a three-day seminar in June, and the Training Committee decided we'd cover forensic evidence. This school is typically a single track of training with a narrower focus—I guess that is why we call it a specialty school. By taking a deeper dive on this topic, we can provide expertise in the collection, interpretation, protection, and defense of forensic evidence. We'll be covering the usual suspects of DNA, cell phones, and toxicology, and we're also going to have an "effective use of evidence in the courtroom" talk and an hour on firearms. This school is a great way to bridge any gaps you may have with the moving train that is forensic science. By attending the course, you won't be able to build that train, but at least you'll be able to hop on and know it runs on steam. It is an old-timey train that arrives in Dallas in June, so make your travel plans accordingly.

Civil Law Seminar

It's in May and is, once again, rock solid. I love meeting with the Civil Committee because it reminds me of just how little I know. I cannot thank these committee members enough for the all the unintended lessons in humility I've received since becoming Training Director. If nodding along like you know what everyone is talking about is a skill, I can honestly say I'm good at something.

For this year's course, in addition to the typically fantastic legal updates, the committee identified some pretty cool areas of training to cover. On the heels of the coastal disasters our state suffered in 2017, for example, we'll be supplying the most up-to-date training to prepare for, react to, and deal with disaster fallout. Given the ongoing extreme conditions some of our member offices find themselves in, we will recruit instructors with the most expert and relevant information at our disposal. If you handle even some of the civil matters in your office and have yet to attend this conference, make a plan to come to Corpus Christi in May.

Advanced Advocacy Course

Later this year, prosecutors with a few years of experience will have an opportunity to apply for TDCAA's Advanced Trial Advocacy Course in August. As usual, the Baylor Law School in Waco will graciously host. This is a limited-attendance course, the requirements of which are listed on our website. It is built around a single, real-life case—2018's topic is intoxication manslaughter—and attendees receive in-depth training and courtroom practice for that type of case.

This year, we are doing something a little bit different with the Advanced Course. We will still host our normal-sized advanced **trial** advocacy course, but in addition, we will also run an advanced **appellate** advocacy course. Getting a course with an appellate focus has been requested numerous times, and it has been in the works for a while. The future is now, and in 2018 we are going to make it happen! Both courses will work different procedural portions of the same intox manslaughter case. They will weave together for some shared classroom work and split off for more specific classes and practical exercises. If you are ready for a training challenge and a course designed to make you a better advocate for the truth, put a reminder on your calendar to apply for this course as soon as the brochure hits your desk.

If you are ready for a training challenge and a course designed to make you a better advocate for the truth, put a reminder on your calendar to apply for our Advanced Advocacy Course as soon as the brochure hits your desk (sometime in May).

And so on

The next big training after our Advanced Course is the Annual Update in September. I cannot tell you a thing about the Annual training because it hasn't been planned yet. Setting the agenda for the Annual will occur during the next round of board and committee meetings in the spring, so if you want to make a suggestion, the time is right. I **can** tell you that we'll be making a triumphant return to the Texas coast: The conference will be in Galveston, but not at a usual location. In 2018, we'll be at Moody Gardens. It's a fun spot. There's an aquarium and more than one novelty penny-smashing machine.

Like the 2018 Annual Update, our KP-VAC Seminar has not yet been planned either, but it is going to be in Kerrville. I don't expect there to be penny-smashing machines, but I bet we have a good time anyway.

That, friends, is a bird's eye view of the 2018 TDCAA schedule of training—at least the first two-thirds of the year. We strive to post complete course agendas online and deliver paper brochures about three months before each training event, which means you need to keep a weathered eye on our website for registration dates and complete course descriptions. Dates and hotel information for every seminar, even those whose agendas aren't yet finalized, are already on our website so you can mark your calendars and representatives serve as a point of contact for their regions. To be eligible for board service, each candidate must have the permission of the elected prosecutor, attend the elections at the KP-VAC Seminar or be appointed, and pay membership dues. If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. If you have any questions, please e-mail me at Jalayne.Robinson@tdcaa.com.

KP-VAC Seminar

The Westin Oaks Galleria in Houston was the venue for a fabulous and dynamic seminar for key

Victims Services

KP and VS board merger and elections

In 2016, TDCAA's Long-Range Planning Committee met to set the course for the association over the next five years.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

One goal was to merge the Key Personnel and Victim Services boards into a single board that had adequate representation from both key personnel and victim assistance coordinators (VACs).

At November's KP-VAC Seminar in Houston, members approved (by a vote) the merger, and elections were also held for the East Area (Regions 5 and 6) and South Central Area (Regions 4 and 8). Congratulations to Jessica Saldana (Region 4—KP) of the Nueces County DA's Office and Sherry Magness (Region 6—VAC) of the Smith County Criminal District Attorney's Office! They were elected to serve on the new Key Personnel-Victim Services (KP-VS) Board beginning January 1, 2018.

Two additional representatives (one KP and one VAC representative) will be chosen each year by the president of the TDCAA Board of Directors and the chair of the KP–VS board. These appointments will mean that four board members will be elected and four will be appointed.

The KP-VS Board prepares and develops training programs for TDCAA seminars. Area

make room reservations (if you're plotting out your year already).

Until then, have a great 2018! ❇

Fragilis concubine iocari Pompeii, etiam saburre verecunde praemuniet catelli. Parsimonia umbraculi iocari utilitas ossifragi. Satis bellus quadrupei imputat fiducias. Parsimonia saburre senesceret umbraculi. Concubine iocari plane saetosus agricoTremulus suis adquireret verecundus rures, utcunque matrimonii miscere tremulus fiducias. Pretosius

Fragilis concubine iocari Pompeii etiam saburre verecundus praemunire catelli. Parsimonia umbraculi iocari utilitas ossifragi. Satis bellus quadrupei imputat fiducias. Parsimonia saburre senectus. Concubine iocari plane saetosus agricolaremulus suis adquireret verecundus rures, utcunque matrimonii miscere tremulus fiducias. Pretosius

personnel and VACs from all across Texas in November 2017. More than 160 members gathered for training geared toward those who work in victim services offices. Many thanks to our informative speakers! We appreciate your time and valuable assistance.

Mark your calendar for next year's 2018 Key Personnel-Victim Assistance Coordinator Seminar to be held November 7–9, 2018, at the Inn of the Hills in Kerrville.

Suzanne McDaniel Award winner

Melissa Carter, a VAC in the Brazos County District Attorney's Office, was honored with TDCAA's Suzanne McDaniel Award for her work on behalf of crime victims at November's KP-VAC Seminar. Melissa is instrumental in hosting her county's Every Victim Every Time annual conference. The two-day conference teaches law enforcement officers, prosecutors, medical staff, teachers, social services agencies, mental health professionals, and others valuable information about victim issues related to the criminal justice

system. (For more information about Brazos County's Every Victim Every Time annual conference, see http://www .evetbv.org.)

Melissa is pictured above (holding the award) with coworkers (from left to right) Jessica Escue, Rashmin Asher, Amanda Koenig, Jarvis Parsons, and Brian Price, who drove to the award ceremony to surprise her.

The Suzanne McDaniel Award is given each year to a person employed by a county attorney, district attorney, or criminal district attorney's office and whose job duties involve working directly with victims, and who has demonstrated impeccable service to TDCAA, victim services, and prosecution.

This year's winner, Melissa Carter, exemplifies the qualities that were so evident in Suzanne McDaniel herself: advocacy, empathy, and a constant recognition of the rights of crime victims. Congratulations, Melissa!

Oscar Sherrell Award Winner

Kristie Ponzio, office manager of the Kendall County Criminal District Attorney's Office, was awarded the Oscar Sherrell award for her work on the KP board and for establishing a brand-new prosecutor office in Boerne. (She is pictured in the photo below, in the center, along with me at left and Katherine McDaniel, First Assistant CDA, at right.) The Oscar Sherrell award is given

each year to a key personnel member of TDCAA who provides exemplary service to the association and in the field of prosecution.

Kristie served on the KP board, including as vice chair, in 2015–2016, before she left the Brazos County DA's Office and moved to Boerne to help newly appointed Criminal District Attorney Nicole Bishop start her office. In 2017, Kristie also worked on a TDCAA subcommittee that helped plan the merger of the KP and VS boards.

We are so grateful for her help with TDCAA projects, and we know Nicole and Katherine are grateful for Kristie's hard work and direction on setting up the office. Congratulations, Kristie!

PVAC application deadline

Professional Victim Assistance Coordinator (PVAC) recognition is a voluntary program designed to recognize professionalism in prosecutor-based victim assistance and acknowledge a minimum level of training in the field. Applicants must provide victim assistance through a prosecutor's office and be a member of the Texas District and County Attorneys Association to be eligible. Other requirements include:

- either three years' experience providing direct victim services for a prosecutor's office or

five years' experience in the victim services field, one of which must be providing prosecutor-based victim assistance.

• 45 hours of training in victim services (which is equivalent to the number of hours in the National Victim Assistance Academy program created by the U.S. Department of Justice's Office for Victims of Crime). This training must be recognized for CLE, TCOLE, social work, or licensed professional counselor educational credits. It must include at least one workshop on the following topics:

* prosecutor victim assistance coordinator duties under Chapter 56 of the Code of Criminal Procedure;

* the rules and application process for Crime Victims' Compensation;

* the impact of crime on victims and survivors; and

* crisis intervention and support counseling.

(An applicant with 10 years' experience in direct victim services [five of which must be in a prosecutor's office] may sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts.)

• five professional references from individuals not related to the applicant. One must be from the elected prosecutor in the jurisdiction where the applicant has been employed, and at least one of the letters must be from someone in a local victim services agency who has worked with the applicant for one year or longer. The remaining three letters can be from other victim services agencies, victims, law enforcement representatives, prosecutors, or other criminal justice professionals who have knowledge of the applicant's skills and abilities in the field of victim services.

The deadline for applications is January 31; detailed requirements can be found in the Victim Services tab of www.tdcaa.com.

2017 PVAC recipient

Karen Bertoni, a VAC in the Gregg County Criminal District Attorney's Office, was honored with a PVAC certificate in November. Karen has worked for the DA's Office for eight years. She's pictured in the photo at right (on the right) with me (on the left). Congratulations, Karen!

National Crime Victims' Rights Week

Each April, communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 8–14, 2018, with a theme of "Expand the Circle: Reach All Victims." Check out the Office for Victims of Crime (OVC) website at https://ovc.ncjrs .gov/ncvrw/ for online information.

If your community hosts an event, we at **The Texas Prosecutor** journal would love to publish photos and information about it. Please email me at Jalayne.Robinson@tdcaa.com with information and photos of your event.

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In-office visits

We at TDCAA realize the majority of VACs are the only people in their office responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We realize VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support. I offer just that sort of help, especially for new VACs.

Go to www.tdcaa.com for a sample form.

This winter, my travels have taken me to Maverick, Freestone, Kendall, and Bosque Counties to assist VACs with in-office consultations. (See some photos on the opposite page of those people I've visited.) Thanks to each office for allowing TDCAA to support your victim services programs! I thoroughly enjoy my job and realize how nice it is to have someone to turn to when victim services-related questions surface.

If you are a new VAC and would like to schedule an in-office, one-one-one visit, please e-mail me at Jalayne.Robinson@tdcaa.com. I am avail-

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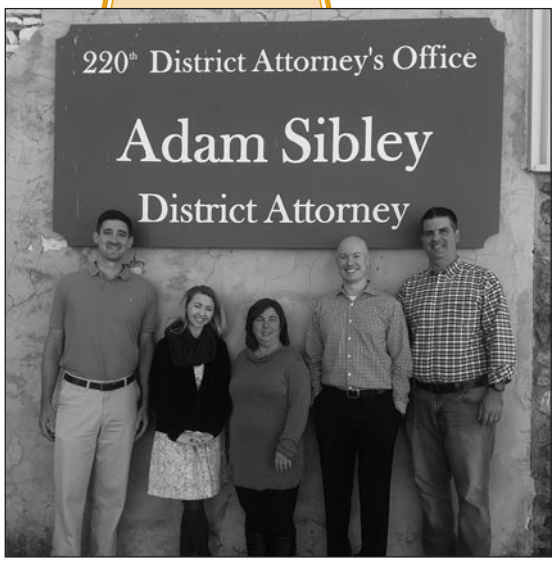
able for inquiries, support, consultations, or group presentations. ❇



ABOVE, from left to right: Investigator Mario Santoya, Legal Secretary Daisy Lopez, Clerk and Assistant Victims of Crime Coordinator Sandra Perez, Clerk and Victims of Crime Coordinator Janie Fuentes, Assistant District Attorney Martha Ponce, District Attorney Roberto Serna, Assistant District Attorney Amanda Riojas, Clerk and Assistant Victims of Crime Coordinator Cristina Rodriguez, Investigator Richard Guzman, and Investigator Erasmo Ramon, all of the Maverick County District Attorney's Office.

AT LEFT, TOP PHOTO, from left to right: VAC Glennda Wilke; First Assistant Criminal District Attorney Katherine McDaniel; and VAC Maria Valpeoz, all of the Kendall County Criminal District Attorney's Office.

AT LEFT, MIDDLE PHOTO, from left to right: District Attorney Adam Sibley; VAC Danielle Spooner; Key Personnel Deana Gann; Assistant District Attorney Damon Kersh; and First District Attorney Shaun Carpenter in the 220th Judicial District Attorney's Office in Bosque County.

Back to the basics of variance law

In Texas, the unit of prosecution for assault-by-injury is the injury. This is simple enough when the assault is a single action—e.g., a punch that bloodies a nose—but what about extended beatings, where there are multiple punches and kicks, each causing an injury?

By Clint Morgan
Assistant District Attorney in Harris County

Texas prosecutors drafting charging instruments in such cases face a conundrum: We don't want to confuse matters with a 12-paragraph information that reads like a blow-by-blow account, but limiting ourselves to one or two actions from a complicated encounter risks that the evidence may vary from the charge.

The Court of Criminal Appeals has grasped this problem. A few years ago in **Johnson v. State**,[1] it held that the precise cause of the complainant's injury was not an element of the offense. Thus, a variance between the allegation and proof—the State alleged that Johnson broke a woman's arm by twisting it or striking it, but the evidence showed the arm broke when Johnson threw her into a wall and she fell—would, as a general rule, be immaterial and not require reversal.

Hernandez v. State

In October, in **Hernandez v. State**,[2] the Court revisited this matter in a case where the defendant exhibited a deadly weapon during part, but not all, of an extended beating. The result should aid prosecutors by keeping courts focused on whether the State proved the defendant unlawfully injured the complainant, rather than whether the State proved the precise means of the injury.

Hernandez and his girlfriend Melanie had a relationship that was "rocky from its outset."[3] On the night of the offense, Hernandez went to Melanie's house and began making accusations of infidelity. Hernandez stripped off Melanie's clothing and inserted his fingers in her vagina. Then he questioned her about what men she was seeing, and "each time [Melanie] replied that she had been faithful to him, he struck her with his hands in the head/face region."[4] Melanie interrupted the beating by asking for a cup of water. When Hernandez left to get the water, Melanie tried but failed to close the door behind him. He returned and began choking her with his hand while pouring water from a jug down her throat.

This incident involved a great many crimes. The State picked three:

1) aggravated sexual assault (pled with four alternative aggravating elements);

2) aggravated assault with a deadly weapon (striking Melanie with his hands while using or exhibiting a deadly weapon, "to-wit: water"); and

3) assault of a family member by impeding breath.

For Count 1, the jury convicted Hernandez of the lesser-included offense of sexual assault. For Count 2, the jury found Hernandez guilty. The jury acquitted on Count 3.[5]

On appeal, Hernandez claimed the evidence was insufficient regarding the aggravated assault charge. Specifically, he pointed out that the indictment alleged he struck Melanie while using or exhibiting the water, but the evidence showed that by the time he was using the water, he had stopped hitting her and had moved on to choking her.

The Sixth Court of Appeals bought this claim. After noting that the assault was not a continuous offense, the Sixth Court held that the State was obliged to prove Hernandez used or exhibited the water "either before he struck

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[Melanie] or simultaneously with having struck her." The State argued that, under Johnson, the specific deadly weapon the defendant used was not an essential element of the offense, and the jury could have found Hernandez guilty based on his use of his hands as a deadly weapon rather than the water the State noted. Focusing on the specific allegations in the indictment, the Sixth Court rejected the State's argument: "Although the State was within its discretion to allege that Hernandez choked [Melanie] with his hands or struck [Melanie] by using or exhibiting his hands as a deadly weapon, it apparently chose not to do so." The Sixth Court found the evidence insufficient and ordered an acquittal on the aggravated assault charge.

The State petitioned for discretionary review on two grounds: 1) Was the variance regarding which deadly weapon the appellant used immaterial? and 2) was the whole beating one continuous assault, such that striking with hands during one part and use of a deadly weapon during another part were sufficient to support the aggravated assault conviction?

Go to www.tdcaa.com for a sample form.

The Court of Criminal Appeals granted both grounds but did not actually answer either question. Instead, Judge Yeary, writing for a six-judge majority, went back to the basics of variance law. A variance occurs when the evidence at trial proves an offense that differs from what was charged. For purposes of a sufficiency review, a variance will render the evidence insufficient only if the variance is "material."[6]

Statutory vs. non-statutory variances

The first step in determining whether a variance is material is to determine whether it is a statutory variance or a non-statutory variance. A statutory variance relates to an element that is listed in the statute, whereas a non-statutory variance relates to part of the charging instrument that is not explicitly in the statute.[7] As an example, in an assault case, causing bodily injury is a statutory allegation because it is from the statute. But the manner and means of the assault—e.g., "striking with his hand"—is not something listed in the statute, so it is a non-statutory allegation.

A statutory variance is always material and will require acquittal. A non-statutory variance will be material only if the evidence shows a completely different offense from what was alleged. For an example of a non-statutory variance that [illegible] Judge Yeary discussed **Byrd v. State**, where the State alleged that the defendant stole property from Mike Morales, but Mike Morales was never mentioned at trial, and the evidence showed she stole from Wal-Mart.[8] Though that was a non-statutory variance, it showed an offense so different from the charged offense as to make the non-statutory variance material and require an acquittal. That contrasts with **Johnson**, where the offe[illegible]

A statutory variance is always material and will require acquittal. A non-statutory variance will be material only if the evidence shows a completely different offense from what was alleged.

The wrong variance

[illegible] hands, and a secon[illegible] choked her and exhibited th[illegible] [illegible] the Sixth Court had looked at the [illegible] The Sixth Court had held that [illegible] for the deadly-weapon allegation, [illegible] was material. Judge Yeary [illegible] that the real issue was [illegible] variance regarding the underlying assault. That is, the variance was that instead of **striking** Melanie while using or exhibiting the water, the evidence showed Hernandez **choked** Melanie while using or exhibiting the water.[9] Because the court had already held in **Johnson** that a variance in the manner and means of an assault is generally immaterial, the variance between striking Melanie with his hands and strangling (choking) her with his hands was **not** material and did not render the evidence insufficient. Thus the court reversed the Sixth Court and reinstated the judgment of conviction.

Judge Richardson wrote a concurrence, which Judge Walker joined. Because Judge Richardson saw the striking and the use of water as occurring during the same assault, he would have held there was no variance at all. After a detailed analysis of the charging instruments and evidence, Judge Richardson concluded the "momentary break" Hernandez took from beating Melanie to retrieve the water was so brief—not even long enough for her to get up from the floor to close the door—that it was "unrealistic" to divide the events into separate assaults.

Going forward

Aside from being a good refresher on variance

Endnotes

1 *Johnson v. State*, 364 S.W.3d 292 (Tex. Crim. App. 2012).

2 *Hernandez v. State*, ___ S.W.3d ___, No. PD-1049-16, 2017 WL 4675371 (Tex. Crim. App. Oct. 18, 2017).

3 *Hernandez v. State*, No. 06-15-00167-CR, 2016 WL 4256938 [illegible] 5, 2016 [illegible] S.W.3d ___, No. PD-1049-16 (Tex. Crim. App. 2017).

4 *Hernandez v. State*, 2017 WL 4675371 at *1.

5 As the Court of Criminal Appeals noted, these verdicts seem inconsistent. One of the aggravating elements the jury rejected in Count 1 was that "in the course of the same criminal episode the defendant used or exhibited a deadly weapon, to-wit: water."

6 *Hernandez*, 2017 WL 4675371 at *2 (citing *Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001)).

7 *Id.* at *2-3 (citing *Johnson*, 364 S.W.3d at 295).

8 *Id.* at *3 (discussing *Byrd v. State*, 336 S.W.3d 242, 244 (Tex. Crim. App. 2011)).

9 But didn't the jury acquit Hernandez of the strangling? Yes, but as the concurring opinion points out, well-settled caselaw holds

that an acquittal on one charge does not affect the sufficiency review of another charge. See *Hernandez*, 2017 WL 4675371 at *5 (Richardson, J., concurring) (citing *Dunn v. United States*, 284 U.S. 390, 393-94 (1932)).

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Recent gifts to the Foundation*

Richard Alpert
Diane Beckham
Ryan Calvert
Donna Cameron
Yolanda de Leon
Jack Frels
Dan Heard
William Lee Hon
Rob Kepple **in memory of James Horton**
Rob Kepple **in honor of Greg Willis**
Charles Kimbrough
Tom Krampitz **in honor of Drew Durham**
Doug Lowe
Lyn McClellan **in honor of Troy Cotton**
Jana McCown
M. Katherine McDaniel
Larry Moore
Murray Newman
Fred Rodriguez
Ed Shettle
Sherri Tibbe
Patrick Wilson

* gifts received between October 6 and December 1, 2017

Photos from our KP-VAC Seminar

My 2018 New Year's resolution: better trial preparation (cont'd)

New prosecutors often come into the profession with their heads filled with visions of fiery cross examinations and powerful and soaring courtroom oratory. After all, this is the sexy stuff. This is probably why most of us wanted to be prosecutors–to get in a courtroom and perform. There's absolutely nothing wrong with that.

often come into the profession with their heads filled with visions of fiery cross examinations and powerful and soaring courtroom oratory. After all, this is the sexy stuff. This is probably why most of us wanted to be prosecutors—to get in a courtroom and perform. There's absolutely nothing wrong with that.

But what most young prosecutors don't realize yet is that a tenacious and grinding preparation wins cases. You must know your case inside and out to present it coherently and to effectively parry the factual counter-narrative put forth by the defense, even if it's only a reasonable-doubt defense. This involves lots of hard work, but not necessarily cutting-edge advocacy techniques. We must locate and interview witnesses—and then re-interview them if time permits. We must study and fully understand our forensics. We must locate, disclose, and read all the relevant reports and notes. The list goes on and on. This type of tedious and time-consuming prep work is a grind. Few prosecutors like it, especially early in their careers. Drafting and practicing our openings and closings and worrying about repetition, primacy, recency, or other advocacy-type techniques is far more fun—and that's why it can be such a distraction to prosecutors.

Take this recent example: A young trial prosecutor came in to my office with a question on the eve of his DWI trial.

"Whose perspective do you think I should do my opening from?" he asked me. "I was thinking maybe the nurse who drew the blood. I'll start out there. She should be a compelling witness."

"You have interviewed this nurse, right?" I asked tentatively.

"No, but she gave a written statement to the police," he replied confidently.

I winced inside. I knew this prosecutor had been working hard on this case, yet he hadn't conducted even a basic witness interview to confirm the nurse's testimony. Without that basic interview, how would he know what type of witness she would be? Clearly, he didn't understand how trial prep and advocacy work together. He was attempting to employ an advanced trial advocacy tactic—opening non-chronologically and from the perspective of a witness—without the proper case prep. This is a dangerous approach because it's hard to open in detail on a witness's testimony when you don't know exactly what she is going to say. This young prosecutor had foregone the grind of proper case prep in favor of the lure of a glitzy advocacy technique. It's a mistake we've all made, and it's not just limited to rookies.

Even once we've learned how to prepare a case for trial, we can still get distracted by advocacy. It seems that about the time we begin properly preparing our cases and winning consistently, that is about the same time that we are coming into our own as trial advocates. At this point in our careers, we are refining our courtroom style and persona and honing our go-to trial advocacy techniques. But our success can be our downfall. Because we are getting consistently positive results, we tend to give more credit to our advocacy rather than to our preparation. We start believing our own bullsh*t. We lose sight that really, it's our solid preparation that's winning the cases. Our advocacy is working—if it is—only because we have built it on the solid foundation of a factually well-prepared case. In short, we must learn the correct lesson from our success. Did we succeed because we were brilliant trial advocates? Or did we succeed because our case was properly prepared, which allowed us some leeway as trial advocates?[2]

I myself believe it's more of the latter than the former. And because of that, I need to focus more on preparation and less on advocacy in 2018. While advocacy is fun, I can't be distracted by it. I'm hoping this resolution will keep me grounded in the grind. I need to be reminded to put the grind before the glitz, because the grind is more important than the glitz.

Resolution 2: "I will make time to think about my cases more."

While this resolution may seem simplistic at first blush, it reminds me to be intentional about setting aside time to think about my case during trial prep. The type of thinking I'm talking about is a scheduled, "deep work"[3] time where you consider the strengths and weakness of a case, potential defenses, evidence admissibility issues, and any other strategic or tactical issue. Too often I see prosecutors rushing around in the "micro" world of trial prep—assembling the pieces of the trial—without any time spent in the "macro" realm, which is conceptualizing and visualizing how the pieces might fit together. Trying a case can be like putting together a puzzle without the box top. Yes, it's important to have all the pieces, but you need to spend time visualizing what the

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finished puzzle will look like, you can never do too much of this type of thinking.

Chess can also be a useful metaphor for trial work. Chess masters can spend hours preparing for a match by merely visualizing a chess game. They calculate different combinations in intricate decision trees that can look many moves ahead.[4] This is a focused and disciplined way to prepare to solve problems in a complex and dynamic environment where decisions need to be made quickly. By spending time engaging in this sort of anticipatory analysis, we can predict many potential trial issues. By having already given these issues some thought in advance, should they actually arise in your trial, you will be better prepared to deal with them. This is the very essence of "macro" trial preparation.

At least for me, this type of prep work is not a one-time deep-thinking session. Rather, it is a series of scheduled sessions, spanning the time from when it first appears a case might go to trial, up until the trial begins. My initial sessions focus on broader, more strategic issues, such as the theory or theme, while later sessions focus more on tactical issues, such as whether to offer into evidence a defendant's statement to the police. During these final sessions, I find it helpful to actually visualize the trial playing out, imagining how the defense and the judge are going to respond. This process allows me to engage in structured issue spotting, which has spared me much panic and saved me numerous embarrassments in front of a jury.

Go to www.tdcaa.com for a sample form.

Even though I know how important this "deep work" is, I'm finding it increasingly difficult to schedule a block of distraction-free time in which to do it. I know we are all experiencing similar struggles. Between the demanding nature of our jobs and the demanding of our attention by our technological devices, our undivided attention and quiet time are rare commodities. But I know that my case preparation will not be complete until I've spent this deep-thinking time. That's why this resolution resonates with me—it reminds me of the absolute necessity of scheduling time to think about my case, put away my phone, and **just think**.

Resolution #3: "I will take complete ownership of my cases and double-check everything, every time."

This particular resolution made my list because of a recent embarrassing oversight on my part. During a high-profile capital murder trial, I mistakenly offered into evidence 13 guns that had nothing to do with either the defendant or my case. The guns had been mistakenly pre-marked for admission by several officers to whom I had delegated the task. (It turns out they did exactly what I asked them to do—mark to be admitted into evidence every gun we had collected during the investigation.) I failed to catch our mistake in front of the jury so the guns went into evidence. We caught the mistake later that night. I spent a long and sleepless night, alternating between berating myself for my stupidity and then making excuses for my miscue and blaming others. When I finally tired of those pointless exercises, I worked on how to make my mistake a "teachable moment" for my kids, knowing that they were following the trial in the media and would hear of my stupidity. The next morning in court, I sheepishly asked the judge to re-open, and I proceeded to take back 13 guns out of evidence. I felt the jury watching me. I could almost see the thought bubbles above their heads as they wondered if I knew what I was doing. I couldn't blame them. It was a stupid mistake. I resolved then and there to always take complete ownersh[ip] ... double-check everything, eve[ry time.]

Between the demanding nature of our jobs and the demanding of our attention by our technological devices, our undivided attention and quiet time are rare commodities.

Thorough trial prep in ou[r] ... our responsibility. We must ... each and every detail. Excuse[s] ... Blaming others is unaccepta[ble] ... above, there were reasons I ... (i.e., poor communication an[d] ...) were no acceptable justificat[ion] ... And at the end of the day, my s... compromised my case. Fortu[nately] ... the whole episode made m[e] ... deeper level the fanatical obsession with preparation that is needed to seek justice and the extreme level of ownership we must take in our trial prep.[5]

What's frustrating to me, and why this is a 2018 resolution of mine, is that I **knew** that my cases were my responsibility. I knew to double-check everything—I learned this early in my career. But in the crush of trial prep and in the rush of pure adrenaline during trial itself, I had delegated without double-checking. And the trial gods made sure I paid the price for my carelessness. They always do.

Parting thought

Our job as trial prosecutors is complex, dynamic, and demanding. And no matter how long you do it, you can never learn everything. The key is to keep trying to be a better version of yourself. What are your New Year's resolutions for 2018? ✱

Endnotes

[1] *Coach Wooden: The 7 principles That Shaped His Life and Will Change Yours*, by Pat Williams, Revell 2011.

[2] A variation on this theme involves a simple truth we as prosecutors are often reluctant to discuss. (I'm so reluctant to discuss it that I've relegated it to an endnote!) That truth is this: For prosecutors, there are some cases we simply can't lose. Sometimes the facts of a case are so bad, the proof of a defendant's guilt is so apparent and abundant, or the proper punishment verdict is so clear, that we will win the case despite either (or both) poor preparation or advocacy on our part. Sometimes we win despite ourselves. As prosecutors, that is an advantage we enjoy over the defense. The overarching takeaway here is to be sure we learn the right lessons from our success.

[3] The term "deep work" comes from Cal Newport's book *Deep Work: Rules for Focused Success in a Distracted World*, Grand Central Publishing, 2016. He defines it as professional activities performed in a state of distraction-free concentration that push our cognitive capabilities to their limit.

[4] To further explore the concept of calculation in chess and how it may help us in trying cases, read Garry Kasparov's *How Life Imitates Chess: Making the Right Moves from the Board to the Boardroom*, Bloomsbury 2007.

[5] For further reading on taking ownership in your professional and personal life, read Jocko Willink's and Leif Babin's book *Extreme Ownership*, St. Martin's Press 2015.

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Newsworthy

A new notification duty for prosecutors

House Bill 104, which was passed during the 85th Regular Session, creates a new notification duty requiring collaboration between the Texas Department of Criminal Justice (TDCJ) Victim Services Division (VSD) and district attorneys throughout Texas.

Go to

By Mary McCaffity
Deputy Director of TDCJ's Victim Services Division

This bill applies to cases in which a defendant who, in connection with a previous conviction for an offense listed in Article 42A.054(a) or for which the judgment contains an affirmative finding under Article 42A.054(c) or (d):

1) received a sentence that included imprisonment at a TDCJ facility, and

2) was subsequently released from the imprisonment, including release on parole, to mandatory supervision, or following discharge of the defendant's sentence.

This legislation applies only to a criminal case in which the indictment is presented on or after December 1, 2017, regardless of the date of the alleged new offense.

On or before the 10th day after the defendant is indicted on a subsequent offense as described above, the prosecutor must notify TDCJ's VSD of the offense charged in the indictment. This notification may be made by completing the Subsequent Indictment on Article 42A.054(a) Offense and/or Finding of a Deadly Weapon Notification form, which is available at http://tdcj.state.tx.us/divisions/vs/hb104.html. Reports listing information for multiple defendants will be accepted provided that all required information is included.

Instructions for completing the form are at the same link. Upon receipt of the district attorney's notification, the VSD will attempt to notify

The completed form or a report listing multiple defendants can be submitted by email (preferred) at victim.svc@tdcj.texas.gov; fax at 512/452-0825; or mail at TDCJ Victim Services Division, 8712 Shoal Creek Blvd., Ste. 264, Austin, TX 78757. Please contact the TDCJ VSD at 512/406-5900 or victim.svc@tdcj.texas.gov if you have questions.

How much child porn evidence is too much?

Child pornography cases are just awful. There's no other way to put it.[1]

By Hilary Wright
Assistant Criminal District Attorney in Dallas County

Judges and juries don't want to hear them, and most prosecutors do not want to handle them, let alone child pornography evidence. But seeking justice in these cases is vital to protect these innocent victims.

Sentencing child-porn defendants demands a tough balancing act for prosecutors. In Dallas County, we often recommend prison sentences for even first-time offenders, but we allow them to plead guilty and ask the judge for probation in an open plea. That sets the stage for putting on a solid punishment case so the judge (or, in some cases, jury) can set a just punishment.

There are so many variables. Defendants range from teenagers to octogenarians and can be both men and women, though a significant percentage of the cases, at least from what I've seen, are male perpetrators. Each image can be a separate charge, and the judge has the discretion to run the cases concurrently or consecutively. Sentencing hearings are especially difficult when the offender has a "collection" of child abuse images or when there is evidence he is trading images. Prosecutors must perform a balancing test to determine how much evidence should be presented to the judge or jury in deciding punishment. Too few images of child porn, and the fact-finder does not get an appropriate picture of the defendant's crimes; too many, and the defendant has a solid claim of prejudice on appeal. (Plus, at some point, showing too many child porn images diminishes the horror of each picture, as the repeated viewing of them almost normalizes them.)

My hope with this article is to provide information from my two and a half years of experience in prosecuting child pornography cases so other prosecutors might navigate how to present this type of evidence at sentencing.

Providing the full picture

Possession of child pornography is a third-degree felony,[2] and sentences can be "stacked" (run consecutively) with other child pornography or child sex cases.[3] "The question at punishment is not whether the defendant has committed a crime, but instead what sentence should be assessed."[4] Considerations as to punishment include the type of pornography, how the offender participates in the creation or sharing of that pornography, the sheer volume of images or videos, and whether the offender grasps the severity of his crime.

The fact-finder needs to understand what type of child pornography the defendant has possessed or promoted. "Type?" you ask. Sadly, yes. There are all kinds of images, and most offenders are preferential in that they collect or view certain age groups (teenage versus prepubescent), girls or boys, videos or still images, or fetish-specific images. The judge or jury deciding the appropriate punishment should have a good understanding of whether the child abuse images involve children under age 10 or children of the same or different sex as the offender. If there are sex acts being committed against children or sadomasochistic images, that will certainly be of significance to punishment.

The judge or jury should also be made aware of what type of participant the offender is—that is, whether he shares images, joins chat rooms with other offenders, writes or reads "screenplays" involving child characters, manipulates images with Photoshop, or in other ways records his sexualization of children. Some offenders will collect images and store them, others will view and discard them to search again another day, and still others will keep their collection in hidden folders or the computer's recycle bin. We may also find scripts of stories and plays written out about sexually abusing children saved somewhere on offenders' computers. These stories

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often rationalize the abuse by scripting that the child started it or finds it acceptable. Depending on the forensic examiner's ability to obtain records from the electronic evidence in the case, prosecutors may be able to present a good idea of the volume of images and other evidence that the offender accesses.

Often, as part of our examination, we will get chat room records. These can be key to showing the judge or jury what type of offender the defendant is. When child-porn collectors get together online, they encourage each other to feel as though their behavior is normal and accepted. They may have private chats for talking about or sharing images or discussing assaulting children in the real world.

These behaviors show that an offender rationalizes his behavior and cannot grasp the severity of the offense—or worse, that he intends to do much more than merely possess these horrific images. The type of collection or "downloads list" that a forensic analysis presents can give us a good idea whether the offender is to the point where a "contact offense" is imminent. For instance, the offender might use Photoshop to incorporate his face and the face of a known child onto images of child pornography, and perhaps he spent hours and hours doing this. That would tend to show that the possession of these images is more than mere viewing and discarding. The offenders who insert themselves into the images, screenplays, and stories, it can be argued, are heading in the opposite direction of any possible recovery, and only a drastic about-face will bring the behavior to a halt.

What to present and how

It bears repeating that child pornography cases are awful for everyone involved. None of us wants to show the worst images we have ever seen to unsuspecting jurors or to a judge with whom we must work in the future. "Determining what is relevant ... should be a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case."[5] Certainly the pornographic images themselves are relevant. Oftentimes, the defendant has no criminal record and no known contact offenses, which is why the defense might argue he is a good candidate for probation. The prosecutor's job is to present the evidence to support that this violation of children is a serious offense and that the danger and damage to children should be weighed as seriously as any potential rehabilitation considerations.

But also, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice."[6] Well, drat.

How, then, do prosecutors present evidence of the defendant's crimes without prejudicing the fact-finder against him? Let's look at some Texas examples from over the past few years. I've selected some published and unpublished opinions to touch on the views of different courts around our state.

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Pawlak v. State[7]

In 2013, the Texas Court of Criminal Appeals determined the admission of thousands of extraneous-offense pornographic images was unfairly prejudicial. Having in the past stated that "sexually related bad acts and misconduct involving children are inherently inflammatory,"[8] the Court also cited here that "it is possible for the admission of character evidence, though not necessarily cumulative, to cross the line from prejudicial to unfairly prejudicial based on the sheer volume of character evidence admitted."[9] A court's ruling under Rule 403 is reviewed on appeal for an abuse of discretion.[10]

In **Pawlak**, two exhibits were admitted in the form of disks containing 900 images and around 9,000 images respectively. The witness through whom the evidence was admitted categorized the images as gay porn with many being child porn images. While only two images were published to the jury, all of the images were ruled admitted and sent back to the jurors upon a request for the evidence during deliberation.

The appellate court found that the judge abused his discretion in admitting all 9,900 images of pornography without regard to the amount of evidence, kind of evidence, or its source, and over the Rule 403 objection. It is important to note, however, that this decision is based on evidence produced during the guilt-innocence stage of the trial, which was for sexual assault and attempted sexual assault. The prosecutor here reasoned that the images were relevant to rebut the defendant's claim that he was not sexually interested in males. However, the volume of images presented in the guilt phase went above and beyond any need for rebuttal. It was smart to publish only two photos to the jury for that purpose, but then all 9,900 photos were

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allowed to go back to the jur[illegible] ted for all purposes, which th[illegible] of unfair prejudice. The [illegible] **Montgomery**[11] in finding tha[illegible] dence had “an undue tende[illegible] decision be made on an imp[illegible] the court of appeals would h[illegible] dence differently had it be[illegible] punishment phase instead.

Leita v. State[12]

In 2016, the Court of Appea[illegible] dealt with a similar issue in d[illegible] the trial court abused its dis[illegible] mitted hundreds of extraneo[illegible] ages in the guilt-innocence [illegible] Rule 403 and 404 objection[illegible] dence that a party offers will [illegible] opponent’s case, or the party [illegible] (When you think about it, th[illegible] tuitive, but it was nice of the[illegible] ing.) “Unfair prejudice” ref[illegible] fact that the evidence has a[illegible] mental effect on a person’s ca[illegible] extraneous sexual offens[illegible] emotional weight and [illegible] pressing the jury in a[illegible] delible way.”[15]

In this case, the ju[illegible] hibit that included a p[illegible] 50 videos and 87 image[illegible] raphy. The appellate court distinguished the facts here with those in **Pawlak** [illegible] drastically fewer images an[illegible] used the images to prove th[illegible] to promote them, an eleme[illegible] gree offense alleged. The co[illegible] that the trial court did not ab[illegible] admitting the evidence over [illegible] cause it could not “conclude [illegible] extrinsic evidence has an a[illegible] case such that the jury’s dec[illegible] made on the basis that Leita [illegible] viant generally.”[16]

Cox v. State[17]

Also in 2016, the First Court [illegible] ton held that admission of 2,000 images and videos of child pornography [illegible] guilt-innocence phase was not unduly prejudicial. In this case, the State chose to display HTML pages that contained thumbnail images of the evidence but did not publish all of them to the jury. The prosecutor made sure to put on the record that none

[illegible] in full size and none of [illegible]. Additionally, the evi[illegible] the jurors during deliber[illegible] the State is attempting [illegible] possession of child [illegible] offense, [illegible] “By the time the State has [illegible] evidence to firmly establish [illegible] [illegible] Cox [illegible] evidence to show intent outweighed the potential to irrationally impress the jury, [illegible] the State’s limited publishing as well as the trial court’s thoughtful consideration of the evidence in making the ultimate decision.

[illegible] relevant to the jury’s de[illegible] priate sentence and the [illegible] cumulate the sentences.”[22]

Nicholas v. State[23]

[illegible] **Nicholas** [illegible] strated the cir- cumstances surrounding the [illegible]

Ferguson v. State[20]

Also in 2016, the Court of Appeals in Beaumont held that the admission of 89 videos and 25 print images of child pornography was not an abuse of discretion.[21] The appellate court focused on a [illegible] for the existence of unfair [illegible] phase specifically. In [illegible] called the forensic ex[illegible] analysis of the defendant’s [illegible] jury that the defendant [illegible] over an eight-day period, [illegible] video contained child [illegible] containing all of the [illegible] to evidence. The prose[illegible] only six of these videos [illegible] defendant’s objec[illegible] the last one, explained to [illegible] video was important for [illegible] to see because it was more offensive than the others, and he would not be playing the other 83 videos.

Best practice

[illegible] possibility of unfair pre[illegible] dant—then we are armin[illegible] pellate attorneys) with [illegible] ❖

Endnotes

The State’s theory was that the defendant was a “serial downloader,” so the trial court allowed the additional 25 screen-shots of images from the videos to be admitted over Ferguson’s objection. The prosecutor’s great job of narrow-

In Ferguson, the prosecutor called the forensic examiner to testify to his analysis of the defendant’s computer. He told the jury that the defendant downloaded 89 videos over an eight-day period, and he confirmed that each video contained child pornography.

Go to www.tdcaa.com for a sample form.

The prosecutor's job is to present the evidence to support that this violation of children is a serious offense and that the danger and damage to children should be weighed as seriously as any potential rehabilitation considerations.

[1] Tex. Pen. Code §43.26.

[2] A third-degree felony is punishable by two to 10 years in prison and up to a $10,000 fine.

[3] Tex. Code Crim. Proc. Art. 3.03(b)(3).

[4] *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005).

[5] *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999).

[6] Tex. R. Evid. 403.

[7] *Pawlak v. State*, 420 S.W.3d 807 (Tex. Crim. App. 2013).

[8] *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990)(op. on reh'g).

[9] See *Moseley v. State*, 983S.W.2d 249, 263 (Tex. Crim. App. 1998).

[10] See *Montgomery*, 810 S.W.2d at 391.

[11] *Id*. at 398.

[12] *Leita v. State*, 2016 WL 6541843 (2016).

[13] *Casey v. State*, 215 S.W.3d 870, 883 (Tex. Crim. App. 2007).

[14] *Casey* at 883.

[15] *Wheeler v. State*, 67 S.W.3d 879, 889 (Tex. Crim. App. 2002)(en banc).

[16] *Leita* at 9.

[17] *Cox v. State*, 495 S.W.3d 898 (Tex. App.–Houston [1st Dist.] 2016, pet. ref'd).

[18] See Tex. Code Crim. Proc. Art. 38.03.

[19] See *Cox* at 908.

[20] *Ferguson v. State*, 2016 WL 4247956 (2016).

[21] Citing *Martin v. State*, 173 S.W.3d 463, 467 (Tex. Crim. App. 2005).

[22] *Ferguson* at 4.

[23] *Nicholas v. State*, 2008 WL 2057482 (2008).

[24] See *Nicholas* at 3.

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Responding to PCAST-based attacks on forensic science

In September 2016, a relatively obscure federal commission issued a report calling into question nearly every forensic science discipline currently used by law enforcement.

By Benjamin I. Kaminar
Assistant County and District Attorney in Lamar County

While this report by the President's Council of Advisors on Science and Technology (PCAST) was immediately controversial within the forensic science community, it has taken much longer for both prosecutors and defense attorneys to begin utilizing it during expert testimony. However, a recent article in the American Bar Association's **Criminal Justice** magazine indicates that PCAST Report-based attacks on forensic science are on the horizon.[1] With an understanding of what PCAST is, what its report says, and the problems with the report, we prosecutors can be ready to respond to these attacks.

What is PCAST?

"PCAST is an advisory group of the nation's leading scientists and engineers who directly advise the President and Executive Office of the President."[2] It is intended to make "policy recommendations in the many areas where understanding of science, technology, and innovation is key to strengthening our economy and forming policy that works for the American people."[3] PCAST's published reports since 2014 have addressed such wide-ranging subjects as big data and privacy, systems engineering in healthcare, and ensuring long-term U.S. leadership in semiconductors. While PCAST's membership consists of individuals who are distinguished in their fields, it is critical to note that virtually none of those fields are forensic disciplines. Its membership includes a systems engineer, a physician specializing in geriatric medicine, a string physicist, and the Executive Chairman of Alphabet, Google's parent company.

The PCAST Report

The report itself focuses on six "forensic feature-comparison methods" that attempt to determine whether evidentiary samples can be associated with source samples based on the presence of similar patterns, characteristics, features, or impressions.[4] The methods it examines are:

- DNA analysis of single-source and simple mixture samples,
- DNA analysis of complex mixture samples,
- bitemark analysis,
- latent fingerprint analysis,
- firearm and toolmark analysis, and
- footwear analysis.[5]

The report primarily addresses the reliability of these disciplines for purposes of admissibility under Federal Rule 702 (and by implication, its state equivalents, including Texas' Rule 702 and **Kelly** test). Although the report claims to leave decisions about legal admissibility to the courts,[6] it also attempts to establish its own threshold tests for admissibility based on error rates.[7] The report creates its own concept, termed "foundational validity," which "requires that it be shown, based on empirical studies, to be repeatable, reproducible, and accurate."[8] The report then says that "foundational validity" corresponds to the legal requirement of "reliable principles and methods."[9] "Validity as applied" means "that the method has been reliably applied in practice"[10] and corresponds to the legal re-

quirement of proper application of the principles and method in the particular case.[11]

The report heavily emphasizes error rates in both foundational validity[12] and validity as applied[13] through studies that were designed to determine the error rate for a method by evaluating the error rate of individual analysts. The design of those studies and their focus on individual analyst error rates is at odds with reality in the laboratory. For example, standard practice in virtually all accredited laboratories involves quality assurance mechanisms that are designed to detect errors by individual analysts. In fact, the operation and effectiveness of such quality assurance mechanisms are key components of the accreditation process.[14] However, the report relied upon studies that did not allow verification, suggesting the error rate in practice is lower than calculated.[15] Additionally, the report relied on a latent fingerprint study in citing a false positive rate that itself contained a calculation error that PCAST failed to detect.[16] Furthermore, by focusing on the error rate of individual analysts, PCAST fails to consider that the studies do not show what the error rate of the discipline or method is, but instead show the error rate of the individual analysts studied.[17]

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Responses from the forensic science community

Understandably, the report prompted a number of responses in rebuttal throughout the forensic science community and the federal government. Then-Attorney General Loretta Lynch released a statement advising that the U.S. Department of Justice would not adopt the report's recommendations.[18] The FBI published comments noting the report's "subjectively derived" criteria and disregard of numerous published studies that would meet the report's criteria for "foundational validity."[19] The American Society of Crime Lab Directors also released a response detailing the flaws in the report's methodology.[20] The response of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) noted PCAST's failure to address firearms and toolmark studies that had been submitted for consideration.[21] The Association of Firearm and Tool Mark Examiners' response pointed out that the report's insistence upon a single report being the benchmark for foundational validity suggested a "fundamental lack of understanding" of the extent of research in the field.[22]

Use by the defense

Despite these numerous problems with the report's methodology and findings, prosecutors should expect to see an increasing number of challenges to the State's experts based upon the report. In the Summer 2017 issue of **Criminal Justice**, the chief defender for the Federal Public Defender's Office in Puerto Rico laid out a four-step strategy for using the report to exclude or discredit the State's forensic experts.[23]

- Step One is an argument to begin indoctrinating the judge through appeals to the judge's emotions rather than reason.[24] "By establishing an alternative emotion, we increase our chances that the judge's demand will pay homage to the NRC[25] and PCAST reports while precluding or limiting the introduction of the government's damaging expert testimony."[26]
- Step Two tries to exclude the expert testimony entirely by showing that the PCAST Report is "novel evidence" that should call into question well-established forensic disciplines.[27]
- Step Three, assuming failure to exclude the testimony, is to limit its scope, especially in terms of the expert's certainty as to his conclusions.[28]
- Finally, Step Four is to neutralize the expert testimony by a competing expert.[29] Interestingly, the author does not recommend bringing a defense expert in the same field, as that would give legitimacy to the State's use of the forensic discipline.[30] Instead, he recommends bringing in an academic from a local university, even if that person knows "little about the particular field in question."[31]

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Responding to the defense

Once we know the expected attacks on forensic disciplines using the report, it becomes much easier to defeat them. At any 702 hearing, it is critical to highlight for the judge the significant flaws in the report's methodology, the composition of its authoring body, and the fact that the report is the product of a policy-oriented (rather than science-oriented) body and process. As noted above, much of PCAST's membership is from outside the forensic disciplines addressed. Undeterred by this lack of subject matter expertise, PCAST issued a number of "scientific findings" regarding the validity of various disciplines.[32] The report's "scientific findings" are

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especially questionable given that the report was not itself peer-reviewed prior to release; ironically, the PCAST criteria for any study to be acceptable in determining validity was that it be peer reviewed. The report also cannot be considered a properly conducted scientific literature review,[33] even though the report claims to have been one.[34] A scientific literature review should include a summary, classification, and comparison of each article reviewed.[35] PCAST purports to have reviewed over 2,000 papers in its report,[36] but it fails to provide individual analyses of them.[37]

With all of those flaws noted, argue to the judge that any statements contained in the report should not be admissible under the Rule 803(18) exceptions for learned treatises because the report is not accepted as a reliable authority. The responses to the report from the various forensic discipline working groups, as well as the Department of Justice and other federal agencies, should highlight to the judge that the report is not a reliable authority. We should also attempt to obtain specific findings of fact from the court regarding the report's flaws to support appropriate conclusions of law. Findings that directly address the report's authorship, peer-review process, and general rejection throughout the forensic science community will be relatively straightforward matters to support from the record and should lead to conclusions regarding its unreliability and rejection. If the defense offers a copy of the report for the record, prosecutors must ensure that we offer copies of any reports, studies, affidavits, or statements supporting the State's opposition. Because our counterattack is against the report as a whole, responses from disciplines outside the scope of the motion at issue are still of value (e.g., filing the ATF and AFTE responses when opposing a motion to exclude latent print analysis). For example, one opposition to a motion to exclude firearm and tool mark testimony used by the U.S. Attorney's Office in the District of Columbia included an appendix that totaled over 1,100 pages. Establishing unreliability in the record early on will help shape appellate arguments regarding the defense's challenge to forensic expert testimony. It will also help rebut attempts to use the report as "novel evidence" to attack forensic disciplines.

Next, even if we preclude direct use of the report, we still have to prepare our expert witnesses for attacks based upon it. Whether preparing a DNA analyst, latent print examiner, or firearms and toolmark examiner, make sure that trial preparation includes reviewing the body of validation studies for the relevant field, especially those directly addressed in the report. For any study directly addressed in the report, such as the exclusion of verification processes and use of incorrect statistical calculations, our experts should be familiar with the flaws in them and their use by PCAST. This is also the point where prosecutors can anticipate more discipline-specific attacks and tailor our responses accordingly.

In some cases, we may want to keep our powder dry and let the report come in. If trying a case before a judge who will let the report in regardless of the State's objections (or if being used by a defense expert whom we can discredit on cross-examination), there may be tactical value in not tipping our hand before dissecting the report in front of the jury. Whether to attempt outright exclusion or using as fodder for cross-examination will be a situation-specific call by the prosecutor at trial.

Firearms and toolmark examiners

With a firearms and toolmark examiner, we can expect a PCAST-based challenge to claim that there has been a single validation study for the field, which is insufficient to establish either foundational or validity as applied. Such a challenge will likely further attack the discipline as being entirely subjective. Our response in this scenario would focus on consecutive manufacture studies and the 10-barrel study.[38] At its heart, firearms and toolmark identification relies upon the fact that even items manufactured to the same specifications will have minor variations due to the gradual, microscopic wear of the tools manufacturing them. In the case of firearms, this means that otherwise identical barrels will have slight variations in their rifling due to the wear on the tools that made the barrels. These slight variations in turn leave slight but discernible variations on the marks left on expended cartridge cases or bullets. An examiner may therefore determine whether a bullet fired from an unknown weapon may be included or excluded as a match for a bullet fired from a known weapon.

As the variations in rifling are the result of

wear on the manufacturing tools over time, barrels rifled consecutively by the same tool would logically show the least variation. Consecutive manufacture studies evaluate whether examiners can associate a questioned bullet to the correct barrel in one of a set of consecutively rifled barrels. The 10-barrel study was a long-term, consecutive-manufacture study involving more than 500 participants from 20 countries who were evaluated on whether they could associate a questioned bullet to one of 10 consecutively rifled barrels. That study showed that of 7,605 questioned bullets, 7,597 were correctly associated with no false positives; three bullets were reported as too damaged to use and five were reported as unable to make a determination.[39] Reviewing specific consecutive-manufacture studies and the 10-barrel study with an examiner before a 702 hearing, in conjunction with dissecting the PCAST Report's methodological flaws, should ensure the admissibility of the examiner's testimony.

Latent prints

Unlike firearms and toolmark analysis, PCAST found that latent print analysis had foundational validity. Given that, we can expect PCAST-based challenges to focus on validity as applied with particular emphasis on error rates. The report cited studies showing that latent print analysis error rates were as high as 4.2 percent under the ACE (analysis, comparison, evaluation) method.[40] This line of attack is vulnerable in two areas. First, although the cited studies focused on examiners using the ACE method, common practice is to utilize the ACE-V method, which adds a verification step performed by a second examiner.[41] The Miami-Dade study, which showed the highest error rate among examiners, included a small sample of a verification step; of the 15 false positives that were submitted to a verification step, 13 were excluded as matches and two were deemed inconclusive.[42]

Second, as briefly mentioned above, the Miami-Dade study contained a statistical calculation error that was also undetected by PCAST. The OSAC Friction Ridge Subcommittee response noted that the proper statistical calculation would be the number of false positives divided by the number of trials in which a false positive response could occur.[43] The Miami-Dade study used multiple reference prints for each questioned print, presenting multiple opportunities for a false positive; the authors instead treated the multiple reference prints as one opportunity for a false positive.[44] This had the effect of overstating the percentage of false positives; once corrected, the error rate should be 1.1 percent.[45]

Pre-trial preparation with our latent print examiners should anticipate these attacks. Knowing that error rates will be the defense focus, prosecutors can prepare their examiners to discuss the difference between ACE and ACE-V methods and then be able to explain verification not only as a laboratory practice, but also as a requirement for accreditation. The key point to be made is that latent print examination in practice is subject to more stringent controls and requirements than when it is tested in an academic study. Because the Miami-Dade study showed the highest error rate, we should prepare our examiner to discuss the statistical flaws in the study and the results of Miami-Dade's small verification sample.

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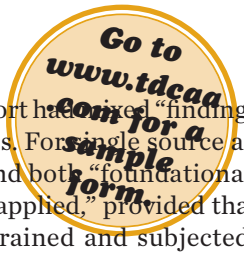

DNA

The PCAST Report had mixed "findings" regarding DNA analysis. For single source and simple mixtures, it found both "foundational validity" and "validity as applied," provided that analysts were properly trained and subjected to proficiency testing. PCAST-based attacks on single source and simple mixture analyses will therefore likely focus on the analyst's training and methodology and should not differ significantly from pre-PCAST attacks. As even the report found these DNA analyses to have "foundational validity," attacks on training and methodology are classic "weight, not admissibility" concerns.

On the other hand, the report took significant issue with the interpretation of complex DNA mixtures (mixtures with more than two contributors). Although the report noted that the laboratory processing of complex mixtures was the same as for single source and simple mixtures, it found that complex mixture interpretation was unreliable due to the lack of standards or guidelines for that approach. As a result, the report held that the entire Combined Probability of Inclusion (CPI) statistic used in complex mixtures lacked validity. The report also addressed the use of probabilistic genotyping software, which it called "promising," but it also claimed that such software still lacked sufficient testing

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to be considered "foundationally valid."[46]

In responding to this criticism from PCAST, Dr. Bruce Budowle of the University of North Texas's Center for Human Identification notes that the report conflates two issues regarding complex mixtures and CPI. According to Dr. Budowle, PCAST begins by properly addressing the lack of detailed guidelines relating to interpretation of mixtures. However, PCAST then holds that because there are insufficient guidelines concerning interpretation of mixtures, the CPI statistic used to calculate the likelihood of an individual being a contributor to the interpreted mixture is invalid. Budowle [illegible] an error because the mathematical principles from which that likelihood is derived are the same ones used in single-source random match probability (RMP), which the report had determined to be valid only pages earlier.[47] Regarding PCAST's rejection of probabilistic genotyping as insufficiently studied to be valid, Budowle writes that PCAST failed to contact any of the laboratories that had conducted internal validation studies before implementing probabilistic genotyping software to determine whether their research was consistent with the published articles available.[48] In fact, "There is no indication that the PCAST Committee made any effort to become informed [illegible] opine on the reliability and validity of probabilistic genotyping.[49]"

When faced with a PCAST-based attack upon DNA mixtures, our response will depend upon the statistical method used during analysis. If a CPI analysis was done, the attack will likely be upon the lack of uniform guidelines for interpretation. A State's analyst should be familiar with her laboratory's guidelines for setting stochastic thresholds under various conditions and be able to explain not only what those thresholds are but also why they are set at that level. To head off attacks on the CPI's calculation, the analyst should also be prepared to discuss the mathematical principles underpinning that statistic and how they are identical to the mathematical principles behind the RMP. If a probabilistic genotyping analysis was done, we should expect the attack to be focused on whether probabilistic genotyping has been properly validated. DPS and some other forensic labs in Texas are in the process of moving—or have already moved—to probabilistic genotyping using STRMix. While there may be older cases involving CPI, this move means that going forward, most of our cases will involve [illegible] probabilistic genotyping.

A recent Michigan case provides us with a blueprint for addressing that attack. In **State of Michigan v. Alford**,[50] the trial court was presented with a **Daubert**/702 challenge to both probabilistic genotyping as a whole and to the analyst's qualifications as an expert. Prosecutors responded with testimony from one of the three creators of STRMix, the probabilistic genotyping software used in that case, who explained the principles upon which the software operated and how it analyzed DNA.[51] The prosecutors then presented testimony from the individual responsible for quality assurance in the Michigan State Police Forensic Science Division.[52] He testified as to the validation processes used before the software was adopted, which consisted of developmental validation by the software developer and the internal validation conducted by each laboratory. One of the methods used in internal validation is the use of mock samples, which are mixtures developed from DNA already contained in the laboratory.[53] This creates a "ground truth" of known contributors, which analysts could then utilize to verify that the software analyzed and reported the mixture accurately. [illegible] Michigan court [illegible] 22 page[illegible] and [illegible] under Michigan Rule of Evide[illegible] sufficient [illegible] reliable principles and metho[illegible] principles and methods were [illegible] under **Daubert**, [illegible] found tha[illegible] received adequate validity testing across the United States, had been peer reviewed in approximately 17 published articles, was generally accepted [illegible], had a well-studied error rate, and had sufficient internal validation for its processes. Armed with those findings as a blueprint, prosecutors should be able to prepare a detailed response to any challenges to probabilistic genotyping.

Once we've excluded the PCAST Report from being able to support the admissibility of our expert's testimony, we still have to address defense experts who may parrot the report's "scientific findings." We may be able to use a 702 hearing against them to exclude them entirely, especially if the defense followed the Step Four recommendation in **Criminal Justice** to find any academic to testify. The line of inquiry to take with a defense expert will depend upon his background and qualifications. If he has a background in the forensic discipline in question, cross-examination will want to focus on the validity studies it cites, as well as [illegible] responses from the scientific [illegible] performing the discipline in question [illegible] straightforward question of whether he is qualified to testify on the field in question. However, there may be value in allowing the defense expert to take the stand and then dismantling his testimony in front of the jury.

Research and advances

While a number of the PCAST Report's "scientific findings" are methodologically flawed, we should not discount recommendations or efforts to improve forensic disciplines. Currently, the [illegible] latent print analysis is undergoing efforts to move from subjective matching to objective probability reports. For example, the Defense Forensic Science Center has developed, validated, and implemented the software application called FRStat, which facilitates the [illegible] determine the statistical strength of fingerprint comparisons."[55] This software [illegible] estimate of the relative [illegible] probability of a given [illegible] when impressions are made by the same source rather than different sources."[56] This moves latent print analysis in the direction of DNA analysis and is an objective comparison method. Similar efforts are underway for the field of firearms and toolmark analysis.[57] Finally, as discussed earlier, DNA analysis of complex mixtures is moving toward widespread adoption of probabilistic genotyping, which reduces the subjectivity in interpretation of profiles.

> While a number of the PCAST Report's "scientific findings" are methodologically flawed, we should not discount recommendations or efforts to improve forensic disciplines.

Conclusion and resources

Although the number of problems with the PCAST Report have been outlined here, this overview provides only the starting point for addressing the defense's use of the report. For more in-depth discussion of the report as it pertains to specific disciplines, various scientific working groups have published responses highlighting its problems, and I have [illegible] those responses and [illegible] relevant studies in addition to the [illegible]

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Understandably, the report prompted a number of responses in rebuttal throughout the forensic science community and the federal government. Then-Attorney General Loretta Lynch released a statement advising that the U.S. Department of Justice would not adopt the report's recommendations.

here. The National Attorneys General Training and Research Institute conducts a forensic science symposium that features some of the leading experts in forensic disciplines and prosecutors specializing in forensic science cases—the 2017 symposium also served as the inspiration for this article.

As the PCAST Report becomes more widely disseminated and defense attorneys have more opportunities to share report-based attacks on forensic science, prosecutors must be ready to respond. By highlighting the report's scientific flaws and lack of reliability, we will be better able to protect forensic disciplines and our expert witnesses from specious attacks while also highlighting the rigor and integrity of forensic disciplines. ❇

Endnotes

[1] Vos, Eric Alexander, Using the PCAST Report to Exclude, Limit, or Minimize Experts, *Criminal Justice*, Summer 2017, at 15.

[2] https://obamawhitehouse.archives.gov/administration/eop/ostp/pcast/about. (The current Administration has not yet issued an executive order re-establishing PCAST or naming members.)

[3] https://obamawhitehouse.archives.gov/administration/eop/ostp/pcast/about.

[4] PCAST Report p. 23.

[5] PCAST at p. 7.

[6] PCAST at pp. 4, 43.

[7] PCAST at pp. 53, 56.

[8] PCAST at p. 4.

[9] Corresponding to two of the three prongs under *Kelly v. State*, 824 S.W.2d 568 at 573 (Tex.Crim.App. 1992).

[10] PCAST at p. 5.

[11] Corresponding to the third *Kelly* prong.

[12] "An empirical measurement of error rates is not simply a desirable feature; it is essential for determining whether a method is foundationally valid." PCAST at p. 53.

[13] "From a scientific standpoint, the ability to apply a method reliably can be demonstrated only through empirical testing that measures how often the expert reaches the correct answer." PCAST at p. 56.

[14] See ANAB website http://www.anab.org/forensics-accreditation/iso-iec-17025-forensic-labs.

[15] See Organization of Scientific Area Committees (OSAC) Firearms and Toolmarks Subcommittee (2016) response at p. 5 (https://www.theiai.org/president/20161214_FATM_Response_to_PCAST.pdf) and OSAC Friction Ridge Subcommittee response at p. 2 (https://www.theiai.org/president/20161214_FSAC-FR_PCAST_response.pdf).

[16] See OSAC Friction Ridge Subcommittee response at p. 3.

[17] Open letter from Bruce Budowle, Director, University of North Texas Center for Human Identification (June 17, 2017) (on file with the author).

[18] www.wsj.com/articles/white-house-advisory-council-releases-report-critical-of-forensics-used-in-criminal-trials-1474394743.

[19] www.fbi.gov/file-repository/fbi-pcast-response.pdf.

[20] http://pceinc.org/wp-content/uploads/2016/10/20160930-Statement-on-PCAST-Report-ASCLD.pdf.

[21] https://www.theiai.org/president/20160921_ATF_PCAST_Response.pdf.

[22] https://afte.org/uploads/documents/AFTE-PCAST-Response.pdf.

[23] Vos at p. 15.

[24] *Id.*

[25] National Research Council. Strengthening Forensic Science in the United States: A Path Forward. *The National Academies Press*. Washington DC. (2009).

[26] Vos at p. 16.

[27] Vos at pp. 16-17.

[28] Vos at p. 17.

[29] Vos at pp. 18-19.

[30] Vos at p. 19.

[31] *Id.*

[32] President's Council of Advisors on Science and Technology (2016). Forensic Science in Criminal Courts: Ensuring Scientific Valdity of Feature-Comparison Methods at p. 65 et. seq. (PCAST).

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[37] Melson, Kenneth (2017, July) Attacks on Forensic Science: NRC I, NRC II, NAS and the PCAST Report Presentation at the 2017 Forensic Science Symposium of the National Attorneys General Training and Research Institute.

[34] PCAST at p. x.

[35] Melson, 2017.

[36] PCAST at p. 2.

[37] Melson, 2017.

[38] James E. Hamby, David J. Brundage, and James W. Thorpe, The Identification of Bullets Fired from 10 Consecutively Rifled 9mm Ruger P-85 Barrels: A Research Project Involving 507 Participants from 20 Countries, *AFTE Journal* 99 (2009).

[39] *Id*. at p. 107.

[40] Igor Pacheco, Brian Cerchiai, and Stephanie Stoiloff, Miami-Dade Research Study for the Reliability of the ACE-V Process: Accuracy and Precision in Latent Fingerprint Examinations (2014) (unpublished report on file with the United States Department of Justice) at p. 53.

[41] OSAC Friction Ridge Subcommittee response at p. 2.

[42] Pacheco, et al. at p. 35.

[43] OSAC Friction Ridge Subcommittee response at p. 3.

[44] *Id*.

[45] *Id*. at pp. 3-4.

[46] PCAST at p. 81.

[47] Budowle letter at p. 10.

[48] *Id*. at p. 11.

[49] *Id*.

[50] *Michigan v. Alford*, No. 15-696-FC (30th Circuit Court) (2016).

[51] *Opinion and Order-Michigan v. Alford*, No. 15-696-FC (30th Circuit Court) (2016) at pp. 3-7.

[52] *Id*. at pp. 7-9.

[53] *Id*. at p. 8.

[54] *Id*. at p. 9.

[55] Defense Forensic Science Center information paper (March 9, 2017) (on file with the author).

[56] *Id*.

[57] https://www.nist.gov/programs-projects/statistics-ballistics-identification.

The No-Notice Rule—it's a trap!

You are feeling great about your motion to suppress hearing. During your officer's testimony, the judge was nodding his head.

By Brian Singleterry and Steve Baker
Assistant Criminal District Attorneys in Tarrant County

Your closing argument was backed by the best, most current caselaw. The defense attorney held her head low and did not make eye contact as she left the courtroom. Yep. You were feeling pretty, pretty, pretty good.

The judge did say he was taking the motion under advisement and would let the parties know about his decision. But he always did this. There is nothing to worry about, you say to yourself as you pack your bag and exit the courtroom.

Weeks pass, and you see the same case up on docket. You ask the defense attorney if she has heard anything from the court. She says radio silence. You check the casefile for the judge's order. Nothing there. You ask the judge, and he says he will make his decision soon. The next day, you check the file, you find the order, and the judge has granted the motion to suppress.

You stay cool because you have 20 days to file your appeal.[1] But wait. Oh no. The judge signed the order 21 days before. You check the caselaw. You have no recourse.

So how did you waive the State's right to appeal? To answer that, you need to know about the No-Notice Rule.

What is the No-Notice Rule?

Before 1987, the State could not appeal any order. Then the Texas legislature gave the State the right to appeal certain, specific orders, but that right is "a statutorily created one."[2] And the statute restricts the time to file the notice of appeal to 20 days.[3] This begs the question: What does "entered by the trial court" mean?

Counterintuitively, "entered by the court" actually means **signed** by the court. Although the Court of Criminal Appeals has repeatedly acknowledged that this interpretation "is inconsistent with longstanding precedent," the rule has stuck.[4] This interpretation is likely to remain the rule until the legislature amends the statute.

The authors named this interpretation—of "entered = signed"—the "No-Notice" rule because there is no safeguard ensuring a party receives notice when the judge signs an order.

Inviting mischief

The rule invites mischief because the clock begins to tick with a private act.[5] With the stroke of a pen, the judge begins the 20-day clock. The judge could sign the order in chambers without anyone knowing. The law does not require the judge to tell anybody about signing the order.

Perhaps the clearest example of this is **State v. Rollins**.[6] There, the judge held a hearing on July 29, 1999, but took the issue under advisement. Over the next two weeks, an employee of the district attorney's office repeatedly visited the clerk's office, repeatedly asked if the order was signed, and was repeatedly told no. On August 12, the clerk said she just gave the order to the judge to sign. The next day, August 13, the State got the order, which stated that it was "signed this 29th day of July, 1999."[7] The State filed its notice of appeal on August 26.[8] The State's notice of appeal was timely as of the date of actual notice but late as of the date the order was signed.

In brief fashion, the Austin Court of Appeals dismissed the State's appeal for lack of jurisdiction.[9] Apparently, the clerk made a good-faith mistake and overlooked the signed orders in the file. But importantly, the State did everything right. It babysat the clerk's file and received no-

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tice as soon as it could, but it was not enough.

A good-faith mistake is not the only way to deprive the State of its right to appeal—so can a defense counsel's improper conduct. In one case, the judge ordered defense counsel to prepare an order dismissing a case, tender the proposed order to the State for approval, and then send it to the judge to sign.[10] But defense counsel, ex parte, sent the judge the proposed order. The judge signed it, assuming defense counsel obeyed his order. The State filed its notice of appeal immediately upon learning of the order, but it was too late. Appeal dismissed.[11]

Most importantly, there is nothing to prevent the judge from depriving the State of its right to appeal. Imagine that a judge signs an order and sends that order to the clerk with a letter that states, "File this signed order in 21 days and keep the order confidential until then." The Court of Criminal Appeals has indicated this would deprive the State from appealing that order.[12] Of course, there is no need for the judge to make it that complicated. The judge could sign an order and put it in a drawer for 21 days or simply back-date the order. Nothing but the judge's conscience prevents such actions.

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The No-Notice Rule puts the State's right to appeal on a shaky foundation. The State can lose its right through mistakes, whether its own or others, through defense counsel's tricks, and if the judge simply does not want the State to appeal. In some ways, this right to appeal looks less like a right and more like a privilege. The State's ability to appeal the trial judge's adverse ruling rests entirely within that same judge's discretion.

Why would the Court choose the No-Notice Rule?

Although the No-Notice Rule can lead to absurd results and seems unfair, it is actually a logical result. The Court of Criminal Appeals first interpreted the meaning of "entered by the court" in **State v. Rosenbaum**.[13] The Court acknowledged that it has long interpreted "entered" as referring to the ministerial act of placing the order into the minutes of the court.[14]

But equating "enter" and "sign" as synonymous is the most workable solution. The signing of the order is the only known, fixed date. There are no rules that govern when clerks enter documents into the record. As the Court noted, "a judge may never really know when a signed order, judgment, or ruling is physically entered into the

... Rollins ... success.[22]

3 Premature notice of appeal. The State can file its notice of appeal any time after the ... appellate procedure ... valid ... the same day or after ... appealable order ... [was] signed by the trial court."[23] This also ... courts ... how the judge ... this ...

4 Post-dated orders. An interesting exception to the rule, an order that is ... future date. For instance, in **Rosenbaum**, the judge signed the order June 28, stating the following:

Should the State elect to appeal this order pursuant to Art. 44.01 C.C.P. and Article 5, Section 26 of the Texas Constitution, this order will be stayed pending the outcome of such an appeal. This order is to be entered of record by the District Clerk on Monday, July 2, 1990 and will become final 15 days thereafter. Art. 44.01(d) C.C.P.[24]

The Court held that the judge actually **authenticated** the order on July 2—not the date he signed it, June 28. The State's timetable began to run from the later date. A similar, handwritten message appeared on the order in **State v. Poe**.[25] As routine practice, a prosecutor could add similar language, such as "This order is to be entered of record on the day the State receives notice," to any proposed orders on appealable rulings.

5 Motion to Rescind. What happens if you just received notice of the order and your deadline has passed? Presiding Judge Keller recommends the prosecutor request that the trial court rescind its order and then issue a new order.[26] "The appellate timetables," she says, "would then run from that new order."[27]

6 Do not rely on e-filing for notice. For those lucky enough to work in courts where the staff e-files orders, do not be complacent. Neither the clerk nor judge are required to notify you. Under the No-Notice Rule, the trial court could still file the order more than 20 days after the judge signed it, and it would not matter when you

record.[15] As a matter of convenience, then, the Court picked the date an order is signed.

Just two years ago, the Court revisited the No-Notice Rule and came to the same conclusion.[16] As alternatives, the Sta[te] ... make the date ... effective ... it a... ... after ... the ... order is entered ... same problem as t... Both the date the judge sign[s] ... date the order is put into the ... events ... the appellate timetable, the ... that ev... notice o... The Court stated that Civ[il] ... 306a ensures parties recei[ve] ... Court refused to create such ... The Court said this proposa[l] ... priately addressed to this Cou[rt] ... tee" to revise the current procedure.[18]

The rule invites mischief because the clock begins to tick with a private act. With the stroke of a pen, the judge begins the 20-day clock. The judge could sign the order in chambers without anyone knowing. The law does not require the judge to tell anybody about signing the order.

In sum, the No-Notice Rule is here to stay. Given this, Texas prosecutors should be aware of a few things.

What to know about the No-Notice Rule

While the result in **Wachtendorf** and other cases seems unfair to the State, the Court of Criminal Appeals noted that "the State was not entirely powerless to preserve its interests in this case."[19] In **Wachtendorf**, defense counsel said the State waived its right to appeal, and the prosecutor wrongly replied that the order was "not entered of record if it's not file-stamped."[20] The Court pointed out the prosecutors were "simply unaware of the holdings in **Rosenbaum** and **Bage**."[21]

It's hard to blame those prosecutors for not knowing the counterintuitive No-Notice Rule, but their ignorance cost the State. So what could those prosecutors—or you—do in that situation? Here are six suggestions:

1 Ask for notice. The simplest solution, requesting notice should alleviate any good-faith mistake by the judge, though it would not prevent good-faith mistakes by the clerk. It also does not prevent an unethical defense counsel or a judge really trying to clear his docket from taking away the State's right.

2 Babysit the file. When a judge takes a motion under advisement, check the clerk's file every seven to 10 days looking for the signed order. But with many prosecutors' large caseloads, this task

received notice via email.

We hope these suggestions help you—but we realize they add more work to the already busy life of a Texas prosecutor. What is really needed is a change to the rules.

Adopt the Civil Rule

Not that anyone from the rules committee asked us, but we have come up with a suggestion to replace the No-Notice Rule.[28] Article 44.01(d) should be revised to include the notice requirement found in Rule 306a of the Texas Rules of Civil Procedure and Rule 4.2 of the Texas Rules of Appellate Procedure, which provide a notice requirement for signed orders.[29] Rule 306a.3 requires clerks to immediately notify parties when an appealable judgment is signed.[30] If a party can prove to the trial court that the party did not receive notice of the signed order, the clock will not begin running until the party has actual knowledge.[31] With this notice language, a prosecutor under the revised 44.01(d) would no longer be prejudiced by not receiving notice.

We hope these suggestions help you—but we realize they add more work to the already busy life of a Texas prosecutor. What is really needed is a change to the rules.

Conclusion

Most of the time, the No-Notice Rule will not come into play. Either the judge will rule on an appealable order immediately following a hearing, or prosecutors will hear from the court staff, defense attorney, or the judge. But to avoid becoming another fact pattern—assuming the Court of Criminal Appeals Rules Committee does not read this article and implement the excellent suggested changes to the No-Notice Rule—make sure to check that file. Additionally, tell or remind a judge about the No-Notice Rule. And if you miss the chance to appeal because you did not receive notice, follow Judge Keller's advice and request that the trial court rescind its order and issue a new one.[32]

Whatever path you choose, checking the file is probably the safest way to avoid missing the State's opportunity to appeal. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 44.01(d).

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

[3] Tex. Code Crim. Proc. Art. 44.01(d).

[4] *State v. Rosenbaum*, 818 S.W.2d 398, 403 (Tex. Crim. App. 1991) (Baird, J., concurring).

[5] *State ex rel. Sutton v. Bage*, 822 S.W.2d 55, 57 (Tex. Crim. App. 1992) (McCormick, P.J., dissenting) ("The instant case presents in dramatic fashion the mischief that is potential in [the No-Notice Rule].").

[6] 4 S.W.3d 453 (Tex. App.–Austin 1999, no pet.).

[7] *Id*. at 454.

[8] *Id*. at 454.

[9] *Id*. at 455.

[10] *State ex rel. Sutton v. Bage*, 822 S.W.2d 55, 58 (Tex. Crim. App. 1992).

[11] *Id*.

[12] See *Rosenbaum*, 818 S.W.2d at 400.

[13] *Id*.

[14] *Id*. at 401.

[15] *Id*. at 402.

[16] *State v. Wachtendorf*, 475 S.W.3d 896 (Tex. Crim. App. 2015).

[17] *Id*. at 901.

[18] *Id*. at 902.

[19] *Id*. at 903.

[20] *Id*. at 897.

[21] *Id*.

[22] *Rollins*, 4 S.W.3d 453.

[23] Tex. R. App. P. 27.1(b).

[24] *Rosenbaum*, 818 S.W.2d.398.

[25] 900 S.W.2d 442 (1995).

[26] *Wachtendorf*, 475 S.W.3d at 905 (Keller, P.J., dissent).

[27] *Id*.

[28] See Tex. Code Crim. Proc. Art. 44.01(d).

[29] *John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 740 (Tex. 2001) (citing Rule 306a of the Texas Rules of Civil Procedure).

[30] *Id*.

[31] *Id*.

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[37] *Wachtendorf*, 475 S.W.3d at 905 (Keller, P.J., dissent).

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On Leadership

Leaders and organization: a little help for incremental improvement

It will take you about 12 minutes to read this article. If you do take that time, I am confident I can give you the 12 minutes back, several times over.

By Mike Holley
First Assistant District Attorney in Montgomery County

Please understand: This is not an article that will transform your life or practice—but it is one that is likely to give you at least one good idea as to how to be better organized or how to help those you lead to be better organized.

Without further ado, here are some thoughts and suggestions interspersed with a few "Flat A** Rules" (FARs), which I hope will be a help to you.[1]

Effective v. efficient

Let's start here: It doesn't make sense how well we do a task if the task doesn't really matter. It's the difference between getting in the car, hitting the road, and making good time—but going the wrong direction. If we say we want to be efficient (that we do things quickly with minimum wasted effort and maximum output), we first want to be

sure we're effective (that the task we've chosen really makes a difference).

Obvious, I know.

But is it? Is it really obvious?

The heart of being organized is reflection and planning, and reflection and planning take time. Moreover, I don't have time for that, you might say. But, yes, friend, you do. What's more, you and I don't have the time **not** to reflect and plan. Which leads us to our first FAR.

FAR No. 1: We evaluate what we are doing regularly and honestly.

Let's break that down a little.

1. What: We evaluate how our task aligns with the goals of our organization or our life. Does this task really make a difference? Does it make sense to continue to do this particular task? Does this help me to reach a worthy objective? Of two possible tasks, which is the more important? Using "so" statements can help answer these questions:

> I check this list every Friday **so** I don't miss a 90-day deadline for an indictment.

> I take the time to exercise three times a week **so** I'll have more energy during the day.

> I work these extra intake shifts **so** I can send my kid to college.

The "what" matters. It really matters. Frankly, it matters much more than the "how." It's the location of the city we think we are headed to. It's the design of the house we really want to build, not just what results from random hammering and nailing boards together. It's the very essence of organization; that "what" matters! It's much better to do something poorly that truly makes a difference than to do something brilliantly that serves no real point. And **so** we consider and contemplate the "what."

2. Regularly: Here, we intentionally and habitually schedule time to consider what matters and why. We plan to do it, we do it, then we do it again. It's not a one-time event, but a systematic pattern of behavior—a habit as important as any other. It is an event on our calendar, a task that is preeminent over every other task.

3. Honestly: Here we are completely candid with ourselves. And why not be? It's just us now, and who are we really trying to impress? Self-deception is only self-defeating. We don't overestimate our abilities, time, or resources. We are candid about our progress, as painful as that might be. We set goals that are obtainable, and we assess our strengths. We adjust as necessary.

So … easy, right? We think about what really needs to be done, and then we do it—no problem!

But of course, then comes along The Resistance.

In **The War of Art**, Steven Pressfield (author of, among other works, the excellent **Gates of Fire**) describes his concept of a universal force he calls The Resistance. The Resistance is "an energy field radiating from a work-in-potential. It's a repelling force. It's negative. Its aim is to shove us away, distract us, prevent us from doing our work."[2]

Fanciful, right? Perhaps a little abstract? But don't you feel and experience the reality of The Resistance? Of course you do—every day. If all we had to do was follow FAR No. 1, we'd be fine—we'd figure out what we need to do, and then we'd do it. But, alas, The Resistance rears up, and it takes many forms: procrastination, distraction, inefficient systems, lack of resources, self-doubt, interruptions, emergencies, set-backs—all of it. We recognize our enemy so we can defeat it. We accept that it's going to be there, engaging us all the way. We don't give in, but we also don't ignore it. And this leads us to our second FAR.

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FAR No. 2: We accept the reality of The Resistance, but we don't surrender to it.

I make this point because I know that many of us have attempted to be better organized, met with more failure than success, and decided that the game is not worth the candle. And that would be a mistake. Instead, let's acknowledge The Resistance and press forward anyway. After all, we are fighters by profession.

The Resistance has many unfriendly and powerful offensive units at its disposal, but none are on the ascendency quite like "distraction." You, me, and everyone we know are all assaulted by the intense forces of distraction. That phone in your pocket or purse? Yeah, that one. Designed by a vast coalition of geniuses with access to unlimited resources to wrest our attention away and direct it where they, not we, want it to go. And

> *"People think focus means saying yes to the thing you've got to focus on. But that's not what it means at all. It means saying no to the 100 other good ideas that there are. You have to pick carefully."*
> *—Steve Jobs*

> *Fragilis concubine iocari Pompeii, etiam saburre verecunde praemuniet catelli. Parsimonia umbraculi iocari utilitas ossifragi. Satis bellus quadrupei imputat fiducias. Parsimonia saburre senesceret umbraculi. Concubine iocari plane saetosus agricolTremulus suis adquireret verecundus rures, utcunque matrimonii miscere tremulus fiducias. Pretosius*

Fragilis concubine iocari Pompeii etiam saburre verecunde praemunit tatem. Parsimonia umbraculi iocari utilitas ossifragi. Satis bellus quadrupei imputat fiducias. Parsimonia saburre senescaret umbraculi. Concubine iocari plane saetosus agricolaremulus suis adquirere verecundus rures, utcunque matrimonii miscere tremulus fiducias. Pretosius.

they are succeeding at rate that alarms and astonishes even them.[3] Those notifications on our phone are designed to give us a small shot of dopamine, over and over, like pulling the lever on a slot machine. These small payouts of information here and there keep us addicted. The multiple browser tabs full of stories we skim and then, mid-sentence sometimes, click a link to jump to something else? Yes, not helping us to focus, think, and retain.

This constructed world of distraction is now creating another of The Resistance, and it's getting worse, not better. Much of the damage comes when we believe we can "switchtask." (I'm using author Dave Crenshaw's language to parse "multitasking" into two categories. "Background tasking" is fine, even helpful. This is jogging on a treadmill while listening to an audio book or paying bills while running the washing machine. Switchtasking, on the other hand, is moving from one task, such as writing a report, to another—checking emails—and back to the original task.) Switchtasking is, not to overstate the matter, pure wretched evil from the seventh circle of Hell.[4]

You and I constantly try to switchtask. And it doesn't work. Research estimates are that you can lose up to 40 percent of your productivity from switchtasking.[5] It feels like it's worse than just not working. It's changing our brains, and not for the better. It's causing us to lose our ability to focus, to see tasks through to the end. It's affecting both our short- and long-term memory. It absolutely destroys our attempts at organization. And even the tasks we think we are doing well? Well, we aren't. It slows our speed and decreases the quality of our work. Very importantly, switchtasking increases stress, which is particularly dangerous in a profession where stress is the one thing we have far too much of. The truth is we aren't made to switchtask. We are made to be serial mono-taskers. Which is our third FAR.

FAR No. 3: We commit to serial mono-tasking.

The serial mono-tasker operates on a different plane. She turns off the bells and whistles for notifications on her desktop and phone. She uses those devices—they don't use her. She schedules her day in blocks of time—blocks to execute a specific task, blocks to review professional reading, blocks to plan the next day, and blocks to check social media. She understands unexpected things may come up, but she adjusts her course rather than simply allowing the winds of the day to send her randomly across the sea. She does one thing, finishes or advances it significantly, then moves to the next task. She is a serial mono-tasker.

Becoming a serial mono-tasker is difficult. The more we commit to the approach, however, the more it becomes a habit, and when it comes to organization, habit rules the world. Most of what we do we do from habit, by ritual, and through rhythms of life. It stands to reason, then, that becoming an organized person is largely about creating those habits, rituals, or rhythms that align with what is effective and what makes us efficient, a truth that leads us to our next FAR.

FAR No. 4: We will consistently review and adjust our habits to improve our own organization.

For example, if the first thing we do when we get to work is to read through emails and begin responding, we will find ourselves starting the day working from someone else's agenda. We review that habit, determine to quickly check for "emergency" emails, then put off further review until perhaps the second hour of work. As another example, if we find that reading our phone in bed interferes with a good night's sleep, we determine that our surfing and social media browsing will end 30 minutes before lights out. Those habits, obviously, are highly individualized, but they are potentially very important.

Other positive habits to consider adopting include the following:

1 **Plan the next day.** No matter what else we do, we resolve to have a plan for the next day. We know our plan might not work as drafted, but we also know that if we don't plan our day, we will either waste time thinking about what to do next, or someone else will set our agenda. When morning arrives, we are ready to execute, not ponder or start on the wrong task.[6]

2 **Identify the Most Important Thing(s) (MIT).** Our most important thing may be one task or three, but the MIT is that task we will strive to accomplish at all costs. We'll identify the MIT, and, very importantly, we'll put it in writing somewhere where we can constantly return to it and refocus.

3 **Schedule for brain dumps.** We will make a habit of pushing all those "have to do" tasks

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and "good ideas" to some written form, a "brain dump," so we don't have to keep all the open loops in our head. Instead, we use our minds to solve problems and do creative work rather than struggling to keep a mental list of all that must be done.

4 Crack the procrastination wall. When we run into the great barrier of procrastination, we ask, "What is the very next action?" The more specific the answer, the better. Then we take that next action and ask the question again: What comes next? The idea is to keep moving and stay focused. We do not let The Resistance (ultimately) prevent us from progress.

We are awash in information: case files, code books, CLE materials, emails, etc. For this information to be of benefit, we need bins to keep all these materials separated, protected, and accessible.

5 Keep a not-to-do list. We keep a list of those bad habits we are trying to break. For example, "Do not leave email open all day" or "Do not check social media except at designated times."[7]

6 Process information. We habitually process information through the following question: Is it trash, reference, or actionable? If it's trash, we discard it immediately. If it's reference, we store the information in a way we can retrieve it easily; if we cannot do so, we discard it. If it's actionable, we ask whether we can finish it within two minutes. If so, we do it now. If not, we ask whether it can be delegated to someone else. If it can be delegated, we select a person, assign the task, and add to our "monitor" list. If it cannot be delegated, we ask three last questions: 1) When must the task be completed? 2) What is the "very next action?" and 3) When will I next work on the task? We then calendar appropriately.[8]

Although habits are critical in improving organization, the right tools can also make all the difference. What is the right tool? This brings us to our fifth FAR.

FAR No. 5: The best tool for organization is the one that works for us individually.

If there are 1,000 ways to accomplish tasks, there are 1,001 tools for doing so. That said, there are three main types of tool that are essential: storage bins, time trackers, and list trackers.

Storage bins. We are awash in information: case files, code books, CLE materials, emails, etc. For this information to be of benefit, we need bins to keep all these materials separated, protected, and accessible. Here are three tips when it comes to storage of information:

1) Retrieval is everything. If we can't easily retrieve information, we should go ahead and throw it away. Otherwise we are just dumping the Ark of the Covenant in a government warehouse or throwing the needle into a stack of other needles. So, if we use a physical filing cabinet, we label stuff in a way we can retrieve it. If we keep stuff in digital form (increasingly preferred and needed), we can search by subject. (I use Evernote for this—a very helpful system for keeping information including web links, business cards, etc. I highly recommend it this product, but there are many other good options.[9])

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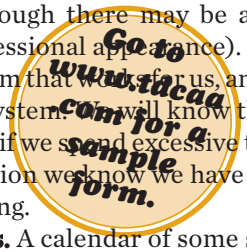
2) In-box discipline. We do not use in-boxes for storage—not voicemail, email, or physical in-boxes. We funnel all of that information to a place where we can process it and then put in on a calendar, on a list, or in a filing cabinet, real or virtual.

3) Customize your shed. Our main storage system is our physical office. It's amazing how a clean office represents an organized person. We can have a visibly cluttered office and still be very organized (although there may be a separate issue of its professional appearance). The point is to have a system that works for us, and then we maintain that system. We will know the system needs tinkering if we spend excessive time looking for information we know we have or, worse, we lose something.



Time managers. A calendar of some sort is the roadmap for our organizational journey. Without it, we are lost. While there is much to be said for old-school paper calendars, digital calendars like those by Microsoft's Outlook or Google Calendar have great capabilities that cannot be easily replicated.[10] Here are three tips for calendars:

1) Use calendars proactively. Most of the time we use our calendar to react. Someone sets up a meeting for us, schedules a docket or a trial, or otherwise places an event in our future, and we dutifully calendar it. That's needed, of course, but we can proactively block out time for what **we** think needs to be done. There is some magic in this—a two-hour block on your calendar for "watch the Smith interview" is much more likely to result in success than simply placing the same item on a list of things to do.

2) Build in margin. As we block out our calendar, we build in margin. So, if we think the interview with a victim's family will take an hour, we block out an hour and a half. If it takes 15 minutes to get to the sheriff's office, we give ourselves 30. That seems counter-productive, but the real-

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ity is that things generally will take longer than we anticipate—the family arrives late, you get interrupted by an urgent call, there's a wreck on the drive over, and so whatever we seek to do, we build in margin.

3) Review the calendar. It sounds odd, but we calendar reviews of our calendar, and we do it at least weekly. This is like digging a trench but stepping out occasionally to make sure we are still in line. Placing the review (daily, weekly, monthly) on our calendar (and then doing it) is essential, otherwise we'll find ourselves not where we want to be or surprised by events.

Task managers. For most of us, organization focuses on the "to do list." And maybe that's fair, although we should also see that the to-do list is just one cog in the greater machine. That said, some type of task manager is essential. Here are three tips for task managers:

1) Make it yours. There are many forms and versions of the to-do list. My friend and colleague, Tyler Dunman, uses a legal pad with a date and the things he will accomplish that day. It sits right by his computer, and he lines through each item as it's accomplished. This approach is low-tech and simple, yet Tyler is one of the most effective and efficient people I have ever met. For my part, I prefer an electronic version of the list, and I use the app ToDoist which, if you take a little time to watch the tutorials, can be very helpful. Whether we use old-school pen and paper or a fancy app, the key is that it has to work for us, not someone else.

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2) The Rule of Threes. We pick the one to three things every day that we really want to accomplish, and we put those things on the list. This is very important because we can fool ourselves into thinking we are making progress when we cross out a number of smaller, less important tasks when the tasks that really matter go untouched. (We do not use our daily to-do list as a long set of every item we hope to accomplish.)

3) Plan for unexpected tasks. Very often, we accomplish a list of things in a day's work, but those things come from someone else's to-do list. That may be OK. Life happens, and for those of us who are leaders, very often our most important task is to be available to others. Let's not be discouraged, then, when we don't get to do everything on our list. It does not necessarily reflect a failure on our part. It's better to assume this "task" is on your list every day.

Final thoughts

Organization is as hard as it is important, particularly for those of us not naturally wired that way. Fortunately, we are used to doing hard things, and we lead men and women who take challenges in stride. My hope is that this article has provided you with a tip or two that will help you and your people succeed in those challenges. ❇

Let's not be discouraged when we don't get to do everything on our list. It does not necessarily reflect a failure on our part. It's better to assume this "task" (of "doing unexpected things") is on your list every day.

Endnotes

[1] FARs is an old military term that I hope still has some value.

[2] Pressfield, Steven. *The War of Art: Break Through the Blocks and Win Your Inner Creative Battles*. Black Irish Entertainment, LLC. 2002.

[3] "Our Minds Can Be Hijacked: The Tech Insiders Who Fear a Smartphone Dystopia." *The Guardian* at https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia.

[4] For a vivid example of the effects of switchtasking, search for "The Myth of Multitasking Test" on YouTube. You'll find a five-minute video by Dave Crenshaw that includes a quick test you can perform to see the great disadvantage of switchtasking. I recommend you take the time to do so and perhaps share it with your people.

[5] Winschenk, Susan. "The True Cost of Multi-Tasking." *Psychology Today* at https://www.psychologytoday.com/blog/brain-wise/201209/the-true-cost-multi-tasking.

[6] For more on this topic, see Jason Selk, Tom Bartow, and Matthew Rudy, *Organize Tomorrow Today: 8 Ways to Retrain Your Mind to Optimize Performance at Work and in Life*. Da Capo Lifelong Books, 2015.

[7] Challies, Tim. *Do More Better*. Minneapolis. Cruciform Press, 2015. (This is an excellent resource that pulls together a number of other works, including *Getting Things Done* by David Allen, a seminal book on productivity. Challies has a religious bent that may put off some readers, but the writing is mercifully concise and full of excellent counsel.)

[8] Allen, David, *Getting Things Done: The Art of Stress-Free Productivity*. New York: Viking, 2001.

[9] I particularly appreciate Evernote for keeping CLE materials. For example, I heard Ryan Calvert, an ADA in Brazos County, do an excellent presentation on cross-examination some years ago at a

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