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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

The murdering minister

Kari Baker's death in 2006 was originally ruled a suicide, but her family's persistence eventually led to her husband's indictment and conviction for murder. How McLennan County prosecutors tried a cold case against a prominent Baptist minister.

By Crawford Long and Susan Shafer
Assistant District Attorneys in McLennan County

On April 8, 2006, at midnight, the 911 dispatcher received a call from Matt Baker, a minister at Crossroads Baptist Church in Hewitt, south of Waco. Baker said he had just returned home and found his wife, Kari, unconscious in their bedroom. The dispatcher told him to perform CPR while he waited for emergency responders. Firefighters and EMS arrived but were unable to revive Kari; she was pronounced dead at the scene.

Officers with the Hewitt Police Department talked to Baker, who said that he had left his wife at about 11:10 p.m. to rent a movie and fill the car up with gas. When he returned, the bedroom door was locked. He pried open the lock with a screwdriver, only to find his wife unconscious and naked on the bed. Emergency responders noted that her body was clad in a t-shirt and underwear; Baker claimed that he dressed his wife while he was on the phone with the 911 dispatcher. A typed suicide note was found on a dresser along with an empty bottle of sleeping pills.

Officers took pictures of the scene, called a McLennan County justice of the peace, and told him what they had found. After conferring with them by phone and without going to the house, the JP ruled Kari's death a suicide and did not order an autopsy.

Background

Matt Baker met Kari Dulin when they were students at Baylor University in Waco; they married three months later at her parents' home. He later attended Baylor's George W. Truett Theological Seminary and became a Baptist pastor.

During this time, the Bakers had two daughters, Kensi and Kassidy. In 1998 Kassidy was diagnosed with a brain tumor. After treatment in a hospital, she appeared to be on the road to recovery and returned home, but early one morning in March 1999, Matt Baker walked into Kassidy's room and found she had stopped breathing.

By all accounts, Kassidy's death had a great impact on her mother. An outgoing young woman with a lively personality, Kari grieved

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Third Annual Champions for Justice event to honor Carol Vance

Special thanks to our honorary host committee

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By Jennifer Vitera
TDCAF Development Director in Austin

A frightened child whose life will be forever changed by the acts of an abuser, a grieving family trying to cope with the loss of a loved one taken from them by a drunk driver, and an elderly widow defrauded by an identity thief. Each of these victims desperately needs a champion, someone to stand up for them and seek justice on their behalf. For the better part of two decades as the district attorney in Harris County, **Carol Vance** was that champion.

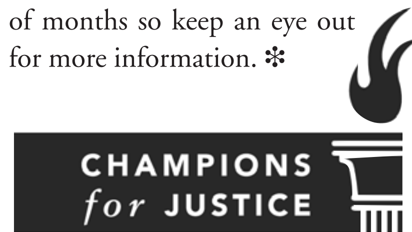
In the three short years that the Foundation has been up and running, we have established a solid footing and are realizing our potential in bringing training and services to Texas prosecutors for the benefit of the State. In addition to that, we also recognize legendary Texas prosecutors at a Champions for Justice Event in their communities—which brings us to Carol Vance. The TDCAF will host its third Annual Champions for Justice Event on April 22, at the home of Gene and Astrid Van Dyke in Houston.

Carol Vance

We are inviting TDCAA members to be a part of this event by making a contribution in honor of Carol Vance. Please show your support and appreciation for all that he has done for Harris County and beyond.

Tickets for this reception are $50 each, and sponsorship levels are $10,000 for Platinum, $5,000 for Gold, $2,500 for Sterling, and $1,000 for Bronze. Order tickets or make a contribution in Mr. Vance's honor by visiting www.tdcaf .org or by contacting me at 512/474-2436 or vitera@tdcaa .com. We hope to see you there!

Thank you to our TDCAA members, TDCAA's Board of Directors, and TDCAF's Board of Trustees and Advisory Committee for their continued support of the foundation. We will kick off our 2010 Annual Campaign in the next couple of months so keep an eye out for more information. ❇



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Two new staffers to serve prosecutor offices

Plenty of our members still remember when "prosecutor training and assistance" meant that someone in your own office handed you his yellow legal pad with his best voir dire questions written out. Today, our association of 6,000-plus members grows and develops services according to a series of five-year long-range plans. The current TDCAA Long Range Plan, adopted in 2006, calls for the association to ramp up services in direct advocacy and victim assistance.

By Rob Kepple
TDCAA Executive Director in Austin

I am very pleased that at the beginning of this year, TDCAA leadership (with money from the Texas District and County Attorneys Foundation) has funded two new positions at TDCAA designed to meet your needs in appellate advocacy and victim assistance.

John Stride

John Stride hails from the Denton County Criminal DA's Office and will be telecommuting from his farm four miles north of Krum for the foreseeable future as our new senior appellate attorney. His job duties (which are outlined in more detail on page 10) include answering critical questions, writing a regular column in this journal (see his first one on page 11), and identifying important appellate issues for the membership as a whole. We are so grateful to have him on board! Welcome, John.

The other area that will have newly dedicated staff support is victim services. The legislature made victim assistance part of prosecutors' statutory duties decades ago, but the funding has never been there to fully support your efforts. TDCAA leadership has made this a priority by creating a new staff position dedicated to the training and support of victim assistance. I am pleased to announce that TDCAA hired **Suzanne McDaniel** as TDCAA's first Victim Services Director. Many of you know Suzanne from her former position at the Attorney General's Crime Victim Services Division. You may not know that Suzanne served under legendary former Harris County DA **Carol Vance** as the first DA office victim assistance coordinator in the state. She brings a wealth of experience and energy to this new position and will operate much like our DWI road warrior, **W. Clay Abbott**, in bringing training and support directly to you in your jurisdiction. You can reach her at mcdaniel@tdcaa.com.

Suzanne McDaniel

A new voice at TDCAA

When you call TDCAA, you are likely to speak first with our new receptionist, **Naomi Williams**. Naomi, a Texas State Bobcat, has worked in the legal and non-profit world before, so she's primed and ready to work for TDCAA and to help you. Make sure you give her a warm welcome to the profession when you call!

Naomi Williams

Clay Abbott's reputation precedes him—literally

By now most of you have benefitted from training by **W. Clay Abbott**, our TxDoT-funded DWI Resource Prosecutor. Clay travels the state in his red convertible—his office away from the office—training prosecutors and police on the latest DWI law, procedures, and best practices.

Apparently he is getting pretty well-known in law enforcement circles. Not long ago, returning from a long swing through West Texas, Clay was pulled over by a local officer for a chat—something to do with the speed limit dropping from 70 to 35 in town. The officer instantly recognized Clay, and the temporary road-side detention turned into a discussion of some legal issues that had been bothering the officer.

Clay eventually went on his merry way, all the more mindful of those pesky speed drops in every town. In fact, he was sure he was following the speed limit when in the next town he was stopped a *second* time. This office didn't have a ticket for Clay—he had DWI questions. The first cop had called ahead to give the second officer a heads-up that the DWI expert was on his way into town.

And so it went, all the way

back to Austin. Clay was pulled over four times on that trip—not for moving violations but rather to administer roadside CLE to traffic cops. I've advised him to start traveling with a TCLEOSE sign-in form so at least the officers can get a little in-service training credit.

Overheard in Court

Many in the legal profession were saddened to hear of the death of **Judge Jerry Buchmeyer**, a long-serving federal judge in the Northern District of Texas. He was well-known for his article in the *Texas Bar Journal*, "Et Cetera," which featured humorous exchanges overheard in court.

Good news: **Missy Medary**, a municipal judge in Corpus Christi and a former ADA, is keeping the spirit of humor alive with a new website, www.overheardincourt.com. This site is already very active with great courtroom exchanges, and my guess is we all have some good ones to add.

From the mouths of baby prosecutors

At TDCAA every seminar, our training staff solicits information from attendees through a questionnaire. The TDCAA Training Committee, chaired this year by **Christi Jack** (ADA in Tarrant County), and our staff reads through each one to get ideas for improving courses and meeting our members' needs.

We got some great suggestions from those attending the January Prosecutor Trial Skills Course (whom we affectionately call "baby prosecutors"). One requested help on three issues: 1) a huge volume of work, 2) a judge who doesn't follow the law, and 3) law enforcement resistance to conducting full and complete investigations. Imagine having those three problems all at once in a jurisdiction! I was a little disappointed to read this, though, because I would have thought that those three problems would have been solved in the 20 years since I worked as a baby prosecutor. I hope someone comes up with the solution soon so we can train on it and be done with it once and for all!

Mark your calendar for Guarding Texas Roadways

Many of you participated in a ground-breaking seminar in our 2008 DWI Summit called **Guarding Texas Roadways**. Thanks to the Texas District and County Attorneys Foundation and the tremendous work, energy, and support of the Anheuser-Busch Companies, we trained more than 1,400 Texas prosecutors and law enforcement officers all around the state in a live, interactive program broadcast from the A-B studios in St. Louis to 34 A-B distributorships across Texas.

By popular demand, the second statewide DWI summit will take place on Friday, November 12, 2010. And the success of the first event has gained national attention: This time around, the program will not only be broadcast in Texas but also in other states from New York to California. I want to thank the Foundation and the great support from Anheuser-Busch—we know the 2010 DWI Summit will surpass its predecessor. Stay tuned for more details.

Three of our finest

In the last few months we have lost some of our finest. I would be remiss if I did not honor their commitment to justice and what these three folks have done for their communities and for Texas.

Bill Jennings, who passed away in October, was a fine Criminal District Attorney in Gregg County for 16 years before taking the bench. He was well-respected, and his passing is a great loss to the courthouse community in Longview. Bill died of a sudden heart attack while piloting a sailboat in a race, which led a friend to note, "He certainly wouldn't have picked the time, but he wouldn't have argued about the location."

I am also saddened to report on the recent passing of **Ann Forman**, a child abuse prosecutor at the Travis County District Attorney's Office for 17 years. Anne represented the State, DFPS, and kids in court—perhaps a thankless job at times, but the recently announced downward trend in child abuse cases nationwide can be attributed to those who stand between kids and those who hurt them, and that included Ann. That puts her in the superhero category in my mind.

Finally, we lost **David Laibovitz**, another Travis County Assistant District Attorney who left us too early. David was the community prosecutor and liaison with the Austin Police Department, as well as a great faculty advisor and speaker for TDCAA. David was a beloved man and great supporter of Longhorn sports, as evidenced by the well wishes and phone calls he got from folks all over the

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state, including UT Football Coach **Mack Brown**.

We will miss these three crime-fighting superheroes and will need to pick up where they left off.

The 2010 Prosecutor Combine

In February 2009, members of the TDCAA Diversity, Recruitment, and Retention Committee interviewed 3l law students during the Public Service Consortium at the University of Texas School of Law. The idea was to interview those who wanted to be prosecutors and help direct the "hot prospects" to offices with job openings in November, after the students passed the bar. Think of it like the National Football League's combine where representatives of all the teams gather to evaluate the top college players at one time.

We just finished the second combine in January, and I can report that a group of law students set to graduate this spring are going to make great prosecutors. Over two days of interviews we evaluated and ranked 30 students, and there is a strong group of "must hires" in this group. The committee will keep tabs on those students over the coming months, and when you are in need of a new lawyer this fall (or an intern this summer!), just call me if you need a rundown of our top picks for 2010. ❇

THE PRESIDENT'S COLUMN

Five pointers for prosecutors in the foreboding world of the employment lawyer

Employment law is fun. Not fun like going to the park or the lake or the golf course, but fun like an Ingmar Bergman film festival. Sure, it's dark and moody and you may walk away despondent, but someone's bound to be impressed that you've endured it and can talk about it with words like "nihilistic" and "existential."

In that spirit, I offer a few indicators of what happens when employment situations deteriorate. A recent study found that the median amount of jury awards in employment cases increased by about 60 percent within the last decade. Of more concern to us, the defendants most often hit with adverse verdicts in employment cases during that time were governmental entities. To drive the point home to those of us who might be inclined to roll the dice at trial, employers won fewer than 40 percent of the cases that went to verdict. That figure tends to support the conventional wisdom of employment lawyers that juries are comprised of employees, not employers.

By C. Scott Brumley
County Attorney
in Potter County

Confronting those realities is hard for us in the prosecution world. Most of us don't have much formal training in management, and employment law is the domain of outside counsel in most offices that don't have a major sports franchise or amusement park within their jurisdictions. In hopes of minimizing the need for large brass nameplate firms (but with no intended ill will toward their rainmaking efforts), I offer five general rules for dealing with employment issues within your office. These lessons have been learned, often the hard way, through more years than I care to remember of dealing with civil rights and employment law and should be considered in the context of the shopworn "this is not intended to be understood or relied upon as legal advice; talk to your own impeccably dressed employment lawyer about specific problems you may encounter" disclaimer. They are not intended to be considered in any particular order of importance, even though they appear that way.

1 **Make some rules.** Maybe "no rules" works with cage fighting but not in an office. (Cage fighting isn't a good idea there, either.) In 1998, the U.S. Supreme Court gave a strong hint to employers that if they didn't have a clear, consistently enforced sexual harassment policy, they had better get one. As employment law has evolved, it has become clear that this directive is true for all

trouble spots in employment, including race, sex, national origin, religion, age, disability, and family medical leave.

Of course, having clear policies defining and prohibiting unacceptable workplace conduct is only part of the equation. Another part is finding enough paper to print them or computer memory to store them. But the more important factors are making them known and consistently enforcing them. We all know the Tax Code exists, but how useful is it in helping us stay on the straight and narrow? The answer for most of us, with the possible exception of CPAs and tax lawyers, would be "not very." By contrast, effective employment policies are easy to understand and, in fact, must be understood by the workforce, so your office's employment policies should be written in language that the average eighth-grader can understand. And, then, the staff needs to be made aware of them. A signed acknowledgement that the employee has received and will read the policies is a stalwart of traditional employment thinking. (Didn't that sound lawyerly?) An effective program, however, needs to go beyond this tradition. The policies need to be discussed with employees. As big a hassle as this brand of training may be, it's better than the freight train that looms as the alternative.

Then there's enforcement. Enforcement of employment policies has to be consistent. That sounds easy enough, right? It's not. We are wired to be kinder to those we like than to those who give us indigestion … or fruitcake during the holidays. Letting that be the order of the day in management is called many different things by plaintiff's lawyers, with the most polite being "favoritism." Juries dislike that. Giving a pass to the office's good guy for being consistently late, making *au gratis* personal copies, telling the kind of jokes that make even boors like me raise their eyebrows while lowering the boom on the office "whiner" or other *persona non grata* for similar conduct, may feel right in the short term. In the long term, though, it ferments a foul brew of hard feelings. That usually leads, in turn, to a new sense of diligence in the offended employee. Unfortunately, that diligence generally is focused on finding ways to become bulletproof (say, by making a Whistleblower Act- or Title VII-protected report) while throwing you under the bus. If you don't want to be roadkill, you'd better be sure you have a clear, objectively documented reason for being more lenient with one employee than another in the face of similar misdeeds, past or present.

2 **Employment issues are not like fine wine; they don't get better when left to quietly age in a dark cellar.** Let's face facts. Sometimes we would rather give ourselves an appendectomy with a pocket knife and a bottle of scotch than confront certain problems. Workplace disputes usually fall within that category. As intractable as he-said, she-said office vendettas seem, though, playing ostrich with them can bear bitter fruit. Perhaps a different inane analogy would be helpful. If you bury a ladybug next to your house, what happens? Nothing. Much the same holds true for ignoring me. On the other hand, if you bury a termite next to your house, what happens? It burrows into the ground, reproduces, eats the wood in your house, and puts pornography on your computer. Well, maybe not the last part, but you get the point. Much the same holds true with employment issues.

When a complaint about a potential employment law violation arises, prompt action is required. In these circumstances, that action can be thought of as the "-ates." Management needs to promptly **separate** (the accuser from the accused), **investigate**, **assimilate** (the results of the investigation), **evaluate** (those results carefully), **effectuate** (action intended to stop discriminatory or retaliatory conduct), and not **berate** (either the accuser or accused). Likewise, the involved parties must **cooperate**. Your employment policies should make clear that cooperation in any employment-related investigation is required, even if that may implicate *Garrity* concerns.[1] It may also be useful to explain that cooperation is in everyone's interest. From a practical standpoint, the accuser's reticence or mendacity will obviously hinder the ability to uncover the truth. Perhaps more importantly to the accuser, though, it may provide the employer with a defense based on the accuser's failure to reasonably take advantage of the employer's remedial procedures. If the accused chooses to clam up, it may be seen as a tacit confession and prevent a later full testimonial from being seen by the employer or a court as anything but a bit too convenient and contrived.

Another issue to keep in mind in this context is timing. Courts will consistently express their expectation of a "reasonably prompt" investigation and action, but, as is so often the

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case, there's no official stopwatch to gauge what that timeframe really means. The time required to complete a thorough investigation will necessarily be a function of the nature and extent of the alleged violation, as well as the number of people involved as participants or witnesses. An allegation that someone made a photocopy of his derriere doesn't take as long to analyze as a report of a widespread hostile work environment or a sexual assault. Either way, however, the process should be underway within a day.

While the investigation is underway, the accuser and accused need to be separated. The adequacy of separation is better measured in work hours and supervisors than yards. Moving the accuser from next door to the accused to two doors down is unlikely to be effective or well received. If different shifts or supervisors aren't available, some consideration might be given to the use of paid leave while the investigation is pending. But care should be taken here. Harsh words or conditions in imposing the leave may be interpreted as punitive intent. That can be just as bad as ignoring the complaint. Like most other important endeavors, communication is key. At the risk of oversimplification, good communication in this context would be something like, "We have received a report of a violation of workplace conduct rules. We take those very seriously. To ensure a fair and thorough investigation and prevent any retaliation related to the complaint, we are" implementing whatever separation measures the situation dictates. Examples of less-than-effective communication might be: "Shut your pie hole," or "Yeah, I'll get to it … when the federal budget is balanced. Meantime, be thankful I'm not firing you right now. Come to think of it, you *are* fired."

3 Remember a Shakespearean maxim: The fool doth think he is wise, but the wise man knows himself to be a fool. Opinions have their place. They're the building blocks of the editorial page of the local paper and the blogosphere. While I hold my own opinions in notably high esteem, however, neither my wife nor most of the people I know view them in quite the same light. So it is with employment decision-making.

Whether the task at hand is formulating policy or addressing a workplace dispute, the foundation must be built upon objective facts. Getting a handle on those facts is crucial. The process of gathering those facts must proceed from a willingness—indeed, a need—to develop the total picture, warts and all. That means the process can't succeed if it stops when only positive evidence is in hand. To paraphrase an old political saw, it's not what we know that hurts us; it's what we *think* we know. Another bit of wisdom teaches that there's no political problem that can't be solved by a few well-placed photographs. Although that thinking is as cynical as I am, it speaks to the notion that objective evidence is far more useful in making sound, supportable decisions than preconceived notions, generalizations, or naked conclusions.[2]

With that in mind, a sound investigation or fact-finding effort must dig beyond the fluff or vitriol on the surface. Reporters are taught in journalism school (putting aside the question of retention) to seek the same thing in every story: who, what, when, where, why, and how. Similarly, answers to those inquiries should be the basis of every employment action. If those answers don't come in written or tangible form, they must be converted to one of those formats immediately. Take statements and get signatures. Take pictures. Then take time to review the evidence and reach a rational conclusion in keeping with the evidence gathered. The need to temporize is especially crucial if you're angered by what the evidence reveals. Haste and rage tend to generate poor decisions, both in the workplace and in the courtroom.

4 You know how you feel about those "Snitches Get Stitches" T-shirts? The same should be true in the office. Most of us recognize that firing an employee who complains about discrimination or violations of the law can be problematic, even if the merit of the complaint's substance is open to debate. At least with respect to Title VII cases, however, the horizon expanded significantly in 2006. While Title VII does not set forth a "general civility code for the American workplace," the court construed the linchpin concept of harm resulting from retaliation to be "materially adverse," which means conduct that might "have dissuaded a reasonable worker from making or supporting a charge of discrimination."[3] So, where can the line be drawn between petty slights or insults and actionable retaliation? Perhaps it's somewhere near the difference between "your

momma" and "your office is now in the basement." In any event, courts and Wonder Lawyers continue to debate and struggle with that distinction. So maybe it's more useful to focus on a two-pronged approach to avoiding the quandary entirely.

Initially, the office must have some means of hearing what's actually taking place in the trenches. Having an "open door" policy is one way to do that. The *glasnost* approach to management, though, has its upside and downside. It promotes free communication about what's happening in the office, but it's more likely to thrive in a decentralized authority structure. Decentralized organizations typically are slower to definitively respond to problems, particularly those that are acute in nature. Doing something important takes longer when you have to get out of a beanbag chair to act. A centralized authority structure is usually more efficient in crisis management, but intimidation in such groups may impede the free flow of communication about problems festering among employees. Where the office has more of a centralized power structure, it may be useful to consider providing an outside recipient for workplace misconduct reports, at least as an alternative. In either event, a report must be acted upon promptly, despite any consternation the report may cause. Even the best signage and views don't change the destination of a dead-end street.

Next, and ultimately, the issue should be viewed more as cultural than procedural. All the written procedures and protocols drafted by the finest employment lawyers pale in comparison to employees' perception of prompt, fair action on a complaint. If management is seen as open to receipt of legitimate complaints, as well as diligent and fair in investigating and resolving them, employees are far more likely to speak up at the proper time than if the office's policy manual is as thick as the Houston phone book but rarely consulted.

5 **If you can't fire 'em, don't hire 'em.** Before anyone twists off, I'm not suggesting avoidance of hiring a member of a protected class. In fact, that's the opposite of what I'm saying. The point here is that the proper focus is on job-related qualifications. Experience, education, work history, and demonstrated interest in what we do professionally are legitimate considerations. At the same time, anyone who has interviewed employment applicants and participated in hiring employees knows that there is an inescapable crapshoot element to the process. References can be checked and impressions can be gauged, but it is nigh impossible to truly know the person hired until she actually shows up to work and begins functioning within the office. That's when the determination of whether the résumé matches the worker can be made. If the paper qualifications don't pan out in the real workplace, there should be no hesitation in taking the appropriate action to protect the office's productivity. Occasionally, however, there's a tightening in the gut beyond the normal and natural anxiety over issuing walking papers. That may be an indicator that this rule has been violated.

Just as certainly as there are clear job-related qualifications to be considered in evaluating an applicant, there are irrelevant factors that absolutely should not find their way into the mix. Most of us are savvy enough to understand that protected characteristics (e.g., race, sex, religion, national origin, age, and disability) should not be considerations, positively or negatively. But there are subtler, though equally thorny, issues that can slither into the process. The difficulty of avoiding evaluation of how people look cannot be denied, and it's not entirely irrelevant. If an applicant is sloppily dressed, that may be an indicator of a disinterest in formality or a lax approach to work. On the other hand, how a person fills out a suit (whether well-tailored or otherwise) bears little relation to ability. Likewise, a person's familial relation to another employee of the office or the county will not make him a better lawyer, clerk, or investigator. The payoff comes when the employee hired, at least in part, on the basis of these latter attributes fails to perform up to expectations. At that point, the complications of hiring someone on the basis of something other than job-related criteria bubble up to make for the queasy feeling that precedes bad press and lawsuits.

Conclusion

While much has been written about how to avoid these dilemmas, the best advice may be a simple test that applies to most difficult decisions: Consider whether you would be comfortable with the decision if its details were published on the front page of the local newspaper. If not, you probably have some more thinking to do. Take it from someone who

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has seen more column inches in the local paper as a government lawyer than he ever saw as a reporter. Now that's existential. ❇

Endnotes

1 See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (coercion of statement under threat of removal from public office precludes use of statement in subsequent criminal proceedings).

2 I'm told that using the word "naked" in a writing makes it instantly more readable and appealing.

3 *Burlington Northern & Santa Fe Ry. Co. v. White*,

NEWS WORTHY

PCI and Oscar Sherell Award nominations due July 1

Applications for the TDCAA Professional Criminal Investigator Certificate are now being accepted. The deadline for the certificates, which will be awarded at the TDCAA Annual Criminal and Civil Law Update in September, is July 1. The application and Standards for the certificate can be found at www.tdcaa.com; search for "PCI."

We are also currently accepting nominations for the Investigator Section Oscar Sherell Award, which goes to an investigator with outstanding service to the association. Nomination forms can be found at www.tdcaa.com. Search for "Oscar Sherell."

If you have any questions, please contact Maria Hinojosa with the Denton County Criminal District Attorney's Office at 940/349-2714 or by e-mail at maria.hinojosa@dentoncounty .com. ❇

NEWSWORTHY

A note about our new appellate attorney's duties

Thanks to generous contributions to the Texas District & County Attorneys Foundation, TDCAA's new appellate attorney, John Stride, is available to consult and assist with appellate issues at Texas prosecutor offices. Because of the high volume of criminal appeals in Texas, John's focus will be on assistance rather than direct representation. TDCAA will provide this help through:

1. email communication and telephone consultations on appellate issues and trial issues that will affect appeals;
2. regional training sessions on appeals, as well as training segments at the TDCAA Annual Criminal & Civil Law Update and Elected Prosecutor Conference; and
3. compilation of a brief bank that includes sample language on the most commonly filed appellate issues.

John will be available to help write briefs for prosecutor offices in Texas. Ordinarily, use of TDCAA's briefing services will be reserved for more challenging, novel, undecided, or controversial legal issues, and normally won't be available for elementary or largely factual issues such as sufficiency of evidence or ineffective assistance of counsel. John should be able to handle approximately 10 replies to defense appeals in non-capital cases per year, under the following guidelines:

1. The prosecutor's office must send a written request by fax (512/478-4112) or e-mail (stride@tdcaa.com) to John within five calendar days of receiving the defense brief.
2. The request must include a copy of the defense brief, and a copy of the record must follow within an additional three calendar days.
3. No more than one request per office per year will be accepted.
4. Each request will be considered by the TDCAA Appellate Advisory Committee, which will vote to approve or deny the request based on the issues presented, whether other resources are available, and John's current caseload.
5. The committee will make a decision within three business days, and if the project is rejected, the record will be sent back within two business days of that decision.
6. While John will draft briefs for prosecutor offices, it is the responsibility of each office to sign and file the documents. Based on bylaws adopted by the TDCAA Board of Directors, no TDCAA staff member may sign a brief on behalf of the association.
7. John will advise and coach prosecutors on oral argument strategies, but he will not appear to make oral argument.
8. Based on bylaws previously adopted by the TDCAA Board of Directors, neither John nor any other TDCAA staff member will sign an amicus brief written on behalf of the association. For critical issues of statewide importance, John will instead communicate with the office handling the appeal and ascertain its interest in asking other prosecutor offices to submit amicus briefs on the issue. If the office handling the appeal is interested, John will coordinate with other offices to seek amicus support on behalf of the office handling the issue.

8\. One of John's key duties is to identify emerging trends and issues in Texas criminal jurisprudence and assist Texas prosecutors in developing a consistent and coordinated approach to addressing those trends. John will write columns in each edition of the *Prosecutor*, and one of the topics should be a list of ongoing issues of statewide importance. John will use the available methods of communication with TDCAA members (website, e-mail, the *Prosecutor*) to let members know of TDCAA's interest in assisting offices on appeal with those issues. ❇

A wave of change in criminal jury charges

Unless you have been hibernating (completely understandable given the prolonged North Texas deep freeze this winter) you must have become aware of the rumblings surrounding criminal jury charge law. Jury charge law is changing—slowly, maybe, but surely and inexorably. A groundswell of support for this change is rippling across Texas and changing the jury charge landscape.

By John Stride
TDCAA Senior Appellate Attorney

Over the last few years, the Court of Criminal Appeals has been turning the tide of jury charge law that, cavalierly perhaps, many of us have taken for granted. Just across the street, the State Bar of Texas' Committee on Pattern Jury Charges has been pooling the resources of 20-odd members of the criminal justice system to generate uniform criminal jury charges. This article will detail the slow but steady sea change of criminal jury charge law.

The Court of Criminal Appeals' contribution

The court, in an apparent move away from *ad hoc* legal reasoning, is actively engaged in efforts to clarify jury instructions, establish boundaries, and plant common sense and consistency. Today, the court's opinions take a broader view and resolve the issues within a more cohesive framework. The court has specified with greater particularity when lesser-included offenses are required, has provided clarification on the scope of proper instructions, and continues to wade through the muddy waters of unanimity and election law. This is not the place for an in-depth summary of the evolving law, but the highlights follow:

Forfeiture

- *Delgado v. State*, 235 S.W.3d 244 (Tex. Crim. App. 2007) (declining to require a *sua sponte* defensive limiting instruction)
- *Posey v. State*, 966 S.W.2d 57 (Tex Crim. App. 1998) (instruction on defensive issue of mistake not required absent request or objection)
- *Tolbert v. State*, No. PD-0265-09 Tex. Crim. App. submitted Sept. 30, 2009 (whether trial court must submit a lesser-included offense (LIO) *sua sponte*).

Lesser-included offenses

- *Grey v. State*, No. PD-0137-09 Tex. Crim. App., 2009 LEXIS 1610 (Tex. Crim. App. Nov. 18, 2009) (establishing when a trial court must, and when it may, submit LIOs)
- *Barrios v. State*, 283 S.W.3d 348 (Tex. Crim. App. 2009) (reprising the preferred transitional language between LIOs)
- *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007) (explaining the first step of the two-part test for LIOs).
- *Farrakhan v. State*, 247 S.W.3d 720 (Tex. Crim. App. 2008) (following *Hall*'s two-step test for LIOs)

Comments on the weight of the evidence

- *Bartlett v. State*, 270 S.W.3d 147 (Tex. Crim. App. 2008) (instruction on breath test refusal was improper)
- *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007) (denial of defense instruction on verbal threats proper)
- *Brown v. State*, 122 S.W.3d 794 (Tex Crim. App. 2003) (instruction on inferring intent was improper; explaining scope of proper instructions).

Defense instructions

- *Williams v. State*, 273 S.W.3d 200 (Tex. Crim. App. 2008) (defendant may waive mitigation issue in capital case)
- *Bufkin v. State*, 207 S.W.3d 779 (Tex. Crim. App. 2006) (instruction on consent should have been given)
- *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998) (restricting defenses to those statutorily granted).

Confession instructions

- *Oursbourn v. State*, 259 S.W.3d 159 (Tex. Crim. App. 2008) (establishing when various confession instructions required)
- *Vasquez v. State*, 225 S.W.3d 541 (Tex. Crim. App. 2007) (similar).

Unanimity

- *Huffman v. State*, 267 S.W.3d 902 (Tex. Crim. App. 2008) (disjunctive wording violated right to a unanimous verdict)
- *Pizzo v. State*, 235 S.W.3d 711 (Tex. Crim. App. 2007) (explaining

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when unanimity required)

- *White v. State*, 208 S.W.3d 467 (Tex. Crim. App. 2006) (jury unanimity not required).

Elections

- *Dixon v. State*, 201 S.W.3d 731 (Tex. Crim. App. 2006) (explaining rationale for election law)
- *Ngo v. State*, 175 S.W.3d 738 (Tex. Crim. App. 2005) (disjunctive submission of separate offenses violated right to unanimous verdict).

Verdict forms

Jennings v. State, No, PD-0261-09 (Tex. Crim. App. Jan. 27, 2009) (deciding that a verdict form is part of the jury charge; thus, errors governed by *Almanza*).

The State Bar's contribution

The State Bar of Texas (SBOT) has also begun compiling a series of books on pattern jury charges for criminal cases. The criminal law versions join those in other areas, such as civil and family law. Already the first criminal law volume is available, and it includes instructions on the general charge, special instructions, intoxication offenses, controlled substances offenses, and punishment. It also offers a commentary on criminal jury charges, which provides important observations for those of us creating and using jury charges in all areas of criminal law. Annotations and caselaw are liberally included.

As devised by the SBOT committee, the format of the instructions brings clarity, understanding, and uniformity to criminal jury charges. Be warned that the changes are dramatic: Charges follow a consistent outline with clear headings, state the controlling law and definitions, and apply the law to the facts in everyday language. To assist understanding and clarify burdens, elements of offenses and defenses are broken down into numbered and lettered lists.

As stated in the introduction: "Appellate courts are unlikely to regard trial judges' refusal to use the committee's jury instructions as reversible error. These instructions will be used, then, only if trial judges are willing to exercise their considerable discretion to adopt them in particular cases." As prosecutors, it is our role to seek justice, and promoting these charges is one significant way we can do that. I urge you to adopt the pattern jury charges at every opportunity. Juries should find the instructions both easier to understand and more grounded in common sense—a vast improvement over the muddled, old-fashioned legalese of many traditional criminal jury charges. Practitioners should find them much easier to use with their consistent format and greater clarity, while trial judges and court reporters should enjoy the ready access to uniform charges. Finally, appellate courts should be less surprised by the variety, confusion, and inadequacies of many present jury charges.

The committee creating the instructions is comprised of prosecutors, defense attorneys, trial and appellate judges, and law professors. Currently, Tarrant County Criminal Division Chief Alan Levy is the Chair and UT Criminal Law Professor George Dix Vice-Chair. Judge Cathy Cochran participates as the Court of Criminal Appeals Liaison. As a member of this approximately 20-person committee, I can tell you just how hard—even mind-bending—it is for the committee to resolve some of the issues that must be addressed to create pattern jury instructions. Sometimes, offering alternative instructions is the only reasonable solution. Nevertheless, for most instructions, agreement is usually achieved and a single pattern charge is born.

Future volumes of the pattern jury charges, currently in production, will cover remaining offenses and defenses. As the law changes, of course, the extant volumes will be updated. Copies of the book and electronic files are available at www.texasbarcle.com or by calling 512/427-1411.

Whatever the impetus for change, the Court of Criminal Appeals and the SBOT committee are plainly devoted to filtering through the primordial ooze that envelops much of past charging practice to create an up-to-date, comprehensive, coherent, practical, and effective law. It is welcome relief. Existing notions of jury charge law are being uprooted and flushed away by an advancing tidal wave and, following the receding water, fresh, more vital growth will bring brighter, stronger, more defined law. Let's nurture the change.

A note on TDCAA's jury charge bank

Over recent years, TDCAA has maintained a jury charge bank on its website. A group of dedicated prosecutors generated the instructions and updated them as it could. In light of the SBOT publishing pattern jury

charges, however, TDCAA has suspended further work on the charge bank—at least for the scope of the SBOT's published instructions. Nevertheless, charges for crimes between 2003 and 2007 remain online at www .tdcaa.com. Comments on how the charge-bank resource may be adapted for the future, if at all, are welcomed. Please send your suggestions to me (stride@tdcaa .com) or Diane Beckham (beckham@tdcaa .com). ❇

War Stories

What's the hardest lesson you've learned as a prosecutor?

Alexis Hernandez
Assistant Criminal District Attorney in Dallas County

I'm still learning that I'm not the investigator and I'm not the trial prosecutor (I'm the appellate prosecutor), and they do their best with what time and resources they have. Sometimes the record I receive is what it is and I just have to work with what I have.

One case involved a robbery. The trial prosecutor was excellent at setting up the record and referencing detail upon detail with the exhibits. The record was nearly perfect. But had he asked a single question of a particular State's witness regarding an element of the crime, I would not have had to link logic chain upon logic chain of facts together for several pages in one of my briefs. Although tedious, doing so let me perform some of my better advocacy and become creative with seemingly disparate facts.

I often think of my former life where I had been studying to go into clinical psychology. I had performed internships dealing with mental health issues from both a policy's perspective and from a clinician's point of view. Now, being on the prosecutor's side of the desk, it is sometimes difficult to accept that people make choices that ultimately take away another person's life, innocence, or personal security. At the same time, I also see defendants who gave up on themselves (or their support systems gave up on them) before they reached the judicial system. It is a reminder that the penal system is but one part that holds people accountable for their actions; human relationships are another part. I can't fix people's relationships with others that may have failed along the way, but I can contribute to holding them accountable in my own personal way.

JoDee Lee Neil
Assistant Criminal District Attorney in Collin County

The hardest thing I've learned is that the unthinkable really happens. Three years ago I would have told you that I've learned the most from my losses in trial, whether it be from an overruled objection, a not guilty verdict, or a piece of evidence that was not admitted. Since then, however, I've learned more about human nature than I ever expected to learn. Although prosecuting crimes against children proved to be a rewarding experience, it was also an eye-opening expression of the actual world where we live. I learned that not all fathers treasure their daughters, that not all mothers protect, and that to some people, a baby isn't

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a precious gift. I've learned that cycles are difficult to break, that some people don't care at all that they hurt other people, and that a lot of people are in so much pain.

I've learned that good can prevail in spite of the filthy crimes others commit and that a small voice is sometimes the loudest. Most importantly, I've learned that one person can make a difference in the life of someone else. It is not easy, but it is worth it.

Kim Schaefer *Assistant Criminal District Attorney in Dallas County*

The hardest lesson I have learned as a prosecutor is that people often commit crimes for no reason. When I started prosecuting in 1992, I made every effort to know why a defendant did what he did so I could assess the value of the case and understand what outcome might lead to true justice. On a strictly personal level, I also wanted any knowledge that could prevent me and my loved ones from becoming the next victim.

These reasons changed as my caseload shifted. As I began to handle more violent crimes and serious felonies, I just wanted to know what would make somebody treat another human being so badly. Perhaps searching for the cause of inhumane behavior was my attempt to restore order to the world. If I could figure out why people committed crimes, it meant a remedy was right around the corner. It is a hopeful way of thinking; it helps you believe your job is more than a speed bump in the defendant's journey toward his next offense.

Over time, however, I have learned not to struggle over "why." I cannot fathom why fathers rape their daughters, women kill their babies, or criminals beat up and rip off old folks. I am quite certain the experts have their reasons, but I know they are not anything I would recognize as "reasonable."

This does not mean I have lost hope. There are simply better questions to contemplate in our line of work: How do surviving victims deal with their experience and move on with their lives? Clearly, some do it better than others, but given the ups and downs that life dishes out to all of us, I think there is a valuable lesson in pursuing an answer to that question.

Jane Starnes *Assistant District Attorney in Williamson County*

It was November 14, 2001, just after lunch. Our receptionist rang me: "Bonnie is on the phone and she's crying." A feeling of dread came over me. I had met Bonnie about six months earlier. She was sexually assaulted by her psychologist, Dr. David Hamilton, during her therapy sessions. Hamilton had convinced Bonnie that she needed to "reenact her past sexual abuse" with him and did so at her home, his office, and a hotel. We had photos, recordings, and his confession. He had been indicted for sexual assault and was in jail awaiting trial. Bonnie suffered from bipolar disorder, and she had her good days and her bad days. This was obviously one of her bad days.

I picked up the phone. "Bonnie, what's happening?" She was breathing rapidly, like a little kid who's crying and hyperventilating. She said, "APD (Austin Police Department) is surrounding my house and I have a gun to my head. Just make sure David fries."

I asked, "What's happened? What's going on?" No response, just rapid breathing. "Bonnie, please talk to me—tell me what's going on," I begged her.

She repeated, "Just make sure David fries." She hung up the phone.

I called her back. She picked up the phone but said nothing. Again I pleaded with her, "Bonnie, tell me what's going on—please talk to me." Click. I called 911. Within minutes, I received a call from a SWAT negotiator. He said, "I understand you've been talking with Bonnie. We're outside her house. Would you mind calling her back? She may not answer, but leave her a message and see if she'll pick up the phone."

We discussed that I would tell her that she couldn't kill herself because Hamilton would walk. I called and got her answering machine. "Bonnie, please, please pick up the phone and talk to me. If you do this, David will walk—he'll get away with it. Please." No response. I called again. The negotiator had said to call over and over if I had to. I called five times, leaving the same message. Don't do it or David will walk. I told her whatever was going on, we could fix it. No response. I called the negotiator back and asked him if I should keep calling. He said to stop. About 15 minutes later he called me. They were in

her house. She was dead. She'd shot herself in the face with a shotgun.

I'd never felt like such an utter failure in my life. How could this happen? Why couldn't I keep her on the phone and talk her off the ledge? What's wrong with me? I shut the door to my office and cried. To know that someone reached out to me in her last desperate moments and I couldn't fix what was hurting her was devastating. Never mind that I have absolutely no experience with this kind of thing. I'm a prosecutor. My contact with victims usually ends with hugs, maybe some tears, thanks, a photograph sent to me later, maybe an invitation to a high school graduation. It's not supposed to end like this.

By the time her funeral came around, I was angry at Bonnie—I didn't go to her funeral. Why did she have to call *me* right before she shot herself? What right did she have to rope me into her suicide? Then, of course, there was guilt about feeling angry at her. What kind of a selfish person gets mad at a severely depressed, mentally ill, traumatized woman? She had the most horrible life of anyone I've ever met.

Several months after Bonnie's suicide and after Hamilton (amazingly) pled guilty to sexual assault, I had lunch with Bonnie's last psychiatrist. I had planned to call him as a witness at Hamilton's trial, if there had been one. He told me that Bonnie had also phoned his office that day, right around the time she called me. He was doing the same thing I was: trying to call her back and talk her off the ledge. A trained psychiatrist couldn't convince her not to pull the trigger, either. We talked about how we both felt angry at Bonnie, and we both came to the conclusion that no one could have stopped her from committing suicide that day. Not me, not her psychiatrist, not anyone. She had made up her mind.

How many times have we, despite our high hopes for a victim's future, found out after a case is closed that our victim became a teenage mother, drug addict, or stripper, or she started self-mutilating, or as in this case, killed herself? When we, as prosecutors, hold the power to rescue a child from an abusive home, help a crime victim heal, send someone to prison for life, and change people's lives for better and for worse, we can and sometimes do get a bit of a hero complex. But cases like Bonnie's remind me that we can't fix everyone's problems. Some people are already so damaged when we meet them that nothing we can do will save them.

Paula Rosales Aldana
Assistant Criminal District Attorney in Dallas County

The hardest lesson I had to learn as a prosecutor is to accept that sometimes I will be able to present only the *best* solution and not a perfect one.

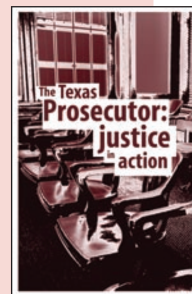
When I began prosecuting in the appellate division, I personalized my cases. Much of my workload involved reasonable suspicion to detain and probable cause to arrest issues, and such cases often involve routine errors. I thought to myself, "If only an extra question had been asked or an additional fact had been articulated, then I would be able to show that the case was perfect." That injustice might result made me feel powerless. So I believed that injustice would be prevented so long as my answers responded to every imaginable question a reviewing court might have on an issue.

Now that my practice has advanced, I have gained more confidence about what a "perfect" case actually is. The best solution is one that contains sufficient strength (but not absolute strength) to show that all elements of a crime were proven beyond a reasonable doubt. Because the best solution requires a more objective analysis, I no longer have to personalize my arguments to know that I presented a complete case. ❇

News Worthy

Prosecutor booklets available free to members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others who are considering jobs in our field.



Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, and allow a few days for delivery. ❇

Photos from our Prosecutor Trial Skills Course

Photos from our Investigator School

Top photo: Stephen F. Allen, winner of the Chuck Dennis Investigator of the Year Award, pictured with Robert Bianchi (left), Victoria County Criminal District Attorney Investigator, and Maria Hinojosa (right), Denton County Criminal District Attorney Investigator.

Middle photo (left to right): Ivan Pearce of Liberty County, Kenneth Newton of Collin County, and Vicki Kraemer of Brazoria County all received PCI awards.

Bottom photo: Llano County District Attorney Sam Oatman (left) presented the Henry Nolan Scholarship to Brett Lane (right), whose stepdaughter, Sydney Scott, won the scholarship. Congratulations to all!

Continued from the front cover

The murdering minister (cont'd)

greatly for her lost child. She sought counseling and wrote passages about her in her Bible. Kari's suicide note even referenced her daughter, and Kari died right around the anniversary of the girl's death.

Suicide or foul play?

Kari's parents, Jim and Linda Dulin, were summoned to their daughter's home the night of her death. While they had difficulty accepting that Kari had killed herself, there did not seem to be any other explanation. Kari had been pronounced dead early Saturday morning, and Matt insisted the funeral be on Monday.

About 10 days later, Linda Dulin got together with her three sisters, who told Linda that Matt had hit on several young women over the years. They had kept these things to themselves while Matt was married to Kari, so Linda was stunned. She resolved to find out the truth about her daughter's death, even if that truth—that Matt had murdered her daughter—was harder to accept than her daughter committing suicide.

The Dulins had added Matt and Kari's cell phones to their plan awhile back, and in checking the phone bill, Linda noticed a number of calls from Matt Baker to Kari's cell phone—*after* her death. Within weeks, Matt made approximately 180 calls to the phone and as many as 17 calls in one day. Further investigation revealed that Matt had given Kari's cell phone to a young woman from church named Vanessa Bulls.

Suspicious of their son-in-law, the Dulins hired a former assistant district attorney and assistant U.S. attorney, Bill Johnston, to investigate, and Johnston asked two one-time lawmen, former deputy U.S. Marshall Mike McNamara and former Department of Public Safety Undercover Agent John Bennett, to assist him. Their investigation turned up numerous instances of Baker's sexual advances toward young women from his years in college and throughout his marriage to Kari. Further investigation indicated that Baker spent a great deal of time on pornographic websites, as well as searching the Internet for information on "overdose by sleeping pills" and for pharmaceutical websites where Ambien and other drugs could be purchased without a prescription. Based on what Johnston, McNamara, and Bennett unearthed, the Dulins filed a wrongful death lawsuit against Baker in July 2006.

That month, in light of the evidence obtained in the continuing investigation, the justice of the peace, Billy Martin, decided to reopen his ruling that Kari Baker's death was a suicide. Her body was exhumed and an autopsy performed at Southwest Institute of Forensic Sciences in Dallas, but because of the passage of time and the embalming of the body, the pathologist could determine only that traces of alcohol, Ambien, and Unisom (both sleep aids) were in her muscle tissue at the time of death—but neither a time frame nor an amount of the drugs could be ascertained. He ruled the cause of death undetermined.

As part of the wrongful death investigation, the Dulins hired a toxicology expert from Tennessee. The toxicologist's opinion was that because no pills were found in Kari's stomach at the autopsy, he did not believe she died of an overdose, nor that she died within 45 minutes, the time Baker said he was gone from the house.

The JP held an inquest in August 2007 at the Dulins' urging and once the results of the autopsy came in. He took evidence from the toxicologist, pathologist, police officers, and the Dulins; Matt Baker did not testify at the hearing. At the end, the JP changed his previous ruling on the death from suicide to undetermined.

That October, Baker was arrested for murder on a warrant from the Hewitt Police Department, based on numerous facts: the improbability of Baker's timeline the night of Kari's death, his statements during the 911 call, searches of his office and home computers, an affair with Vanessa Bulls, the toxicology from the autopsy, and the JP's change in the cause of death from suicide to undetermined. The case was assigned to me, Crawford Long; Susan Shafer, another prosecutor in our office, offered her expertise and assistance, and I gladly accepted.

Preparing for trial

In my almost 30 years of prosecuting cases, this was one of the most difficult, partly because of the enormous publicity. Both the defendant and a lawyer for the victim's family had been interviewed on TV. News programs "20/20" and "48 Hours" broadcast stories on the case, an article ran in *Texas Monthly* magazine, and stories were published in numer-

ous newspapers across the country. Additionally, I had to learn some things that had nothing to do with the law—specifically, the effects of drugs and lividity (pooling of blood) in a body. The answers I found were not reassuring for our case.

Baker's version of events was that he left home to get a movie for Kari at 11:10 p.m. Baker's credit card record showed that he rented movies at 11:50 p.m. The 911 call was received at midnight. That meant that Kari would have had to overdose and die within her husband's 45- to 50-minute absence. The problem was that while the medical people believed that time frame was unlikely, they did not believe it was impossible—a very tough standard to overcome for beyond a reasonable doubt. Plus, because Kari's body had been embalmed, most of the medical experts I consulted were unable to conclusively say whether drugs had caused her death.

The question of lividity had the same problems. The consensus was that lividity can form in 20 minutes to two hours after death. The pictures of Kari were taken a little after 12:30 a.m. and showed lividity; however, the photographs were not close-ups, and doctors were unwilling to say from the pictures when her death could have occurred.

Vanessa Bulls

Even more curious was Baker's relationship with Vanessa Bulls, the woman who had Kari's cell phone. During previous questioning by law enforcement, she had denied a relationship with Baker or any knowledge of Kari's death.

Abdon Rodriguez, an investigator in our office, was assigned to this case; his easygoing manner and his reputation for getting suspects to confess to their crimes made him a natural choice for talking with Vanessa Bulls. Investigator Rodriguez interviewed Vanessa with her attorney, Bruce Burleson, on January 27, 2009, and she held firmly to what she had told Hewitt police investigators in August 2006.

We decided to subpoena Vanessa to the grand jury. She again brought her attorney, who said that Vanessa intended to take the Fifth but that she had some information for us. We went before Judge Matt Johnson of the 54th District Court, had him grant her testimonial or "use" immunity, then took her before the grand jury. We knew through cell phone records that she had been with Baker about a week after Kari's death, and she and Baker had been spotted looking at rings in a jewelry store a few weeks later. I questioned her about the many phone calls and about shopping for rings, and she admitted to these incidents but denied an intimate relationship with Baker. Toward the end of my questioning, I asked if Baker had ever told her anything about Kari's death, and her answer shocked me: She said that Baker told her he killed Kari for her. I quickly got the details of the conversation locked down while she was under oath. After she completed her testimony, we consulted with our elected Criminal District Attorney, John Segrest, who told us to prepare a murder indictment against Matt Baker and present it to the grand jury that afternoon.

Even more scandalous details

We still felt that Vanessa was holding back information, so we sent Investigator Rodriguez to speak with her again on March 31. Vanessa essentially told him the same details that she had given in the grand jury, but once Investigator Rodriguez turned off the tape recorder, Vanessa asked if he believed her. He replied that he didn't think she was telling him everything she knew. Vanessa then admitted that she and Baker had slept together one time, in the master bedroom of the Bakers' home, before Kari's death.

Feeling that Vanessa might disclose more if given the chance, we arranged for another meeting with her in our office after hours. I had another commitment that night, so fellow prosecutor Susan Shafer and investigators Montea Stewart and Abdon Rodriguez met with Vanessa and her attorney, now Russ Hunt, on September 2. Over the next four hours, she told them about her relationship with Matt Baker and what she knew of Kari's death.

Baker had begun flirting with her in November or early December 2005, and by mid-December the flirtation had become overt, with Baker telling Vanessa such things as, "Don't date that guy—only date your preacher." He also said that he had cheated before, that Kari never had a clue, that he had no STDs, and that he was unable to get Vanessa pregnant. Their conversations often included Baker saying negative things about Kari: that she was always depressed, that he was the primary caretaker of the children, that

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Kari was lazy, and that their girls did not like their mother. Vanessa and Baker began a sexual relationship in late February 2006 at the Bakers' home. After their first sexual encounter, Baker told Vanessa that Kari was hideous and that if he and Vanessa "ever fell so much in love," that Baker would "find a way out of" his marriage.

By March, Baker was running his murderous ideas by Vanessa, suggesting such things as tampering with Kari's brakes or setting up a drive-by shooting—even remarking that he could hang Kari and convince authorities that it was a suicide. Vanessa said that Baker told her that he had tried to buy Rohypnol (a "date rape" drug) to incapacitate his wife.

Matt finally settled on a plan. He would slip something into Kari's drink and leave a suicide note. When Vanessa asked him how he intended to write the note, Matt replied that he would type it. "You can't type a suicide note!" Vanessa told him, but Matt replied that Kari typed everything and that, with the anniversary of Kassidy's death looming and the family's awareness of Kari's grief, no one would be suspicious.

Two weeks before Kari's death, Matt told Vanessa that he had made Kari a milkshake spiked with medication, but she had refused to drink it because it tasted like lead. (Later, we found an email Matt had sent to Kari on her work account from around that date, saying that he would make her a better drink than the one he made the night before by putting lots more chocolate in it.)

On Friday morning, April 7, Vanessa knew that Matt intended to make another attempt on Kari's life during his "date night" with her that evening. On Saturday morning, Vanessa's mother woke her and told her that Kari was dead—word of her death was quickly spreading among church members. Vanessa and her parents went to the Dulins' home later that day to offer condolences. As they were leaving, Matt followed them out and winked at Vanessa as she and her parents drove away.

The next Wednesday, while the Baker girls were at school, Vanessa sat with Matt in his living room, and he revealed the details of Kari's murder as though telling a story around the campfire. He had taken apart some sexual stimulant capsules, filled them with Ambien, and given them to Kari. (She thought she was taking an over-the-counter stimulant as part of the "date night," but Matt consumed the sexual stimulant himself.) He took Kari to the bedroom as she became groggy and handcuffed her to their bed, where he engaged in foreplay until she fell asleep. (Although Baker always asserted in interviews and his videotaped deposition that Kari was nude when he "found" her, we believe that she died wearing underwear and a t-shirt.) Kari was snoring but alive. Matt kissed Kari's forehead and told her to give Kassidy a hug or a kiss from him, then placed a pillow over her face. Kari struggled, moving her head back and forth a few times, but between the Ambien and the handcuffs Baker was able to subdue her. He told Vanessa that he removed the pillow, thinking that Kari was dead, but that her eyes flew open and she took one enormous gasp of air. He replaced the pillow on Kari's face, this time being careful to apply pressure around her nose and mouth. When he was sure that Kari was dead, he removed the handcuffs, typed the "suicide" note on the home computer, rubbed Kari's hand on the note in case anyone checked for fingerprints, and placed the note and a bottle of sleeping pills on the bedside table.

After staging the scene, Baker left the house to establish his alibi by buying gas and renting a video. He locked the bedroom door on his way out, leaving the couple's two daughters, then ages 5 and 8, alone in the house with their mother's body. Luckily for Matt Baker, none of the police officers who arrived at the scene checked the home computer for the "suicide" note or took the computer as evidence.

Vanessa's statements to us that night confirmed our suspicions about Baker, but we were shocked at how much she knew. We were well aware that Vanessa's progressively more detailed disclosures about Kari's death meant serious credibility issues in front of a jury, and we were eager to find other evidence to corroborate her testimony at trial. We tracked down the email that Baker had sent to Kari shortly before her death regarding the drink that he had made for her. That email not only corroborated what Vanessa said about Baker drugging his wife but also about Baker killing Kari near the date of Kassidy's death to make it look like a suicide.

Additionally, Vanessa told us that Baker had sent her an MP3 of the song "Dirty Little Secrets" by the All-American Rejects. Baker identified strongly with the lyrics ("I'll

keep you my dirty little secret / Don't tell anyone or you'll be just another regret") and reminded her that if she told what she knew, she'd be his "next regret." (Vanessa had broken off her relationship with Baker in July 2006 and had had no further contact with him.)

Knowing that these pieces of evidence corroborated Vanessa's testimony, we prepared to go to trial.

Trying the case

Two goals of our voir dire were to keep potential jurors from being inclined to acquit Baker because he was a minister and to keep them from being disqualified because of the publicity. Indiana prosecutor Gregory Garrison wrote a book called *Heavy Justice* on his trial of boxer Mike Tyson for rape. In the book, he included voir dire questions intended to prevent jurors from giving Tyson celebrity status, and we used some of them on our own prospective jurors so panelists would not give Baker special status as a minister.

To protect potential jurors who had heard of the case through the media, we got help from Toby Shook, a former Dallas prosecutor. He told us about an excellent case, *Newbury v. State*,[1] on qualifying a juror who has already formed an opinion; its language was very helpful. Fewer panelists were disqualified on publicity grounds than we expected, and jury selection was completed by the end of the day.

Susan Shafer gave the opening statement. Though our office normally has an open file policy, in this case we had not provided the defense with Vanessa Bulls' statements. We had made much of what was in the file—offense reports and evidence from the civil case—available to the defense but held the information from Vanessa close to the vest. The defendant had a propensity to change his story and lie, and we wanted to keep Vanessa's testimony sealed as long as we could. Shafer went through the evidence we would present and ended by telling jurors that Vanessa would tell them how Kari died.

We began by calling witnesses who testified about Kari's state of mind in the week leading up to her "suicide" to show the jury the improbability of her killing herself. She had been forward-looking and excited about an interview for a new teaching position; the interview was the day of her death.

Next we called the officers who responded to the 911 call and the justice of the peace who had ruled Kari's death a suicide. We had the delicate task of putting on witnesses who had come to the scene and made some obvious mistakes and pointing out these mistakes to the jury. Most of our witnesses were willing to admit that they have since learned from the errors they made on the night of Kari's death or that they simply acted on the information Matt Baker gave them. We were very frank that the investigation did not include many important things, such as checking the home computer for the suicide note, noting when it had been typed, taking the computer and printer, and collecting the wine cooler bottles on the bedside table. We simply offered the evidence as it had come to us.

We called the Dallas pathologist who had performed the autopsy on Kari's body and had him explain why it was impossible to state a cause of death. We wanted all the evidence before the jury so it would not appear we were hiding anything.

After the medical testimony, we put on the computer evidence. Baker had said he was using his computer to find out the effects of sleep aids his wife had been taking because he was afraid she would overdose. He was adamant he had never tried to order drugs. Our computer expert showed that many of the sites he visited were not informational but solely for buying drugs. On one site, Baker had attempted to purchase Ambien and had put the order in the shopping cart but not completed it. We then called Mark Henry, the owner of the international site where Baker had tried to purchase Ambien; he came from Spain at his own expense simply because he knew that no one else could explain what he knew about the business records and about how his sites work. He testified that, due to his marketing knowledge, his websites are not reached by simply searching for "overdose by sleeping pills" or "Ambien"; rather, a person would have to search for "buy Ambien" or "Ambien without prescription" for his site to pop up. He operates a point of sale, rather than informational, site. Henry testified to the steps a person would take to put an order in the cart. He said many potential customers stop the order, as Baker had done, when a message came up that shipping would take two weeks and would be delivered

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via U.S. Postal Service; many U.S. customers would rather order from other prescription websites that delivered via a private delivery service such as FedEx. Baker had visited this site only a couple of weeks before Kari's death and had placed a bottle of generic Ambien in the shopping cart before abandoning the purchase.

We next called Linda Dulin. We wanted to tell the jury about some crushed pills Kari had found in Matt's briefcase a few days before her death, but we knew it would draw hearsay objections. To side-step them, we asked Linda about her own confrontation about the pills with the defendant *after* her daughter's death. In Linda's conversation with Baker, he acknowledged Kari had found the pills and said that children at the Waco Center for Youth had put them in his briefcase because they did not want to take their medicine. We then played a videotape of Baker's deposition in the wrongful death suit where he claimed that the pills were Kari's and denied they came from the students at the Waco Center for Youth. Immediately nailing him on his different lies with the video was destroying his credibility with the jury, whether he testified or not.

We then called Vanessa Bulls. An attractive sixth-grade teacher, she was very articulate. She told about meeting Baker at church and admitted the affair with him. We carefully discussed each interview she had given, and she admitted lying to the Hewitt Police Department and initially to Investigator Rodriguez, as well as not giving the full story during her grand jury testimony. When she discussed how Baker talked to her about plans to murder his wife, everyone was horrified. She told the jury that she knew when Baker planned to kill Kari and how he later told her how he had done it—by giving her enough crushed Ambien (disguised as a sexual stimulant) for her to pass out, handcuffing her to the bed, then smothering her with a pillow. He then kissed her on the forehead and said, "Give Kassidy a kiss for me" or "Give Kassidy a hug for me." This testimony was ghastly. Vanessa said in one of their last conversations, Baker told her he killed Kari for her and that "God had forgiven him." We felt it was crucial for the jurors to believe Vanessa, to understand that although she had lied in the past, they could trust her testimony. Someone normally lies to get out of trouble or to make herself look better, but Vanessa's statements after she quit lying did the opposite—they got her involved in the case and painted her in a terrible light. (We pointed this out in closing arguments too.)

Vanessa held up reasonably well under cross-examination. She became confused, as we did, when the defense asked which statements she had made during various interviews, but she was able to refresh her memory over a lunch break and, upon redirect, unequivocally stated which information she had provided in which interviews, even those in which she absolutely denied any knowledge of Kari's murder. Susan's meetings with Vanessa paid off as she was willing to acknowledge all the lies she had told before admitting the affair and foreknowledge of the murder.

After Vanessa testified, we called Dr. Sridhar Natarajan, Chief Medical Examiner at the Lubbock County Medical Examiner's Office. We had asked him to review the autopsy findings from Southwest Forensics. Dr. Natarajan pointed out the gravitational lividity apparent in the few crime scene photographs we had; it did not match up with Baker's explanations for how he found Kari, nor with a diagram he drew for his deposition in the civil case. In looking at the photographs of Kari at the scene and the autopsy photos, Dr. Natarajan found a mark on her nose, which was consistent with a pillow being pressed over her face. After his testimony we rested our case.

The defense

We prepared for Matt Baker's testimony the next day. Though defense counsel never implied he would take the stand, we thought he might try to talk himself out of yet another scrape, as he had done all his life. We wanted to question him on a long list of contradictory statements he had made on many subjects. Our good fortune was that he had been interviewed on "20/20" and "48 Hours" and had testified in the deposition for the Dulins' wrongful death suit, so we could use his words where we wanted to by editing and presenting his videotaped statements. (To get these TV interviews into evidence, we used information from an article in the July-August 2009 issue of *The Texas Prosecutor* journal about the new "media shield" law, and the court took judicial knowledge of the programs that had aired.) We also prepared a dummy on a bed for him to demonstrate

how he put a shirt on his naked wife while talking to the 911 dispatcher on his cordless phone, as he'd claimed to have done, during the call the night of Kari's death. (Although the entire call is four and a half minutes, Baker states after 90 seconds of "dressing" Kari that he had her on the floor and was preparing to begin CPR.)

The next morning, defense counsel introduced several of Kari's emails where she expressed sadness over Kassidy's death. The defense also called a DNA expert to testify about DNA on the "suicide" note. (We had decided not to call the DNA witness ourselves because he had compared DNA standards for Kari, Matt Baker, Vanessa Bulls, Linda Dulin, and a number of police officers with the DNA on the note. The numbers were so low that they did not point to any individual.) Then the defense rested. We were disappointed Baker did not testify, but frankly, as a tactical point, it would have been very difficult for a defense attorney to put him on the stand, given the number of conflicting statements he had already given and the impossibility of explaining so many assertions made on the 911 tape.

The jury was out approximately seven and a half hours before returning the guilty verdict. We learned later they were very thorough in their deliberations and that there was only one vote.

Punishment

On punishment we called several women that Baker had molested over the years. One incident involved a young woman who had gone to the hospital to visit the Bakers while their daughter Kassidy was ill. We also put on testimony that Baker had been consistently visiting pornographic websites on his computer at the Waco Center for Youth and on the laptop provided to him by Crossroads Baptist Church.

The defense called a number of character witnesses for Baker. Inter-

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estingly, they seemed better acquainted with the family than with him. Some of his following seemed to have almost a cult-like support of him. When one woman was asked if her opinion was altered by the fact he had an affair, had molested young women, and watched pornography at work, she said she still believed he was a "godly person." Another of his witnesses testified that she believed that a man could murder the mother of his children and still be a good father to the children.

Both sides made their punishment arguments. Baker had filed an application for probation, as he was eligible under the statute in place in 2006. His attorney, Harold Danford, told the jury that on that day, they had seen the good side of Matt Baker, the good father, the good neighbor, the church volunteer.

We responded by telling the jury that the only good side of Matt Baker is his daughters, whose mother he killed and who convinced the girls that their mother had abandoned them and that he was being railroaded in the courts. We reminded the jury of the last few minutes of Kari's life, when she knew that her husband, whom she loved and trusted, was killing her, and of the damage Baker had done not only to Kari but also to her daughters and family.

The jury returned several hours later with a 65-year sentence. We were satisfied that justice had finally been done both for the Dulin family and the people of the State of Texas.

Matt Baker was a person who led a double life and used his position as a minister for evil purposes. In the end he reminded us of the quote from Shakespeare's *The Merchant of Venice*, "The Devil can cite Scripture for his purpose." ❇

Endnote

1 135 S.W.3rd 22 (Tex. Crim. App. 2004).

Editor's note: Any successful prosecution is a team effort. Investigators Abdon Rodriguez and Montea Stewart helped us put the case together. John Messinger, our appellate attorney, assisted with many legal issues. Prosecutor Robert Callahan helped us with the visual displays for the jury, as did Garrett Pennington, a law student with a third-year bar card who donated his time to organize evidence.

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Dual office holding

When can a prosecutor (or judge, city council member, or constable) hold another government position? Here is an updated chart to show when it's OK to take a second office.

By Seth Howards
TDCAA Research Attorney in Austin

This chart provides a summary of Attorney General Opinions and caselaw on dual office holding. For positions not included below, the Attorney General's Office has provided a 24-page handbook to answer many possible questions; it may be found at www.oag.state.tx.us/AG_Publications/pdfs/dualoffice_easy.pdf.

Position 1	Position 2	OK?	Authority
Assistant DA	Municipal utility district, elected director	Yes, no salary	LO-88-19
Assistant DA	School district board of trustees, same county	Yes	LO-89-082
Board of trustees, ISD (specific circumstances)	City council (and other boards)	No	LO-92-005; see also *Thomas v. Abernathy County Line Independent School District*; 290 S.W. 152; JM-129; LO 90-52
Building inspector	Fire chief (same city)	Yes	*State ex rel. Beicker v. Mycue,* 481 S.W.2d 476
Candidate, county judge	Mayor	Depends	JM-553
Chief appraiser, multiple counties	Tax assessor/collector, multiple districts	Yes	JM-499
Chief deputy, county tax assessor-collector	Court reporter, county court	Yes	JM-1083
Chief of police, elected	Constable, elected, precinct within same city	No	JM-422
City administrator	Assistant police chief	No	GA-536
City councilmember	Member, school district board of trustees	No	LO-93-22
City councilmember	Member of the fire department	No	LO-97-034
City councilmember	Police officer (different city)	Yes	LO-93-27
City councilmember	Teacher at state college	Yes	LO-93-37
City councilmember	Chairman, board of director of university research foundation (non-profit corporation) (same city)	Yes	JM-1065
City councilmember	County commissioner	No	GA-15; LO 88-49
City councilmember	School trustee, state college	No	LO-93-22; *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152

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Position 1	Position 2	OK?	Authority
City councilmember	Volunteer fire department (same city)	Yes	JC-199; see Tex. Loc. Gov't Code §21.003 (adopted in response to JC-199).
City councilmember	Director of a flood control district	Yes	LO-96-064
City councilmember	School board trustee (same city)	No	JM-634; JC-403
City councilmember	Director of a county water authority	No	LO-92-68
City councilmember	County special district employee	Yes	JM-1266
City councilmember	School district employee	Yes	JM-118; MW-230; JM-1266
City councilmember	Director of a navigation district	Yes	JM-1266
City councilmember	Reserve police officer	No	JM-386
City councilmember	County auditor	No	JM-133
City councilmember	Fire chief (same city)	No	MW-432
City councilmember	Selective service board member	Yes	GA-57; allowed as long as selective service system is on standby (no draft)
City councilmember	Justice of the peace	No	JM-395
City finance director	Temporary municipal judge	Yes	GA-199
City manager	Transit board	Yes	GA-538
City official	Political party precinct chair	Yes	JC-562
Constable	Bailiff	Yes	LO-92-73 (and salary OK per LO-97-060)
Constable	Jailer	Yes	JM-485
Constable	School board	Yes	JM-519
Constable	Deputy sheriff	Yes	GA-402
Constable	Groundwater district board	No	GA-214; GA-0540
Constable	Municipal fire fighter	Yes	C-270
Constable, elected	Public school teacher	Yes	LO-94-077
County attorney	Board of directors, county hospital	No	LO-97-100
County attorney	City attorney, same county	Yes, so long as not subject to Prof. Prosec. Act	JC-0054
County attorney	Assistant county attorney of neighboring county	Yes	GA-350
County attorney	School district board of trustees, same county	No; automatic resignation	LO-95-029
County attorney	Special prosecutor, another county	Yes, no salary	JM-763
County attorney, elected	City prosecutor, same county	Yes	LO-96-148
County attorney, elected	Professor, part time, state university	Yes	LO-90-039
County commissioner	Board of trustees, community college (same county)	No	JM-129
County commissioner	Reserve deputy sheriff	Yes	LO-97-081
County commissioner	Municipal judge	Yes	GA-348
County court at law judge	Trustee, independent school district	No	JM-213

Position 1	Position 2	OK?	Authority
County EMS employee	Municipal justice of the peace	Yes	GA-569
County judge	Administrator, county EMS, same county	No	LO-94-46
County judge	Director, river authority	No	JM-594
County judge	Practicing attorney, same county	Gray area	JC-0033; see also Govt. Code §82.064 and Code of Prof. Resp. Rule 1.06
County judge	Records management officer, same county	Yes	LO-90-062
County judge	Texas Board of Criminal Justice	No	LO-95-052
County tax assessor-collector	Trustee, independent school district	No; automatic resignation	LO-92-004
District attorney	Teaching position, state university	Yes	LO-93-96
Dept. of Public Safety officer	Governing bodies; any 'public office'	No	JM-588
Deputy constable	Assistant city fire chief	Yes	DM-156
Deputy district clerk	Deputy county clerk	Yes	MW-415
Deputy sheriff	School trustee	Yes	O-3308 (1941)
Director of a municipal utility	Member of planning and zoning commission	No	JC-339
District clerk	Reserve deputy sheriff	Yes	LO-98-035
District judge	School district board of trustees, same district	No; automatic resignation	LO-98-094
Election clerk	Off-duty school district employee	Yes	JM-862
Former district judge, sitting by assignment (and available for assignment)	Teaching position, state university	Yes	LO-98-109
Investigator, DA's office	Trustee, independent school district	Yes, no salary	LO-95-001
Justice of the peace	City council	No; automatic resignation	JM-395
Justice of the peace	Deputy sheriff or deputy constable, unpaid	No, unless another county	LO-92-35
Justice of the peace	Jailer	No	JM-1047
Justice of the peace	Juvenile law master, same county	Yes	LO-96-078
Justice of the peace	Public school teacher	Probably yes	See Attorney General publication "Traps for the Unwary," part IV
Justice of the peace, appointed	Municipal judge, part time, city within JP's precinct	Yes	JM-819, overruling in part JM-422, reinstating LO-2055
Local public official, elected	Employee of state legislator	Yes; salary allowed in some cases	LO-98-039
Marshal	Constable	No	*Torno v. Hochstetler*, 221 S.W. 623
Mayor	Hospital district director	No	JC-363

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Position 1	Position 2	OK?	Authority
Municipal employee	Member, city commission, elected	No, but need not resign to run	LO 97-034
Municipal judge	Director, Gulf Coast Waste Disposal Authority	No	JC-0095, LO-98-124
Municipal judge	Junior college trustee	Yes	JC-0216
Municipal judge	Board of directors river authority	No	LO-97-027
Municipal judge	Municipal judge, another district	Usually no; never if elected to both	DM-428
Municipal police officer	City council, different city (uncompensated)	Yes	LO-95-048
Peace officer	Commission from more than one agency	Case-by-case	GA-0214
Police chief	School trustee	Yes	GA-393
Police officer	City council, another jurisdiction	Yes	LO-93-27
Police officer	Police officer, another city	No	LO-92-36
Police officer	Municipal judge (different city)	Legally yes, but no	LO-93-59, but see State Commission on Judicial Conduct PS-2000-1
Police officer	Part-time security officers	Yes	DM-212
Police officer	County road & bridge dept. employee	Yes	JM-862
Polygraph examiner for district attorney's office	Municipal judge	Unclear	GA-551
Secretary, district attorney	Court reporter (occasional), same county	Yes	JM-163
School board trustee	County or precinct chair of political party	Yes	JC-537
School board trustee	Groundwater conservation district	No	JC-557
School board trustee	County treasurer	Yes	JC-490
School board trustee	Teacher	No	LO-97-034; LO-90-045; LO-89-057; LO-89-002; LA-114
School district board trustee	Volunteer teacher	No	JC-371
School trustee	Water improvement district board	No	GA-224
School trustee	County improvement district board	No	GA-307
School trustee, college district	Municipal utility director	No	GA-32
School trustee state college	City council	No	LO-93-22, *Thomas v. Abernathy ISD*, 290 S.W. 152
Sheriff	Volunteer fire fighter	Yes	LO-93-54
Sheriff	School trustee	No	GA-328
State legislator	Independent contractor for county government	Yes	LO-95-022
State representative	Assistant county attorney	No	JC-0430
State Supreme Court justice	Board of directors, State Justice Institute	No	DM-49

❇

Contempt of court for Texas gang injunction violators

A novel approach to keeping gang members off the streets while they await trial in Wichita County

By R. Kinley Hegglund, Jr.
Senior Assistant City Attorney in Wichita Falls

The ongoing and dramatic fight against criminal street gangs requires law enforcement officials to proactively make use of all available options. Three gang injunctions have been implemented in Wichita Falls since 2006 (read more about them in the September-October 2007 issue of this journal at www.tdcaa.com/node/1140), the first of which named 21 members of the Varrio Carnales (VC) street gang. Violations of the injunctions are common (police have made more than 50 arrests since the injunctions went into effect), but so are additional crimes while gang members are out on bond. To protect law-abiding residents, we began searching for ways to keep these repeat offenders off the street until their trials; we found that trying gang members for civil contempt not only punished them more quickly but also kept them in jail instead of letting them bond out.

Background

The VC Gang Injunction revolves around certain prohibitions in a set safety zone. VC Safety Zone No. 1 comprises 1.54 square miles and is located in the center of Wichita Falls. This zone was created because it is where the VC tended to commit the majority of its criminal activity and where many of the gang members lived and went to school. Within the safety zone, the trial court prohibited named defendants from engaging in 29 specific activities, including associating with other gang members, possessing alcohol, wearing gang colors, and violating curfew. Although these activities are not generally illegal, because a judge has determined that the prohibitions are reasonably related to stopping gang activity, they were included in the injunction. It should be noted that a defendant in a civil gang injunction case receives due process prior to being placed on a gang injunction. Such defendants have the right to retain legal counsel and the right to a jury trial. The 29 VC gang prohibitions apply only to defendants who have been afforded said due process of law.

Gang injunction violations constitute a Class A misdemeanor.[1] The DA's office has been very successful in obtaining convictions for these violators, and there are generally multiple injunction violations per arrest. Convictions typically result in 10 months' incarceration per incident, but unfortunately, gang members habitually violate injunction prohibitions while released on bond for their initial offenses. The lack of severe and immediate consequences emboldens the gangs and frustrates the law enforcement officers tasked with gang suppression. When a gang member repeatedly violates a gang injunction, the community suffers and individuals are put in harm's way.

Section 125.066 of the Civil Practice and Remedies Code authorizes violators of gang injunctions to be held in civil contempt of court. Punishment for contempt was set by statute at 10 to 30 days in jail and $1,000 to $10,000 per violation. A contempt of court proceeding can be completed quickly, and a conviction places the gang member behind bars without possibility of bonding out. Pursuing civil contempt was a novel idea and completely unprecedented in Wichita County, so with the permission of City Attorney Miles Risley and Criminal District Attorney Barry Macha, staff attorneys further researched the matter. We found that a defendant in a civil contempt case is entitled to certain protections, such as the right to court-appointed counsel (if indigent) and a jury trial (if requested) if the possible jail time exceeded six months (including stacking).

Not finding any legal obstacles and having confidence in the jurors of Wichita County, we decided to

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proceed. On November 14, 2008, contempt cases were filed and set for trial in December 2008 against two leading VC members, Israel Contreras (age 29) and Sergio Maldonado (age 21). The suits alleged that each defendant had violated eight separate provisions of the VC gang injunction. Contreras' violations stemmed from one incident, whereas Maldonado's violations were from three different arrests.

Contreras' violations

On September 5, 2008, Officers Jason Leavelle and Jason Beesinger, members of the Wichita Falls Gang Task Force, observed Israel Contreras driving in VC Safety Zone No. 1 at 10:36 p.m. (after the 9 p.m. curfew). They paced him and found that he was driving over 80 miles per hour in a marked 60 mph zone. As the officers were pursuing Contreras, they observed what appeared to be a lit cigarette fly out of the car's window, followed soon thereafter by a plastic baggie. At the stop, Officer Beesinger noted a strong odor of marijuana coming from Israel Contreras. Officer Leavelle retrieved the discarded baggie and found it contained marijuana, and Contreras admitted to Officer Beesinger that he had thrown a marijuana blunt from the car. In addition to the marijuana, the officers observed open containers of alcohol in the car, including a cup of alcohol sitting in the console next to Contreras accompanied by another VC gang member.

Contreras was arrested for contempt of the gang injunction. His eight violations included associating with another VC gang member, possessing an alcoholic beverage, speeding, possessing of narcotics, violating the 9:00 p.m. curfew, operating a motor vehicle while under the influence, tampering with evidence (attempted disposal of drugs), and driving with a suspended driver's license.

Maldonado's violations

Maldonado's first five violations stemmed from a November 17, 2006, police pursuit in which Maldonado and other VC gang members attempted to evade police. Upon capture, Maldonado had in his possession a cell phone with a VC screen background—possessing property with gang symbols is a violation of the injunction. Additionally, Maldonado was charged with breaking the injunction's curfew, associating with VC gang members, fleeing from peace officers, and giving false information to a peace officer (for initially denying ownership of the cell phone).

Two weeks later, Maldonado was observed associating with two other members of the VC gang and entering the home of another gang member, both violations of the injunction. His eighth violation occurred when Maldonado was observed on a public street in the VC gang zone after curfew.

Trial preparation

The city's hope for a quick trial in December 2008 did not materialize. The main issue was whether this case was criminal or civil in nature. The defendants' attorneys insisted that this was a criminal case and should be governed by the rules of criminal procedure, where the burden of proof would be on the city to prove guilt beyond a reasonable doubt. The city felt that the legislative intent was clear that this was a civil contempt case; the gang statute expressly states that contempt of court proceedings are civil proceedings. We presented the legislative history to the trial judge to show that legislators' purpose in creating the contempt statute was to provide a speedy alternative to backlogged criminal dockets (additionally, gang violations can be tried criminally via the Penal Code). That both provisions exist strengthens the argument that the contempt of court process constitutes a civil alternative to criminal prosecutions. Visiting Judge R.L. Thornton, after reviewing briefs from both parties, ruled that the case would be tried as a civil proceeding, and the burden of proof would be simply preponderance of the evidence. The case was transferred to the 78th District Court and set for a jury trial on July 20, 2009, before Judge Roy Sparkman.

With the trial months in the future, the city sent out discovery to both defendants, including interrogatories, admissions, requests for production, and requests for disclosure. At this point, Contreras' attorney withdrew, citing a lack of experience in civil litigation. Maldonado's lawyer filed a global objection to the discovery one day after discovery was due; however, neither defendant responded to the discovery within the required 30-day period. Consequently, pursuant to Civil Rule 198.2(c), the admissions became deemed as a matter of law. This constituted a major misstep by the

defendants' counsel. By failing to specifically object to the discovery, the defendants lost their right to object to the city's discovery. The deemed admissions in effect meant that the defendants would be going forward with one arm tied behind their backs.

The city then filed a motion to compel discovery, which Judge Sparkman granted, but Maldonado and Contreras failed to meet the court-ordered deadline. Maldonado's attorney, likely in an attempt to wiggle out of his client's discovery problems, then filed a petition for writ of mandamus in the Fort Worth Court of Appeals, alleging that the trial judge erred in treating the case as a civil, rather than criminal, contempt. The idea was that if the case were not civil in nature, then the civil discovery issues would be moot.

It soon became clear that the appellate court was not going to render a decision prior to the July trial date. With the fundamental nature of this case still in question, the city opted to postpone the trial until after the Fort Worth Court of Appeals denied Maldonado's petition for mandamus and his motion for rehearing.

End game

Once the appellate issue was resolved, the city began its downhill run. We drafted a second motion to compel discovery and we anticipated a November trial setting. In early October 2009, the city received a pleasant surprise: Maldonado accepted a nine-year plea deal on a pending felony, delivery of a controlled substance. He was no longer a threat to the community.

The city turned all of its energies toward Israel Contreras. We filed a motion for sanctions for abuse of the discovery process related to the defendant's failure to answer any discovery, and on October 13, Judge Barney Fudge granted the city's request for sanctions. Contreras was then prohibited from offering any evidence or defenses at trial that would have been responsive to the tendered discovery requests. Coupled with the deemed admissions, Contreras' prospects at trial looked bleak. The city asked that the case be set for a bench trial, and the defendant did not request a jury trial. Trial was set for November 30.

Considering how long it took to get there, the trial itself was uneventful. Contreras began by asking for court-appointed counsel. We cited authority that a trial judge, even in a criminal case, has discretion to deny a defendant's request for court-appointed counsel on the eve of trial. Judge Fudge denied Contreras' motion for counsel and ordered the trial to proceed.

Three witnesses took the stand: Officers Leavelle and Beesinger testified as to the events they observed on September 8, 2008, and Sergeant Charles Eipper, the head of the gang task force, testified as an expert witness concerning the Varrio Carnales street gang and Israel Contreras' position as a high-level member. The cross-examination of the three officers was minimal. The proceedings ended when the deemed admissions were read into the court's record. After closing arguments, Judge Fudge found Contreras in contempt of court on all eight violations. He then retired to consider punishment.

We asked for the maximum 30 days and $10,000 fine per violation as well as for attorney's fees. The city additionally asked that the court stack the sentences.[2] Judge Fudge ruled that Contreras would receive 30 days per violation, to run consecutively, and would be fined $1,000 per violation, plus $5,000 in attorney's fees. (Should Contreras come into money in the future, the city will attempt to collect.) We were very pleased at the 240 days' jail time and $13,000 in fines and attorney's fees.

Conclusion

These first test cases allowed the city to evaluate the usefulness of the gang injunction civil contempt statute. Although the cases did not proceed as quickly as we first anticipated, creating the documents and other forms will greatly assist in future contempt proceedings, and familiarity with the procedures will likely result in quicker turnarounds in the future. Injunction violations continue to occur in Wichita Falls, and it is likely that Contreras and Maldonado will continue to be problems for local law enforcement upon their release.

That said, the gang injunctions and related litigation and contempt proceedings have been successful. Gang activity has been reduced by approximately 18 percent, and gang members are not the brazen band of thugs that once terrorized the community. They are more timid in public and are forced to operate much more in the shadows because they can no longer gather openly or travel together in the safety zone. This dis-

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ruption greatly affects their ability to utilize the gang's main asset: intimidation through numbers. An unforeseen benefit has recently materialized in that the local gangs are finding it more difficult to recruit new members—law enforcement's actions seem to be adversely affecting the gang's coolness factor.

The success of Contreras' case means that the city of Wichita Falls has another tool in its arsenal in its fight against criminal street gangs. Additionally, a message was sent to the gangs that Wichita Falls will continue to proactively fight against gang crime. This city will not tolerate criminal street gangs. ❇

Endnotes

1 Penal Code §71.021.

2 *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999); *Ex parte Shaklee*, 939 S.W.2d 144, 145 (Tex. 1997).

NEWS WORTHY

Free ethics training

TDCAA is pleased to kick-off our regional summer tour early this year with two dates in May.

W. Clay Abbott, our DWI resource prosecutor and nationally renowned speaker on prosecutorial ethics, will be in Lubbock on Friday, May 14 (in the Lubbock County Central Jury Pool, 1302 Crickets Ave.), and in El Paso on Thursday, May 20 (in the District Attorney's Large Conference Room, 500 E. San Antonio St.), for three hours of ethics training. Both sessions start at 1:30 p.m., provide three hours of CLE credit, and are free to all prosecutors and prosecutor office staff. There is no registration at all; simply walk in on the day of the training.

Check www.tdcaa.com for more training as new sites are posted. ❇

How I became a cattle prosecutor

Stealin' cows is still big business in Texas. Here's how a livestock Ponzi scheme in Williamson County was dismantled and the brains of the operation brought to justice.

By Michael Jarrett
Assistant District Attorney in Williamson County

When I came to Williamson County from Dallas in February 2008, I knew that things were going to slow down. As I reviewed my new docket, one case stood out above all the rest. There in the back of my file drawer, where it had been clearly sent to die, was the thick, tattered, three-year-old case against Monte Sharp, who had been indicted for the first-degree felony offense of … theft of cattle. So began my journey on the road to becoming the cattle prosecutor.

A little history on cattle rustlin'

Historically, cattle thieves have resorted to many different methods of stealing cows, including simply cutting fences and taking unbranded cattle or altering the brand. In the 1930s thieves loaded and moved cattle with trucks and trailers in the dead of night. In the late 1970s helicopters were used to herd cows.

Modern-day cattle rustling in many respects can look like a white collar-fraud case, as I learned when investigating Monte Sharp. According to the Texas & Southwestern Cattle Raisers Association, strong cattle market prices and a weak economy has led to an increase in cattle theft. (In some cases a steer can fetch close to $1,000 at auction.) Today's punishment for cattle rustling, a first-degree felony when the value is over $200,000, is a far cry from the vigilante justice that early cattlemen and legendary figures like Judge Roy Bean dispensed, which often ended with the rustler hanging from the nearest tree.

Schwertner Farms

The cattle trading business is still alive and well in the great state of Texas, and nowhere is that more clear than in the small town of Schwertner. After the Second World War, James Schwertner settled in the northern part of Williamson County and named his town Schwertner. In the past six decades that family has been doing business the same way

that Big Jim did in the beginning, with trust, a smile, and a firm handshake. His son, Jim Schwertner, now runs the family business. Jim is well-known and well-respected all over the country and serves as a member of the Texas A&M Board of Regents.

Schwertner Farms is the largest cattle trader in the United States. Its workers buy cattle at auctions around the country everyday, ship the cows to the farm, and resell them before they go home every night, as is company policy. This is hard work. It's like day-trading with livestock, but instead of just clicking on a laptop, these guys are actually moving and selling cattle from all across the nation. It's a fast-paced business, and there is no time for face-to-face meetings for every sale. A buyer may call and request a truckload of cattle to be shipped to his farm in Oklahoma or Kansas, a $50,000 deal that is sealed with the word of the rancher and a promise to pay when he receives the cattle. That's how the cattle business has always run and likely how it always will.

The scam

On August 31, 2005, Monte Sharp, a rancher and cattleman from Alva, Oklahoma, decided to mess with the wrong cattle broker in the wrong county. He began placing large orders for cattle. Jim Schwertner personally checked his credit and personal references, who verified that they knew Sharp and that he could be trusted. This being the cattle business, in a little over a week's time, Capital Land and Livestock (CCL), Schwertner's cattle trading company, shipped over 1,300 head of Texas cattle to Sharp at a value of nearly $700,000 on little more than his word and a promise to pay.

Mike Mackey, another cattle trader in Alva, realized something was suspicious with Sharp's business dealings and contacted Jim to see if he had any business with Monte Sharp. Mackey had been out to Sharp's cattle pens and realized that the cattle he had just shipped had been quickly moved off the property. Mackey alerted cattle men that he worked with, including Jim Schwertner, who called Sharp personally. Sharp assured him that the check was in the mail. Jim explained that he would be at his doorstep in a few hours to talk further about the cattle. On September 10, 2005, Jim Schwertner, along with his salesman and banker, flew on Jim's personal jet to Oklahoma to confront Monte Sharp.

When the cattlemen arrived at Sharp's pens in Alva, they soon realized that the cattle were not there. Sharp explained that he had already shipped them off to feedlots in Oklahoma and Kansas. Jim wanted to know exactly where the cattle were, and Sharp wrote on invoice lists from the feedlots, "These cattle belong to CLL." This paperwork became a key piece of evidence at trial.

Jim and his team then flew to Kansas where they met with the feedlot owner, who explained that Sharp had essentially mortgaged the cattle to the feedlot and had been paid out 70 percent of the cattle's value. The remainder of the money would go to Sharp once the cattle were sold to the slaughterhouse and after the feedlot's fees and costs were recovered. The plan became clear: Sharp was floating cattle like petty criminals float checks. He was borrowing money on cattle, purchasing other cattle, then trying to pay back the first seller with the second seller's money. Monte Sharp was a smooth talker and had friends in both the cattle business and in banking, and he was able to sweet-talk ranchers all over the country into believing he was legitimate. There is no telling how long he was able to successfully run his scam, a Ponzi scheme like Bernie Madoff had used, except Sharp was using cattle instead of stocks and securities. His house of cards was about to tumble down.

As a banker and longtime businessman, Jim knew he had to gain secured creditor status to insure his standing in the line of creditors in Sharp's inevitable bankruptcy. So Jim and Sharp agreed to execute a promissory note using all of Sharp's assets as collateral. This also would become an issue at trial; the defense later claimed that Jim's secured creditor status absolved Sharp of any criminal intent.

On his return to Texas, Jim received two checks from Sharp for nearly $100,000, but both bounced. Jim contacted the Williamson County Sheriff's Office and the Texas Cattle Raisers Association, and with the help of the Texas Rangers and DA Investigator Howell Williams, the investigation began. As Sharp's house of cards continued to fall, at least six other cattle brokers across the country were identified as victims of the scheme—Sharp owed these people over $4 million. He was forced into bankruptcy by an Oklahoma federal judge.

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Pre-trial

By the time I received the case, Monte Sharp had already agreed to waive his right to a jury and have a bench trial. We also offered him probation in exchange for a guilty plea and full admission, but he turned down our offer.

Before we could try him, we had to wait for the bankruptcy court to conclude. If Sharp were convicted in criminal court before the conclusion of the bankruptcy case, the ranchers who were owed money, including Jim Schwertner, Dean Goll of Oklahoma, and Tommy Welch of North Carolina, would be less likely to recover their losses through bankruptcy; apparently, a conviction would have prompted the bankruptcy courts to reorganize the entire estate. So we waited, and waited, and waited for nearly four years.

The first issue we had to deal with in preparation for trial was simply whether this was a crime or just a bad business deal. Some people thought it should be treated as a bad check case. Was it theft at all? Truly, the livestock were delivered per the (verbal) agreement, and there was never anything in writing as to when payment was to be received. I reviewed the file, and my investigator and I spent several afternoons meeting with Jim before deciding that this wasn't a bad check case. It was theft, plain and simple.

Monte Sharp was indicted for first-degree theft of over $200,000 of cattle. The State's theory was that Sharp formed the specific intent to commit theft at the time he made the deal and knew he could not possibly pay for the cows. We had learned of Sharp's other schemes and had taken statements from ranchers who had fallen prey to his slick business dealings and country charm. We filed a lengthy notice of extraneous offenses and bad acts and gave notice of every witness who had bad dealings with the defendant.

After nearly four years of delay, Jim Schwertner recovered $800,000 as a secured creditor in bankruptcy court, thus prompting Sharp's defense to argue that Jim had been made whole and that Sharp had satisfied the terms of the sale with the payment from the bankruptcy trustee. Not so fast, cattle thief. The delay from the bankruptcy proceedings had worked to our advantage because Jim's civil attorneys were extremely helpful in providing me with copies of depositions, motions, and discovery from the bankruptcy case. These documents were key in securing a conviction at the criminal trial.

Learning the business

I knew absolutely nothing about the cattle business. To properly try this case, I had to become an expert in the cattle trade—or at least be able to fake it. Two weeks before trial, I asked Jim Schwertner if he could come to my office and spend the day educating me about his business. Without hesitation, he agreed. We spent all day in the conference room just talking about the cattle business, which proved invaluable at trial. Jim and I went through hundreds of documents and dissected them piece by piece. The best nugget we found was a letter Monte Sharp had written to Tommy Welch at another cattle company, which was never part of the bankruptcy. This letter was an attachment to an addendum of some motion that was never really at issue in bankruptcy court, but it just might have been the smoking gun that we needed to prove intent.

> August 25, 2005
> "Tommy, I apologize for misleading Eastern that the cattle were here. I sent the cattle to the feed yards and got them financed. I kept trying to get the loan through. All I did was dig me a deeper hole with you. I got behind and kept trying to let get my loan through. I'm still trying as I write this letter—all I did was dig me a deeper hole. I can't tell you how bad I feel about this. I worked every day trying to take care of this matter. I will get this taken care of with you. I have wanted and will get you paid. If you want to shoot me, I understand. I think everybody understands. Ed has represented Eastern with utmost respect and courtesy to me. I apologize for misleading Ed through this ordeal. My intent all along has been to pay in full and I will do it."
> —Monte Sharp

This was it. Sharp had admitted in writing that he committed a criminal act with another cattle broker, just six days before he began his scam in Williamson County. We had him. But how best to use this smoking gun? It would be great for cross-examination as long as he testified, but we couldn't bank on that, so we prepared our case expecting that he wouldn't. We brought Tommy Welch in from North Carolina, and the day before the trial began, Jim Schwertner flew to Oklahoma and picked up Mike Mackey, the original whistleblower, and Dean Goll, another of Sharp's victims. We also flew in the owner of the feedlot to

testify that Sharp made a deal representing that he had complete control and interest in the cattle to further prove the element that he permanently deprived Jim of the cows. We were ready.

Trial

After weeks of preparation, the trial flowed extremely well. Tommy Coleman, our civil prosecutor, sat with me and was extremely helpful in keeping me organized. Tommy's civil experience in dealing with voluminous paperwork was valuable in keeping the document trail in order.

First, I called Jim's salesman, Ben Sublett, to testify to the initial dealings with Sharp. Jim Schwertner then testified at length about the cattle business and ranchers' ordinary accepted practices of making million-dollar deals on trust and a handshake. He explained that in six decades, Schwertner Farms had done business the same way. Interestingly, the defense really didn't dispute or challenge this assertion—it was true! Jim then described his trip to Oklahoma to confront Sharp. He explained that Sharp said that he knew what he did was wrong and that he could go to jail for his actions. We offered the invoices from the feedlot that Sharp had signed, indicating that the cattle belonged to Capital Land and Livestock. The defense tried to say that this paperwork was evidence of Sharp transferring ownership back to Jim, but again, preparation pays off, because we marched the owner of the feedlot into court next to offer the security agreements that he had executed with Monte Sharp, proving that argument didn't hold up.

All along we knew that this case hinged on intent, so we called three other victims of Sharp's scam to prove up that element. Mike Mackey, an Oklahoma cattle trader, had been duped out of $50,000 the same way Jim had. Mr. Mackey got some of his money back through the bankruptcy proceedings, but in a side note, he bought Sharp's ranch in a foreclosure sale. Next, Tommy Welch from North Carolina testified about how he was similarly taken for several hundred thousand dollars through Monte Sharp's slick tricks. Tommy even said, "I just wanted to believe him, but when the checks went to bouncin', I stopped sending cattle." Tommy told the judge that he had made it through all right financially, but the worst part was when he saw his grown son (who was Tommy's business partner) crying out by the barn. (This 404(b) evidence showed the extent of damage that Monte Sharp's greed had on his victims.) Finally, Dean Goll, a businessman from Oklahoma, testified. He explained through detailed business records how Sharp sold him fictitious cattle and even charged him for feed and medicine, all to fund his scam of juggling other people's money. Goll's testimony ended when he explained to the judge that he did not have a secured interest and got no money from the bankruptcy settlement. He was out nearly $2 million and had to sell three family farms just to pay the banks back the money he had borrowed. It nearly bankrupted him, and this life-long cowboy and rancher broke down on the stand. The State rested its case.

The defense case focused on Sharp's intent, as we expected. Defense counsel called several witnesses to claim that Sharp was in the process of securing business loans from various banks and venture capital firms. Our cross-examination focused on the irrefutable fact that at the time the deal was made, Sharp had no way to pay for Schwertner's cattle. Finally, Monte Sharp took the stand.

Sharp was exactly as I expected. He was slick, arrogant, and melodramatic—but almost charming. He tried to play the victim and claim that a bank loan was just around the corner and that he always intended to pay Jim the money he owed. He explained that if he hadn't been forced into bankruptcy and his assets frozen by the courts that everyone would have been paid in full. He even cried a little, and then it was time for cross-examination.

We went step by step through the facts. Sharp admitted to shady dealings with Goll and Mackey—he knew he wasn't on trial for that. Then I pulled out copies of an old notebook, one that the sheriff of Wood County, Oklahoma, had taken from Sharp when he was first arrested. The notebook had pages and pages of numbers, most of which were important only to Sharp, but there were three pages that were important to me. The first two were an accounting of the debt he owed to various cattlemen, including Schwertner, Goll, and Mackey. Sharp authenticated the writing as his own and verified that that was the money that he *intended* to pay. The last page, in the same handwriting, had similar accounting of his debts but had the words "STAY OUT OF JAIL" at the top. Sharp had written

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that he needed to pay off these people to stay out of jail! We argued at the trial's conclusion that this was consciousness of guilt.

Finally, the letter

After I passed Sharp for redirect, his attorney attempted to rehabilitate him on his intent. She asked if he had known how badly he would hurt people whether he would do it again. He sobbingly said that he never would and that he was sorry. His attorney passed him and I walked straight to the witness stand with the letter to Eastern Livestock. He authenticated the letter as his own writing, and it was admitted into evidence. Sharp admitted he had written the letter to Tommy Welch at Eastern Livestock six days before he made any deals with Jim Schwertner and Capital Land and Livestock. I asked him to read his letter to the judge, and I heard a classic objection, "Your Honor, now the prosecutor is just trying to embarrass him." I read the letter to the judge myself and passed the witness.

The judge heard arguments, and Sharp was immediately found guilty of first-degree theft. The judge ordered a pre-sentence investigation (PSI), and sentencing was scheduled for two weeks later. I held firm to my offer of 20 years in prison. The day of sentencing, Sharp decided that the risk of spending life in prison was too great and he agreed to my offer and to waive appeal. I am very happy with the results of this case, and Jim Schwertner was thrilled. It took over four years, but justice was done. The biggest cattle thief in Williamson County history is safely locked behind bars, and the message "Don't mess with Williamson County" was sent loud and clear to would-be cattle rustlers.

Side note

Monte Sharp was sentenced for his crime in December 2009. Right before I left for Christmas, I found a new file waiting on my desk with a familiar seal that said, "Texas Cattle Raisers Association: Special Rangers." Here we go again! ❇