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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

Untangling how to charge a DWLI

Transportation Code §521.457 might be intimidating at first (and eighth) glance, but it's not as bad as it looks, especially with a couple of handy flow charts and this simple explanation.

Say you're faced with drafting the misdemeanor information for a Class B Driving While License Invalid (DWLI) charge under Transportation Code §521.457. Not exactly the stuff that prosecutor dreams are made of, but it must be done. A quick look at 521.457 and—what!? There must be 10 subsections to this thing! A Class B misdemeanor can't be this complex!

The good news is that it's not as bad as it looks. Just keep in mind that a Class B misdemeanor under §521.457 requires two paragraphs: one for the base, Class C offense and another for the Class B enhancement. I have developed a couple of flowcharts that should help: one explaining the process for the first paragraph (on page 23) and the other for the second paragraph (on page 24).

By Perry Cunningham
Assistant Criminal District Attorney in Dallas County

The first paragraph

The source of the first paragraph will come from subsections (a)(1)–(4) and subsection (b). That is, there are five different ways to charge the base Class C offense, because DPS can 1) cancel, 2) suspend, 3) revoke, 4) deny renewal of, or 5) issue an order prohibiting the defendant from obtaining a driver's license. DPS calls these disabilities "enforcement actions" (abbreviated as EAs). How do you know which subsection of the statute to use as the first paragraph? Take a look at the defendant's driver history summary and determine what disability (or disabilities) the defendant's driver's license was subject to at the time of the offense (i.e., which enforcement actions were in an "ACTIVE" status on the offense date). (There's a sample of someone's driver history summary on page 20.) If multiple active DPS enforcement actions were in effect, then there may be more than one way to draft the first paragraph. Any of these conditions existing at the time of the offense can form the basis for the Class C (first) paragraph. I have included a handy chart that cross-references the particular enforcement action to the section of the Transportation Code from which it came; check it out on pages 21 and 22. In Dallas County, we reference the applicable code section in the text of the first paragraph.

But what if the defendant doesn't have a driver's license? Can I still charge him or her with DWLI? Yes—because the reach of §521.457 extends to the defendant's *privilege* to drive; see subsection (a)(2). DPS will attach enforcement actions, if necessary, to an ID card or even to a driver with no ID card.

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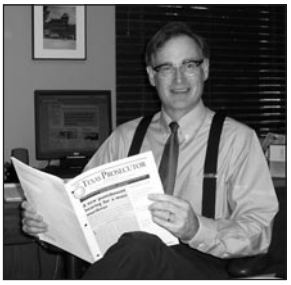
A key to success: T3

Not long after I started developing TDCAA training in 1991, I met **Kay Chopard Cohen**, who at the time was working for the National Highway Traffics Safety Administration (NHTSA) as a trainer. Kay had been the training coordinator for Iowa prosecutors and had a real fire in the belly for prosecutor and peace officer training. She brought to Texas a week-long course that launched Texas prosecutor training to a whole new level: the Train The Trainer (T3) program. That week-long course made believers of even the toughest DA office investigators who attended—believers in smelly markers, flip charts, stickie notes, and minimum 36-point font on any PowerPoint (all hallmarks of the course). The TDCAA Board instantly recognized how valuable this training was—training our trainers to be effective presenters. We have plenty of subject matter experts, and we needed to help them become the best presenters they can be.



By Rob Kepple
TDCAA Executive Director in Austin

Fast forward to March 6, when TDCAA, thanks to enduring funding from the Foundation, again hosted its annual T3 seminar for a group of 27 hand-picked, soon-to-be TDCAA presenters. Since 2010 more than 200 prosecutors, civil practitioners, key personnel, and investigators have gone through the course. Participants work hard: They hear about adult learning needs, planning a talk, writing learning objectives, organizing a presentation, creating visuals, dealing with problem students, and more. And at the end, they all give a presentation showing off their new skills. (My favorite continues to be a presentation on how to make a pizza. The PowerPoint itself was gripping.)

TDCAA seminar attendees benefit from this Foundation project, but not a single attorney goes through the course who doesn't appreciate the bump in trial skills he gets. After all, adult learning principles are just as applicable in the courtroom as the classroom. So thank you, Foundation leadership, for supporting this vital work! ❇

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National report on use of force

At the end of 2015, TDCAA issued a report on use of force prosecutions in Texas. The report served as a roadmap for TDCAA training efforts and was widely shared around the country. (You can read it on our website; just look for this column in this issue of the journal.) Now the Association of Prosecuting Attorneys, with the help of some Texas prosecutors, has issued its own report, "21st Century Principles of Prosecution: Peace Officer Use of Force Project." (It's also on our website in the same place.) The report focuses on a number of principles organized around four core areas: human dignity, prosecutorial independence, transparency, and procedural fairness and justice. The issues surrounding use of force prosecutions aren't going away, and this report is a good beginning on a national level.

By Rob Kepple
TDCAA Executive Director in Austin

The needs of our newest prosecutors

We always ask those who attend our seminars to fill out an evaluation form and a questionnaire about their training needs. We play close attention to those, and TDCAA's Training Committee uses them to pick topics for our courses and design the courses themselves.

The evaluations from our newest prosecutors—those at the January Prosecutor Trial Skills Course—revealed some predictable needs: mostly more hours in the day to get things finished, help in dealing with law enforcement officers who have done a less-than-great job on their misdemeanor cases, and more DWI training. We also identified a relatively new thread in this last batch of questionnaires: help in how to plea-bargain a case. Not just strategies, but rather how to arrive at a just and fair offer. I was impressed that this group was thinking so hard on this issue (part of it was that the faculty and faculty advisors spent time talking about how important plea bargains are). If you are supervising relatively new prosecutors, know that it is also your job to guide them in how to handle plea bargaining so that it arrives at a fair and just result. They'd appreciate the guidance!

Dean of Investigators and Key Personnel?

In the last edition of *The Texas Prosecutor* journal, I congratulated **Charles Bailey** (DA in Camp and Titus Counties) on being the longest-serving elected DA, thus becoming the Dean of Texas District Attorneys. In addition, I noted that our Dean of Texas County Attorneys is **Joe Warner Bell** of Trinity County. This proclamation prompted at least one letter asking about long-serving personnel—investigators, victim assistants, and support staff—in prosecutor's offices. It's a great question: Who is the Dean of Texas Investigators? Who is the Dean of VACs? Who is the Dean of Texas Key Personnel? I am only spit-balling here, but I am thinking the Dean of Texas Investigators might be **O.J. Hale**, who works for the DA in Webb County, **Isidro "Chilo" Alaniz**. He's been at it for 44 years—since 1973.

Is there another investigator with longer service? And who has clicked off that kind of a number among the ranks of our victim assistants or key personnel? If you think you might be worthy of the title, email me at Robert.Kepple@tdcaa.com.

Our State Bar President can write!

I want to thank our State Bar President, **Frank Stevenson**, for the time and effort he took to write his President's Opinion in the latest *Texas Bar Journal* published January 2. In his column, titled "The Time of our Lives," Frank begins with the story of Odysseus and Calypso as a way to talk about the significant work of Texas prosecutors. And Frank spent quite a bit of time talking with **Sarah Wolf**, TDCAA's Communications Director, to learn about Texas prosecutors, their work, and their stories. His column honors our profession, and he goes out of his way to name some of our best: **Jack Roady** and **Kevin Petroff** (CDA and First Assistant in Galveston County); **Lauren Renee Sepulveda** and **Carisa Casarez** (Assistant CDAs in Hidalgo County); and **Erin Faseler** (Civil Commitment Chief of the Special Prosecution Unit). It is great to have a friend

like Frank leading our State Bar, and I can't wait to read his next column!

Clay will train anywhere. *Anywhere.*

W. Clay Abbott is TDCAA's DWI Resource Prosecutor and resident ethics specialist. I am in awe of Clay's ability to spend long days—even weeks—on the road crisscrossing the state to train Texas prosecutors and peace officers under our TxDOT grant. (Thanks, TxDOT!) And much like a travelling preacher, Clay will set up his tent anywhere. Case in point: In the last couple years he has taken his show to both a doublewide trailer and a planetarium.

I thought I had bested him on unusual training venues, having trained in a pigeon barn once (after sweeping up the remains of the bird show the day before), but Clay's recent trip takes the cake. He recently got back from a training for our friends in Connecticut … at a hockey arena. To be fair, the ice was temporarily covered with plywood, but the venue was still freezing cold, and attendees sat at tables on the plywood for Clay's presentation. His PowerPoint played as a video *on the Jumbotron*. Now *that* is good service to the crown! Thanks, Clay, for your dedication.

Thanks to a Texas legend

I know many in our profession and those at the courthouses in Houston were saddened to learn of the passing of **Henry Oncken** at the age of 78. Henry, a former ADA in Harris County and the first assistant under then-DA **Johnny Holmes, Jr.**, went on to be a state district judge and the United States Attorney for the Southern District of Texas. Henry left the Harris County DA's office before I got there so I never worked with him, but I felt like I almost did. He left such an impression we felt like we were travelling in his sizable wake. The best prosecutors in Texas praised Henry for being a true leader—honest, hardworking, and steadfast. He will be missed, but it is safe to say he had—and continues to have—a great impact on Texas prosecutors of today. ❇

News Worthy

Prosecutor booklets available for members

We at the association offer to our members a 12-page booklet that discusses prosecution as a career. We hope it will be helpful for law students and others 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 email the editor at sarah.wolf@ tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

Making terminations as painless as possible

Terminations, discharges, or firings (whatever you choose to call them) are one of those necessary difficulties in being the boss. I hate having to terminate someone. You probably do also. The reality is that at some point, you will have an employee who will not give you any other choice. I recently read that the No. 1 reason why poor-performing employees keep their jobs is their employers' failure to know how to terminate someone. My hope is that this article gives y'all insight into how our office handles employee discipline and offers some direction for undertaking the difficult task of firing an employee.

By Randall Sims
District Attorney in Armstrong and Potter Counties

An extended family

I am proud of the staff of the 47th District Attorney's Office—that's my office. We take our jobs very seriously. We call each other by our first names, and we help each other both inside the office and out. We are a team! If one succeeds, we have all succeeded. If one drops the ball, we all have dropped it. Everyone helps with whatever needs to be done, including me. All of my employees have completely bought into that concept. Those who do not generally do not last long. We are an extended family.

Why am I telling you this? Because one of the most important reasons to address poor-performing employees is to maintain the health of the entire office. Your staff knows exactly who the poor performers are and what they are doing (or *not* doing). Each month in our office, for example, we send out a disposition list to show what cases have moved through the system, and believe me, you do not want to be the one who moved the fewest cases. That means everyone in the office knows who is putting forth their best efforts, as well as who is not. Bad employees are a cancer in the office, and that cancer will spread quickly if not treated. Employees are not only watching their peers, but they are also watching the supervisors to see how people in charge treat the cancer. If nothing happens to the poor employee, other employees will get this cancer. The more who succumb, the worse the morale of the office will get.

Some of you may be thinking, "Wait—Texas is an 'employee at-will state.' I don't need to know all this. I can fire anyone at any time and do not even need a reason." If that is how you choose to handle discharges, then you have just thrown away one important protection should a worker file a lawsuit claiming his termination was illegal. When you discharge someone for a solid reason and have proper documentation to back up that reason, you are in a much better position to defend your firing decision in court than going in there with no documentation.

There are right ways to handle terminations and many ways to mess them up. Fortunately, I have access to a great Human Resources Department here in Potter County. From those folks, I have learned much. There are also private vendors that hold classes on being a supervisor and related topics, and TDCAA is putting the final touches on its own management training aimed at prosecutor-office supervisors. Utilize these assets where they are available. Doing so can save you and your county from a lawsuit.

Protected classes and activities

First of all, do not terminate someone for reasons that will absolutely prompt a suit in federal or state court. None of these things should be any part of the reason for a discharge: age, marital status, race, gender, pregnancy status, request for Family and Medical Leave Act (FMLA) leave, sexual orientation, disability, religion, national origin, or protected activities, such as whistle-blowing or complaints of discrimination or harassment. If you ignore this rule, you will end up in federal or state court. That is going make Momma so disappointed, and the press is going to eat you alive.

Documentation and discipline policies

One of the biggest mistakes that employers make is failure to properly document all the reasons that led up to the termination. Document, document, document! If there is no documentation, then it did not happen. (Document employees' actions for all the same reasons you require law enforcement officers and agencies to document their actions.) I put documentation first because it is your best

friend if you do it correctly; however, it will be your worst enemy if you do not.

If you do not have a policy governing progressive discipline or corrective action, step one is to adopt one pronto. Having a policy will help you should litigation arise over a termination. Also, be sure to create a form that you will use as documentation of any problems with an employee and that will give notice to that employee. (A copy of the form we use is on TDCAA's website; just look in this issue of the journal for this column.) At a bare minimum, these forms should identify the employee, his position, downfalls, corrective actions, and spots for the employee and supervisor to sign off. Because my employees are Potter County employees, we use the Potter County Employment Manual.

Once you have a policy and forms, they will help you only if you use them. Move employees through the steps of the process as necessary. Either they will correct their performance or behavior, or you will move them on down the road toward their last day. (More on that later.) If you do not stick with your own policy, expect an employment attorney in court to repeatedly bring to the attention of the fact-finder your "failure to follow your own policy"—"why should you expect your employees to follow it when you do not?"

Remember that consistency in the decisions you make, how you treat each type of issue, and how you treat each employee is absolutely critical. If you do not discipline one person for an infraction, do not discipline anyone else for it. If you do discipline someone for an issue, discipline everyone who has the same issue. Do not handle an issue one way with this employee and the same issue in another way with a different employee. Deviating from this advice gives you a good chance of winding up in court to defend your actions, so be prepared.

An office's "insiders"

In my office, I have a first assistant district attorney, chief investigator, and office administrator. Each supervises his or her respective employees. They do not have hiring and firing powers, but they are vital to this process. Upon realizing there is an employee problem, the four of us have a meeting. You will need to decide who in your office should be part of your group. In a smaller office, you may be the only one.

These "insiders" discuss the employee and the problems and determine how to respond. The more severe the problem, the more severe the response will be. Here's an example. We have an office policy requiring that prosecutors interview all prospective State's witnesses, preferably before the trial starts but absolutely before they call the witness to the stand. Failure to perform that duty is a "brown box" offense (meaning, it'll earn you a brown banker's box so you can pack up all of your personal belongings from the office). You are gone. There are no excuses.

Less severe problems, such as tardiness, begin a "step" process that starts with an informal counseling session and progresses to written warnings and finally a decision to retain or terminate. At any point in the process, you could jump to the step further down the road or even straight to termination.

First meeting

When an employee fails to meet your expectations, after discussions with your insiders, it is time for a meeting with that employee as soon as possible. I suggest the employee's supervisor have a verbal counselling session with the employee to clarify any problem areas. Again, make the expectations clear, measurable, and with expected timelines. You might even have the employee verbalize his understanding of your expectations to make sure what he believes you want aligns with what you actually want.

You need to document these informal, verbal meetings. We do this in an email to the employee confirming the details of the meeting (when and where) along with a description of the conversation. Make sure that the description outlines what necessitated the meeting and the corrective actions. Be sure to place a copy of that email in the employee's personnel file.

It is essential that you enforce any sanctions you have set for the employee if his poor behavior continues. You really have no alternative but to do what you said you would do if poor performance or a violation of office policies continues. Failure to follow through on this end could result in losing your power to control all of your employees.

Future meetings

Upon recognition that the employee is still having issues after an informal meeting, the next step is to go to a more formal process. Or, if infractions are more serious, this step may be your starting place.

Make the insiders aware of what happened with the employee. This

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group should meet to determinate what actions to take. Take notes at this meeting regarding the employee's problems and the corrective actions, and one of you should fill out a Record/Notice of Corrective Action form. (If you don't have your own such form, you can download ours at TDCAA's website; just look for this article in this issue of the journal archive.) Decide which of you will discuss it directly with the employee. I suggest two staff members be present from this step forward so there's always more than one witness to any conversations. Meet with the employee and cover all appropriate matters, then have both the employee and his supervisor sign off on the corrective action form. We provide a copy of the form to the employee and place the original in the employee's personnel file.

Retain or terminate?

You might reach the point when you wonder, "Is this employee worth keeping?" When that day comes, gets your insiders together to assess whether this employee should remain under your employment. The insiders should carefully measure the employee's issues regarding non-compliance with policies and poor performance. You can easily accomplish that by reviewing all the documentation in the employee's personnel file. (Isn't documentation a great thing?)

A decision to retain means keeping that employee in the pipeline in the hopes that he will make the necessary adaptations. A determination to terminate means, you guessed it, possibly more documentation. Once you've decided to terminate an employee, I strongly suggest you create a timeline detailing all the necessary actions that have preceded that termination.

Begin that timeline with the personnel file: Does it contain everything you need to prove the reasons for discharge? Has everything that has happened been consistent with the office's practices and policies? Look closely, as some practices may not actually follow official policies. If that is happening, correct them by making them consistent immediately.

Fully discuss your intention to discharge the employee with Human Resources, and run it past the attorney in your jurisdiction who is responsible for advising and defending the county (because that is where this matter could end up). If that person is you, seek counsel from one of your peers in another county. These people will be objective about their answers and the situation, whereas you may not be as someone in the fray. Show them all of your documentation regarding the employee's failures and your attempts to correct them and ask, "Do you feel comfortable defending this termination?" Listen to their answers and if your counselors raise concerns, clean up those issues before proceeding.

To give you an example of when someone else's advice saved the day, I'll tell you about an incident where I was ready to terminate an employee. I talked to HR and then the attorney who represents the county, and as we were discussing it, I got fired up—not at them, but at the circumstances. (I confess that I can get boiling-over mad when an employee forces me into firing him. I promise that it takes a whole lot to get me to that point, but I can indeed get there.) Both the HR rep and the county attorney expressed reluctance to terminate this employee, and I went home that night dreading keeping this employee on staff.

That evening, long after the flames of my anger had gone out, I was going over the afternoon's conversation—but with a calmer head. That's when I realized that I hadn't told them about the final warning my first assistant and I had given the employee earlier. We had documented it, but I had forgotten to tell them during our meeting. The next morning, I shared that information with HR and the county attorney, and both agreed that termination was totally justified. (Documentation is a wonderful thing!) And I was glad to have talked through my decision with two outside parties.

Once you have gotten that step out of the way, you are ready to take the final steps. You and HR should prepare all the documents you will need for the discharge, including those about job performance, such as work reviews and warnings. Someone else, usually an HR staffer, will need to discuss with the employee his benefits and final paycheck.

Once you have everything together, meet with your insiders to go over the details of the final meeting with the employee. We never move forward with any of these steps, especially a termination, unless all four of us agree that it is the correct thing to do. Upon setting the date and time for the termination, our office administrator will notify building maintenance that we will need our electronic door lock

codes changed on the day of termination (at a time after the employee has left the premises).

Termination procedures

For terminations in our office, generally three of us (the employee's immediate supervisor, the chief investigator, and myself) are involved. The supervisor enters the employee's office first, and then I enter, closing the door but leaving it cracked open, while our investigator stands outside that door. That's in case the employee becomes aggressive—you can never anticipate how someone will react to being fired. Plus, several employees legally carry a firearm coming and going from the office. While they must put them away and not take them out until they are leaving the building, they still have access to the weapon in their office.

I tell the employee he is terminated and that it is effective immediately. I explain the general reasons for the termination (insubordination, failure to follow office policy, no-shows, etc.), and I say that the supervisor will go over the details, give him a copy of his personnel file, and fill him in on the exit plan. I am courteous. Remember, even a bad employee is a human being so treat any terminated employee with dignity and respect.

Then I exit the room and the chief investigator joins the supervisor (so there will be two supervisors present). They finish going through the issues that got everyone to this spot. Make this discussion to the point and as brief as possible. The point of this meeting is *not* to debate anything, though some employees may try to argue. Don't let them. Stay focused on why you are there.

The supervisors will also inform the employee that he will need to meet with HR for an exit interview to find out about the termination of benefits and his last paycheck. How the employee reacts to the news dictates how we handle removing his personal items from the premises. Usually, one or two investigators will meet the (now former) employee after-hours to pack up personal belongings.

Lastly, the supervisors take all office keys and other property related to his employment from the employee. As a precautionary action, the chief investigator escorts the employee from the building. The chief investigator then informs the deputies at the screening station to our building that the employee is no longer a member of this office.

The building maintenance people arrive and change our electronic door codes. The office administrator has a list of all the passwords for each employee's computer and voicemail so we can gain access to those for work purposes only.

Any termination should be confidential for the employee's privacy, but remember that the other employees know, probably better than the supervisors, who the rule-breakers or slackers are. Office employees know something is up and if you do not say something, rumors will start. My approach is simply this. I call a meeting of all the office employees, which we have periodically, and I end by simply stating that "[So-and-So] is no longer working in this office."

That's it. Everything I've learned from many years of leading and supervising people in prosecutor's offices. I hope this article will be of some help in handling these situations. Until next time, always do the right thing and be sure to keep that white hat clean. ❇

Answers to frequently asked questions

By Jalayne Robinson, LMSW
TDCAA Director of Victim Services

My job as TDCAA's Director of Victim Services is to travel across the state visiting prosecutor offices and providing face-to-face training to victim assistance coordinators (VACs). I also speak about victim services at various TDCAA seminars and visit with prosecutors at those conferences.

Over the past few months, I've noticed a few topics coming up over and over again, especially with so many new elected prosecutors (and their just-hired subordinates) taking office, so I decided to write a column to answer some of those frequently asked questions. I hope it is helpful to y'all!

What should be included in a written notification packet?

The following is an outline of what should be sent in a packet to crime victims no later than the 10th day after the indictment or information.

The packet should include a cover letter, which should be on prosecutor office letterhead and should be addressed to the crime victim. The cover letter should include:

- the case number and the assigned court,
- written notice of the victim's right to file a Victim Impact Statement (VIS) and Victim Information Sheet,
- written notice of his or her right to complete a Crime Victims' Compensation Application,
- name, address, and phone number of the local VAC (you),
- an offer to assist with completing the enclosed documents, and
- written notice for the crime victim to keep the prosecutor office informed of his or her current address and telephone number.

The rest of the notification packet (in addition to the cover letter) should include the following forms and brochures:

- a Victim Impact Statement (VIS) and Victim Information Sheet,
- an "It's Your Voice" Victim Impact Statement brochure,
- an application for the Crime Victims' Compensation fund,
- a Crime Victims' Compensation brochure,
- a Texas Victim Information and Notification Everyday (VINE) program brochure (if VINE is available in your county),
- a Crime Victims' Rights brochure, and
- referral brochures to social service agencies in your community.

Which victims of what offenses should receive a Victim Impact Statement (VIS)?

Code of Criminal Procedure Art. 56.01 provides the definition of who is a crime victim for notification purposes. Additionally, the Crime Victim Clearinghouse (a division of the Texas Department of Criminal Justice Victim Services) provides each office a quarterly VIS Activity Report for reporting how many VISes were sent by your office and how many crime victims returned VISes to your office.

VIS Activity Reports are required for the following offenses:

- aggravated assault
- assault
- homicide
- injury to a child, elderly individual, or disabled person
- intoxication assault
- intoxication manslaughter
- kidnapping
- property crimes (this category is included for those counties that provide VIS forms for property offenses)
- robbery
- sexual offenses against a child
- sexual offenses against an adult
- trafficking of persons
- "other" (this category should be used when a VIS

is provided but the offense is not listed).

Please keep in mind that the VIS is sent to crime victims for them to provide the criminal justice system with a detailed account of the emotional, psychological, physical, and financial impact of the crime on the victim and her family, as well as to explain her feelings of loss, frustration, fear, and anger.

In the upcoming months, please watch for a new training video on our TDCAA Victim Services website, www.tdcaa.com/victim-services, outlining a VAC's basic duties and responsibilities and how VACs can help the prosecutors with whom they work.

Where can I find forms and brochures for victim notification packets?

They are online at various government agencies' sites.

- **VIS forms:** http://tdcj.state.tx.us/publications/pubs_victim_impact_statement.html.
- **"It's Your Voice" brochures:** http://tdcj.state.tx.us/documents/Its_Your_Voice.pdf.
- **Crime Victims Compensation (CVC) applications:** https://www.texasattorneygeneral.gov/files/cvs/cvcapplication.pdf.
- **CVC brochures:** https://texasattorneygeneral.gov/files/cvs/cvc_brochure.pdf.
- To order **hard copies of CVC applications, CVC brochures, and Crime Victims' Rights palm cards**, go to https://www.texasattorneygeneral.gov/files/cvs/orderform_cvs.pdf.
- **Victim Information and Notification Everyday (VINE) brochures:** https://www.texasattorneygeneral.gov/files/cvs/vine_state.pdf.
- an **order form for free publications** from the Texas Department of Criminal Justice Victim Services Division: http://www.tdcj.texas.gov/divisions/vs/victim _clearinghouse_order_form.html.
- **VIS Activity Report** (due to TDCJ Victim Services Division's Texas Crime Victim Clearinghouse each quarter): http://tdcj.state.tx.us/publications/pubs_victim_impact_statement_report.html.

Victim Assistance Manual

TDCAA and I are so very pleased to unveil a newly updated *Victim Assistance Manual*. Printed and distributed in part by grant funds, copies of the manual were mailed during the first part of January 2017 to each prosecutor office in Texas.

The *Victim Assistance Manual* is designed to help prosecutors and VACs develop and enhance their prosecutor-based victim assistance programs. It is meant to be a quick reference when prosecutor office staffers are looking for an answer for day-to-day victim services questions.

The manual covers setting up an effective program, first contact with victims, funding, and Crime Victims' Compensation and restitution, just to name a few topics. A CD is attached to the back cover; it includes sample forms that you can put on office letterhead or customize with your specific court information.

Many, many thanks to Cyndi Jahn (VAC in Bexar County), Michelle Permenter (VAC in Harris County), Emily Johnson-Liu (Assistant State Prosecuting Attorney in Austin), and the Montgomery County District Attorney's Office Victim Assistance Division, who contributed new material to this edition of the manual. And thank you to other TDCAA members (authors of books and articles in this journal) who so graciously wrote some of the materials in this book: Patricia Baca, Beth Barron, Deanna Belknap, Dana Bettger, Della Bryant, Terese Buess, Claudia Duran, Laurie Gillispie, Melissa Hightower, Brandy Johnson, Thad LaBarre, Nicole LoStracco, Barry Macha, Sherry L. Magness, Stacy Miles-Thorpe, Sunni Mitchell, Ellic Sahualla, Bea Salazar, Pam Traylor, Jennifer Varela, Jane Waters, and Sarah Wolf.

It is our hope that you will peruse the manual and reference it when you need to know how best to serve crime victims in your community.

National Crime Victims' Rights Week

National Crime Victims' Rights Week (NCVRW) is April 2–8. This year's theme is "Strength. Resilience. Justice." It envisions a future in which all victims are strengthened by the response they receive, organizations are resilient in the face of challenges, and communities seek collective justice and healing.

Here is a link to an online resource guide provided by the Office for Victims of Crime to help you promote National Crime Victims' Rights Week in your community: https://ovc.ncjrs.gov/ncvrw2017/index.html. Includ-

Continued on page 12

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ed are educational materials, artwork, and theme posters.

TDCAA would love to publish photos and stories from your NCVRW event in an upcoming edition of this journal, so please email them to me at Jalayne.Robinson@tdcaa.com.

In-office visits

Who would have ever thought, 26 years ago when I went to work for District Attorney Marcus Taylor in the Wood County Criminal District Attorney's Office, that God would have been preparing and equipping me with a knowledge and understanding of the criminal justice system (both local and statewide) so I could help other victim assistants all over Texas?! What an amazing gift He has given me, and what an honor that so many of you request my assistance!

With 54 newly elected prosecutors taking office January 1 and numerous new prosecutor staff members across the state, my job as TDCAA's Director of Victim Services has been booming! (Check out the photos at right and on the opposite page of some offices and staff I've visited.) For those of y'all who have not contacted me yet, I am at your service for victim assistance. My visits are totally free of cost to your agency, thanks to a wonderful grant through the Governor's Office. Please email me at Jalayne.Robinson@tdcaa.com for inquiries, for support, or to schedule an office consultation. ❇

ABOVE: In the Nacogdoches County Attorney's Office (left to right), Office Manager Jose Castaneda; First Assistant County Attorney Paige Pattillo; Victim Assistance Coordinator Felicia Cox, and County Attorney John T. Fleming. BELOW: In the Falls County and District Attorney's Office (left to right): Assistant County and District Attorney C. Barrett Thomas, Victim Assistance Coordinator Maggie Garcia, and County and District Attorney Jody Gilliam.

RIGHT: In the Kerr County Attorney's Office, Victim Assistance Coordinator Amanda Calderon.

ABOVE: In the Angelina County District Attorney's Office (left to right): District Attorney Joe Martin; Office Manager Marilyn Powell, and Administrative Assistant and VAC Stacy Richardson. BELOW: In the Guadalupe County Attorney's Office (left to right), Office Manager Lorna Dean, Victim Assistance Coordinator Cherie Perez, and Victim Assistance Coordinator Jessica Vozzella.

TOP: In the Anderson County Criminal District Attorney's Office, VAC Tina Trejo. MIDDLE: Left to right, Wilson County Attorney and VAC Christina Quintanilla and Karnes County Attorney and VAC Ariel Salas. ABOVE: In the 81st Judicial District Attorney's Office (left to right): Victim Assistance Coordinator Katie Etringer and District Attorney Audrey Louis. LEFT: In the Llano County Attorney's Office (left to right): Victim Assistance Coordinator Carrie Lewis and County Attorney Becky Lange.

Not just for law enforcement: exploring the community caretaking exception

By Andrea L. Westerfeld
Assistant Criminal District Attorney in Collin County

Police officers are involved in far more than just the enforcement of criminal law. They are also expected to "aid individuals who are in danger of physical harm, protect the rights to speak and assemble, facilitate the movement of people and vehicles, assist people who cannot care for themselves, resolve conflict, and deter crime through their conspicuousness."[1] These are duties distinct from crime-fighting, but sometimes the officer will find crime while engaged in one of his other duties. The community caretaking exception was created to help resolve this conflict, and the Court of Criminal Appeals recently re-examined the scope of this exception in *Byram v. State*.

The facts

On the Fourth of July in 2013, a Fort Worth police officer was monitoring the bar district downtown.[2] Officer Figueroa was stopped at a red light when an SUV pulled up in the left lane next to him. The officer could smell alcohol from the SUV through his open window, and he saw a motionless woman hunched over in the front passenger seat. Cameron Byram, the driver, stared straight ahead and did not respond even when the officer yelled at him to ask if the passenger was OK. Byram drove away when the light turned green.

Officer Figueroa pulled the SUV over and immediately checked on the passenger. The exact sequence of events after Officer Figueroa pulled Byram over was not clear in the record, but he testified that he had no real reason to think the driver was intoxicated when he pulled the SUV over and that he was more concerned with the passenger. She was "barely conscious," had vomited all over the passenger side of the SUV, and seemed to have some sort of medical problem. The officer called an ambulance for her, but ultimately, she refused medical assistance. Officer Figueroa determined that Byram was intoxicated and arrested him.

The trial court denied Byram's motion to suppress, and he pleaded guilty. On appeal, he challenged the traffic stop as an unreasonable detention. The Fort Worth Court of Appeals agreed and reversed, finding that the community caretaking exception did not apply and there was not reasonable suspicion of criminal activity.

The community caretaking exception

As part of his duty to serve and protect, a peace officer may stop and assist an individual whom a reasonable person would believe is in need of help.[3] There is a two-step test before the community-caretaking exception can apply:

1) whether the officer's primary purpose was to render aid, not to investigate possible criminal action, and

2) whether the officer's belief that the person needed help was reasonable.[4]

The first part of the test is objective, and it relies almost entirely on the trial court's determination of credibility.[5] If the officer admits he was not primarily motivated by concern that the person needed aid, then community caretaking does not apply, but if the officer says community caretaking was his primary motivation, then the trial court must determine the officer's credibility.

For the second part of the test, courts consider four non-exclusive factors to determine the reasonableness of an officer's belief that a person needs help:

1) the nature and level of the distress exhibited;

2) the location of the person;

3) whether the person was alone or had access to help other than the officer; and

4) to what extent the person presented a danger to himself or others if not aided.[6]

The first factor is usually the most important, but a lower level of distress might be rendered more serious by the other factors.[7]

Importantly, these factors are merely useful considerations, not elements.[8] One factor may be missing entirely, but the other factors can

make up for it. The ultimate test is simply whether the officer's belief that the person needed help was "reasonable."

A finding of reasonableness

The Court of Criminal Appeals found that Officer Figueroa *was* reasonable in concluding that the passenger he observed was in need of assistance. She was hunched over and motionless, the SUV smelled strongly of alcohol, and they were in the bar district on the Fourth of July. The lower court focused on the fact that the woman was not alone in the SUV and that they were on a busy street with several hospitals nearby, but the Court of Criminal Appeals noted that the driver appeared unconcerned and ignored both his passenger and the shouting police officer. Even though there were hospitals nearby, Byram was clearly not trying to get his passenger to one, showing that the passenger was not likely to get assistance without the officer's intervention.

The Court also noted that the very fact Byram was driving with an incapacitated passenger and ignoring the shouting police officer suggested another danger—he could have had "a nefarious plan for his passenger" and was trying to avoid the police.[9] This is significant because the Court is considering multiple levels of potential distress. An officer's concern for a person does not have to be limited solely to the most obvious physical danger. The potential that the person might be the victim of criminal activity is another type of distress that can be considered.

In all, the Court found that the passenger's incapacitation, her location in an unconcerned driver's vehicle in the middle of the bar district on the Fourth of July, and the driver's behavior all indicated a level of distress "in which we would expect a caring police officer to intervene."[10] The stop was upheld as a proper use of the community caretaking exception.

A possible challenge for the future

Overall, *Byram* was a fairly straightforward application of the two tests for community caretaking, with some good explanations of the rules but no real new information. What makes the case most interesting is a footnote offering a glimpse into a possible challenge for the future. In Footnote 5, the Court notes that a 2011 U.S. Supreme Court opinion casts doubt on whether the first part of the test should still be required.

In *Ashcroft v. al-Kidd*, the Supreme Court discussed the applicability of a material witness warrant against the defendant.[11] It dismissed the defendant's argument that he was actually being investigated as a terror suspect and the material witness claim was a mere pretext. The Supreme Court noted that a Fourth Amendment reasonableness inquiry is predominantly an objective one. Citing to past precedent of *Whren v. United States*,[12] the Supreme Court stated that it "swept broadly to reject inquiries into motive generally." Apart from limited exceptions,[13] the Court has "almost uniformly rejected invitations to probe subjective intent."[14]

The *Byram* court noted that it has never analyzed whether *al-Kidd*'s emphasis on a purely subjective analysis of reasonableness means that community caretaking cases should no longer examine the officer's "primary motivation" in stopping.[15] And *Byram* was not the case to do so, as the officer testified that he was concerned about the passenger needing assistance, not the driver being intoxicated, and the trial court found that testimony credible. Thus, that part of the test was easily met and only the second factor of reasonableness was at issue.

However, the Court of Criminal Appeals has clearly signaled that it may need to re-examine the rule in light of *al-Kidd* in the future. Any prosecutor with a case with a strong argument for community caretaking but for the officer's testimony that he was not primarily motivated by the desire to help—or with a judge who finds the officer's testimony to that effect not credible—would be wise to raise *al-Kidd* and *Byram*. An officer may be *equally* motivated by a desire to help and a belief that criminal activity is afoot, and that should not prevent the State from relying on the community caretaking exception. *Byram* has signaled that the subjective portion of the test should, at the least, be re-examined in light of *al-Kidd* and perhaps should be removed entirely. ❇

Endnotes

1 *Byram v. State*, No. PD-1480-15 (slip op.), at 1-2 (Tex. Crim. App. Jan. 25, 2017).

2 *Id.* at 2-4.

3 *Wright v. State*, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999).

Continued on page 16

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[4] *Gonzales v. State*, 369 S.W.3d 851, 854-55 (Tex. Crim. App. 2012).

[5] *Id.* at 855.

[6] *Corbin v. State*, 85 S.W.3d 272, 277 (Tex. Crim. App. 2002).

[7] *Gonzales*, 369 S.W.3d at 855.

[8] *Byram*, slip op. at 8.

[9] *Id.* at 10.

[10] *Id.* at 11.

[11] *Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011).

[12] *Whren v. United States*, 517 U.S. 806, 814 (1996).

[13] Special needs and administrative search cases were the only "limited exceptions" the Court listed. *Al-Kidd*, 563 U.S. at 737.

[14] *Id.* at 737.

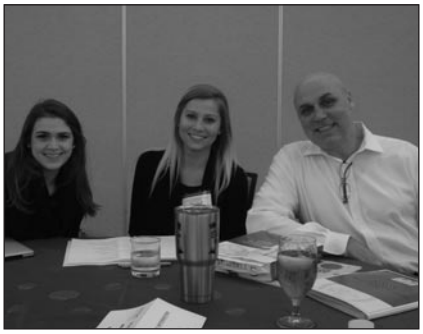
[15] *Byram*, slip op. at 7 n.5.

Award winners from February's Investigator School in Austin

TOP PHOTO: James Kyle Ready, an investigator in the Harrison County District Attorney's Office, was named the Chuck Dennis Investigator of the Year. He is pictured (in the middle) with DA Coke Solomon (at left) and his wife, Melinda (at right). ABOVE: Janet Rogillio, who just retired from the Freestone County and District Attorney's Office, was honored with the Career Investigator Award for more than 33 years of service. She is pictured with (left to right) Keith Meredith, Chris Martin, and Bob Gage. AT LEFT: Three winners of the PCI Award are pictured. They are Greg Bowers, Paul Dyer, and Chawn Gilliland. Other PCI winners (not pictured) include Mike Baker, James Wells, and Joe Erwin. Congratulations to all!

Photos from Investigator School in Austin

Photos from our Prosecutor Trial Skills Course



A roundup of notable quotables

"I think a lot of officers, especially in our department, do things for people all the time, and it goes unrecognized."

—Zionsville (Indiana) Police Department Officer Nick Smiley, who bought groceries for a woman and her children after the kids' stepfather was arrested and charged with child neglect. (http://www.athensreview.com/cnhi_network/for-indiana-officer-buying-food-for-family-of-neglect-suspect/article_77d1897b-777a-5fe1-bf0a-b60a03c05381.html)

"Every girl I know who's left the system either already had a kid or immediately got pregnant. You have to understand—we're children. We'll do anything to give or get love. And that's what a baby is for us."

—Jessica Urias, an adult who spent much of her childhood in Texas' foster care system. She, like many teenagers in foster care, became pregnant at 16, and shortly after giving birth, the state put her daughter up for adoption. (http://www.sacurrent.com/the-daily/archives/2017/01/17/how-texas-overburdened-foster-care-system-has-produced-a-generation-of-lost-adults)

"There are only two reasons why the FDA would take 17 months to make a final decision on Texas' importation of thiopental sodium: gross incompetence or willful obstruction."

—Texas Attorney General Ken Paxton in a press release. In January, Paxton filed a lawsuit against the Food and Drug Administration claiming it has delayed a shipment of the drug thiopental sodium, which is used in death penalty lethal injections. (http://setexasrecord.com/stories/511069479-paxton-files-suit-against-fda-over-delay-in-shipment-of-lethal-injection-drug)

"On a scale of 1 to 10? Eleven."

—Cowboy Sherrod Greeson of the Texas Tech Ranch Horse team, to a reporter who asked him how exciting his day had been. That morning, Greeson and other members of the team were called out of class to round up a pair of cows that had gotten loose in downtown Lubbock. The TV clip might be the most Texas interview ever. (http://www.wideopencountry.com/texas-tech-ranch-horse-team-gives-hilarious-interview-roping-runaway-cows-downtown-lubbock)

"I think it will be less 'Law and Order' and more DMV."

—a friend of the editor via text, on being summoned for jury duty.

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes one to this column will receive a free TDCAA T-shirt!

"I'm blessed. I couldn't live through another one—I'd have a heart attack."

—Charlesetta Williams, a 75-year-old Texas woman who took shelter in her bathtub during a tornado. The twister was so strong it ripped her and the bathtub out of the home; she ended up in the yard, still in the tub, with only scratches and bruises. (http://www.wideopencountry.com/texas-tornado-woman-bathtub)

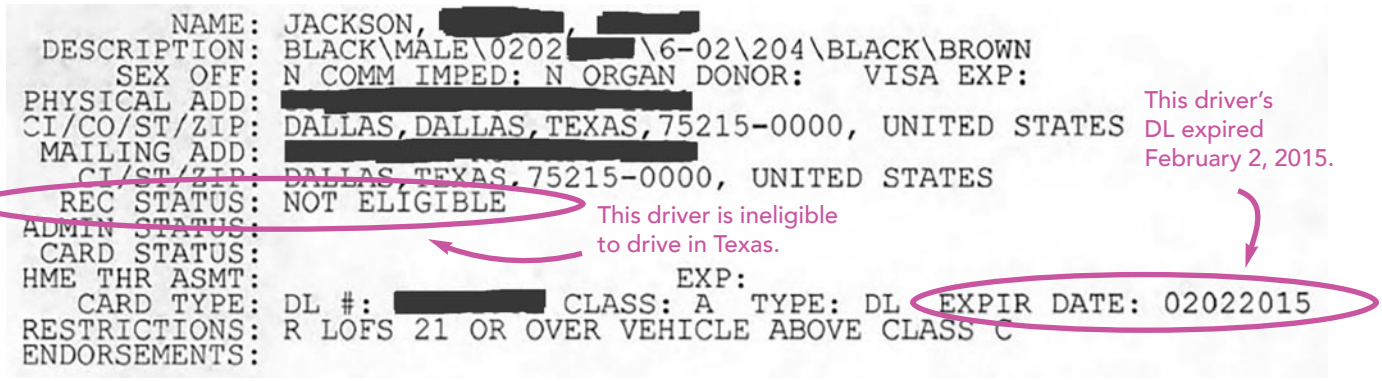
"I did save somebody's life that morning, but I had to take somebody else's life in the process, and that's difficult to reconcile."

—Thomas Yoxall, the Phoenix man who drove up on Leonard Penuelas-Escobar attacking State Trooper Ed Andersson on the side of Interstate 10. Yoxall, who was armed, got out of his car and demanded that Penuelas-Escobar stop. When he didn't, Yoxall shot and killed the assailant. (http://www.cnn.com/2017/01/24/us/arizona-man-saves-trooper-speaks/index.html)

Continued from the front cover

Untangling how to charge a DWLI (cont'd)

Sample of Driver's History Header Section



Driver's History Header Section

The image above is a sample of a defendant's driver's history. Always note, if the defendant has a driver's license, whether it was expired on the date of the offense. If so, *and* the driver's license expired under a period of suspension, the first DWLI paragraph may be charged using the "expired" language under §521.457(a)(3).

The "REC STATUS" field shows the defendant's eligibility to drive in Texas. For DWLI, this status should be "NOT ELIGIBLE," meaning that there is at least one active DPS enforcement action against the defendant's driver's license. An enforcement action is any action taken by the Texas DPS (suspension, revocation, denial of renewal, order of prohibition, etc.) against the driver's Texas DL or ID. (Remember, the defendant's *privilege* to drive in the State of Texas may be suspended or revoked under §521.457(a)(2); such a suspension or revocation can and will take place even if defendant has only an ID or no ID at all.)

Driver's History Enforcement Action Section

The status of each enforcement action is provided in the Driver's History Enforcement Action section (there's a sample of one below). Here are the options for a driver's status:

ACTIVE: The enforcement action is in effect.

EXPIRED: An action with a definite end date has expired and is no longer in effect.

LIFTED: The department has removed the action, and it is no longer in effect.

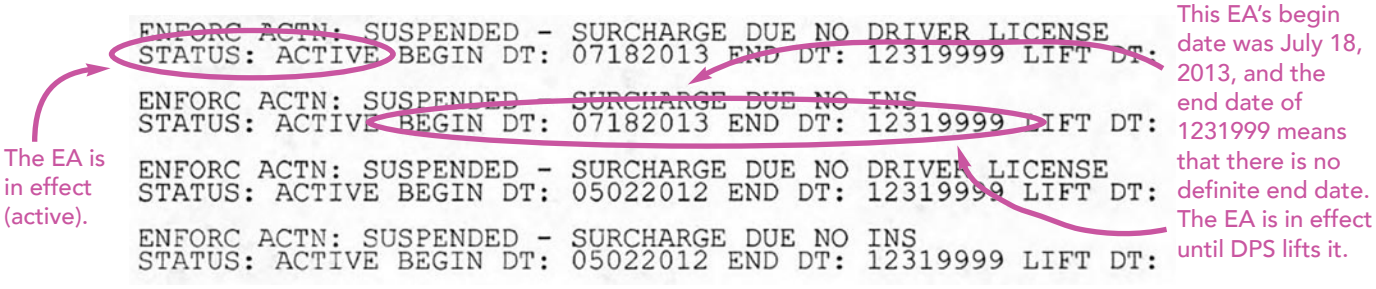
PENDING: The EA is pending; it is not in effect.

NEGATED: ALR hearing decision in the defendant's favor.

Begin, End, and Lift Dates

On the same line as the EA status are the fields denoting "BEGIN," "END," and "LIFT" dates. The

Sample of Driver's History Enforcement Action Section



"BEGIN" date is when the EA goes into effect. The "END" date is when the EA is no longer in effect for those EAs that have a defined duration. The "LIFT" date is when the EA is no longer in effect for those EAs that do not have a defined period.

EA types

The most common enforcement actions are shown in the tables at right and on page 22; they cross-reference the EA to its originating Transportation Code section. Note that when the defendant has multiple "ACTIVE" enforcement actions, there may be more than one that can be used in the charging paragraph.

In the sample on the opposite page, the driver's DL has four EAs in effect: two each of "Suspended—Surcharge Due No Driver License" and "Suspended—Surcharge Due No Ins." Any of them may form the basis for the first paragraph of the charge.

Also note that the Driver's History provided in the NCIC/TCIC report is a summary only. In some cases, the agency may submit the complete record obtained from DPS, but this is rare.

Enforcement Actions	Transportation Code Section
ALR–Related Actions	
ALR Suspension—Refusal	724.035 (Intoxication-related under §521.457 (f-1))
ALR Suspension—Failure	524.012 (Intoxication-related under §521.457 (f-1))
ALR Suspension—Under 21—Detectable	524.012 (Intoxication-related under §521.457 (f-1))
ALR Suspension—Under 21—Failure	524.012 (Intoxication-related under §521.457 (f-1))
Cancellation	
Cancelled Interlock Required	521.246
Denial of Issuance	
Deny Issurance—Drug Offense	521.372 (Basis for §521.457(b))
Deny Issuance of DL—Contempt [minor only]	521.3451 (Basis for §521.457(b))
Denial of Renewal	
Denied Renewal—Failure to Appear	706.004 (Basis for §521.457(a)(4))
Denied Renewal—Failure to Appear [minor only]	521.294 (Basis for §521.457(a)(4))
Department Suspensions—Other	
Suspension—Criminal Mischief	521.320
Suspension—Unsatisfied Liability Judgment	601.332
Juvenile Suspension[1]—Contempt	521.3451
Juvenile Suspension Fam. Code §54.042	521.345
Disqualification	
Disqualified—Three Serious Traffic Violations[2]	522.081
Drug–Related Offenses[3]	
Suspension—Drug Education Program Req'd	521.372
Mandatory Suspension—Drug Offense	521.372
Deny Issuance—Drug Offense	521.372 (Basis for §521.457(b))
Order of Prohibition	521.372 (Basis for §521.457(b))
Drug Education Program Not Completed	521.374[4]
DWI–Related Offenses (see also "ALR–Related Actions")	
Mandatory Suspension—DWI Conviction	521.344 (Intoxication-related under §521.457(f-1))
Mandatory Suspension—DWI Under 21	521.342 (Intoxication-related under §521.457(f-1))
Suspended—Surcharge Due Intoxication[5]	708.152 (Intoxication-related under §521.457(f-1))

Continued on page 22

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Enforcement Actions	Transportation Code Section
DWI–Related Offenses (continued)	
Revoked—Repeat Offender	521.344
Revoked—Fail to Complete DWI Education	521.344
Dept. Suspension—Out-of-State Conviction[6]	521.292 (Intoxication-related under §521.457(f-1))
DWLI-Related Offenses	
Department Suspension—DWLI	521.292
Mandatory Suspension—DWLI	521.292
Medical Advisory Board	
Suspension—Medical Advisory Board	521.319
Revoked—Medical Advisory Boardd—No Reply	521.294
Mandatory Suspensions—Other	
Mandatory Suspension—Habitual Violator	521.292
Mandatory Suspension—Evade Arrest/Det	521.292
Mandatory Susp—Crim Negligent Homicide	521.341
Mandatory Susp—Consump of Alcohol—Minor	521.342
Mandatory Suspension Minor in Possession	521.342
Fail to Complete Minor Education Course—ABC	521.345
SR (Safety Responsibility [Insurance]) Suspensions	
SR Suspension—Mandatory Conviction	601.231
SR Suspension—No Liability Insurance	601.231
SR Suspension—Liability Judgment	601.332
SR Suspension—Accident	601.152
Revocations—Other	
Revoked Minor FTA[7] Non-Traffic	521.294
Revoked—Non-Resident Violator Compact	521.294 or 521.306
Revoked—Sex Offender	521.348
Revoked—Incapable	521.294
Surcharges Due[8]	
Suspended—Surcharge Due No Ins	708.152
Suspended—Surcharge Due No Driver Lic	708.152
Suspended—Surcharge Due DWLI	708.152
Suspended—Surcharge Due Intoxication	708.152
Suspended—Surcharge Due Points	708.152
Suspended—Default Installment Agreement[9]	708.152

Endnotes

[1] DPS may also deny renewal under the same statute.

[2] For commercial driver's licenses (CDLs).

[3] See definition at Trans. Code §521.371(3).

[4] Suspension remains in effect until the drug education program is completed.

[5] Original surcharge for intoxication-related offenses are assessed under §708.102.

[6] DWI-related only if the out-of-state conviction is for DWI or DUI.

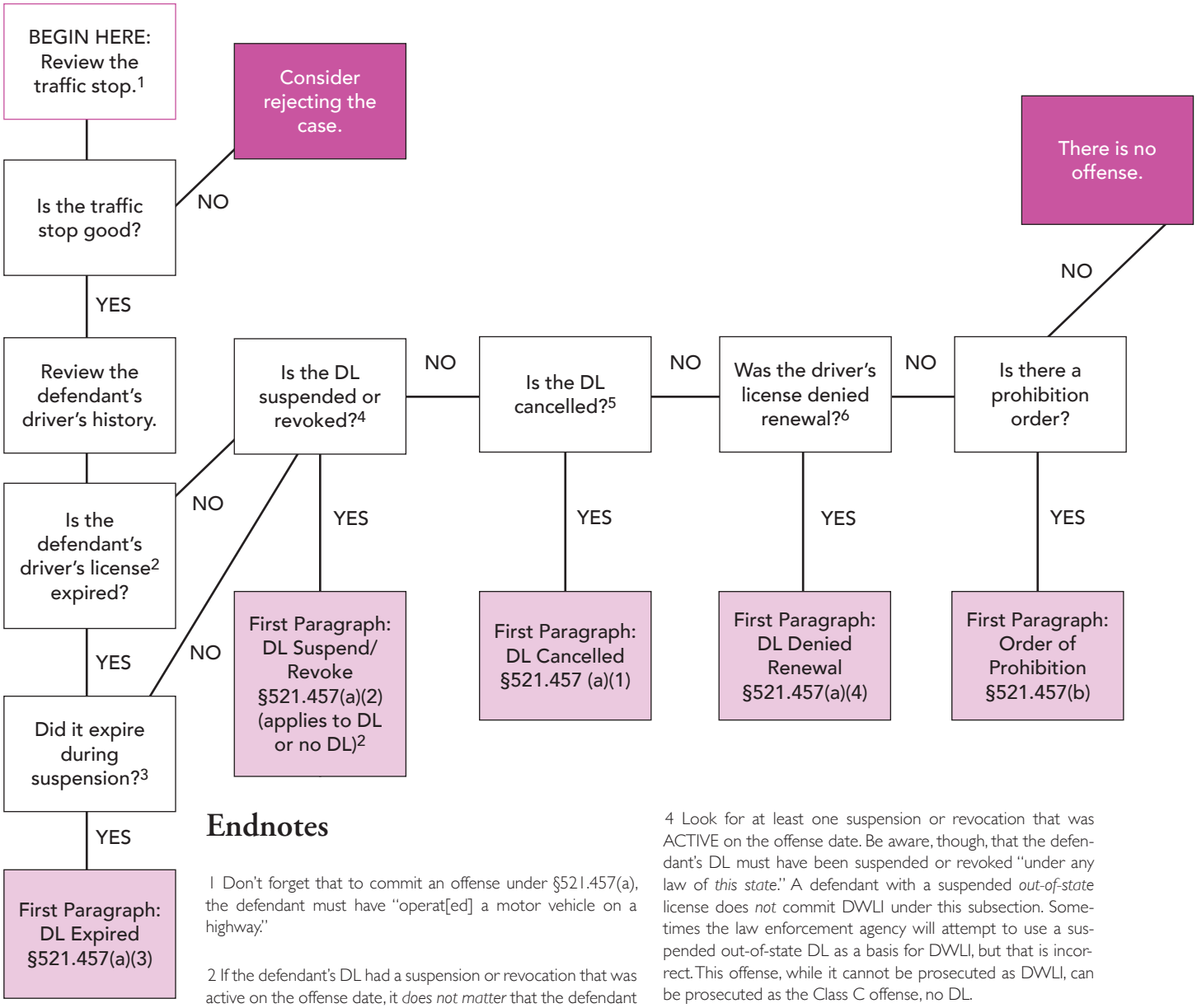
[7] Failure to appear.

[8] Related suspension remains in effect until surcharge and any related costs are paid.

[9] "Default Installment Agreement" may be used for a variety of enforcement actions where the defendant has failed to pay (defaulted on) surcharges previously assessed.

DWLI Flowchart (First Paragraph [Class C Offense])

Remember that charging a Class B DWLI requires *two paragraphs*: The first defines the Class C offense of Driving While License Invalid under Transportation Code §521.457(a) and (b). The second paragraph is the one that supports the Class B enhancement. Also, there may be more than one way to charge the first paragraph, e.g., where there are multiple active suspensions on the defendant's DL *and* it expired during a period of suspension. You then have a choice on which first paragraph to use.



Endnotes

1 Don't forget that to commit an offense under §521.457(a), the defendant must have "operat[ed] a motor vehicle on a highway."

2 If the defendant's DL had a suspension or revocation that was active on the offense date, it *does not matter* that the defendant has no Texas-issued driver's license. DPS can suspend or revoke either a driver's license *or* a person's *privilege to drive* in the state. See §521.457(a)(2): "during a period that the person's driver's license or privilege …" See also §521.001(6)(B).

3 Check the DL history. If the DL was expired on the offense date *and* it expired during a period of *suspension*, then this subsection is applicable, and you can use the paragraph with the "expired" language in it.

4 Look for at least one suspension or revocation that was ACTIVE on the offense date. Be aware, though, that the defendant's DL must have been suspended or revoked "under any law of *this state*." A defendant with a suspended *out-of-state* license does *not* commit DWLI under this subsection. Sometimes the law enforcement agency will attempt to use a suspended out-of-state DL as a basis for DWLI, but that is incorrect. This offense, while it cannot be prosecuted as DWLI, can be prosecuted as the Class C offense, no DL.

5 Note that a "cancellation" under subsection (a)(1) had to have occurred "*under this chapter [521].*"

6 Here again, the defendant must have been "denied [renewal] under any law *of this state*."

7 In rare cases, you may find that an Order of Prohibition has been issued against the defendant's DL. Again, note here that the order must have been issued "under any law *of this state*."

Continued on page 24

Continued from page 23

DWLI Flowchart (Second Paragraph [Class A or B Offense])

Now that you've got your first paragraph, let's look at the enhancement paragraph. There are four possible ways to get to a Class B enhancement. One of the four is rarely seen, so there are three conditions that you will usually look for:

1) a previous DWLI conviction (subsection (f)(1)),

2) whether the defendant was operating without financial responsibility (subsection (f)(2)), or

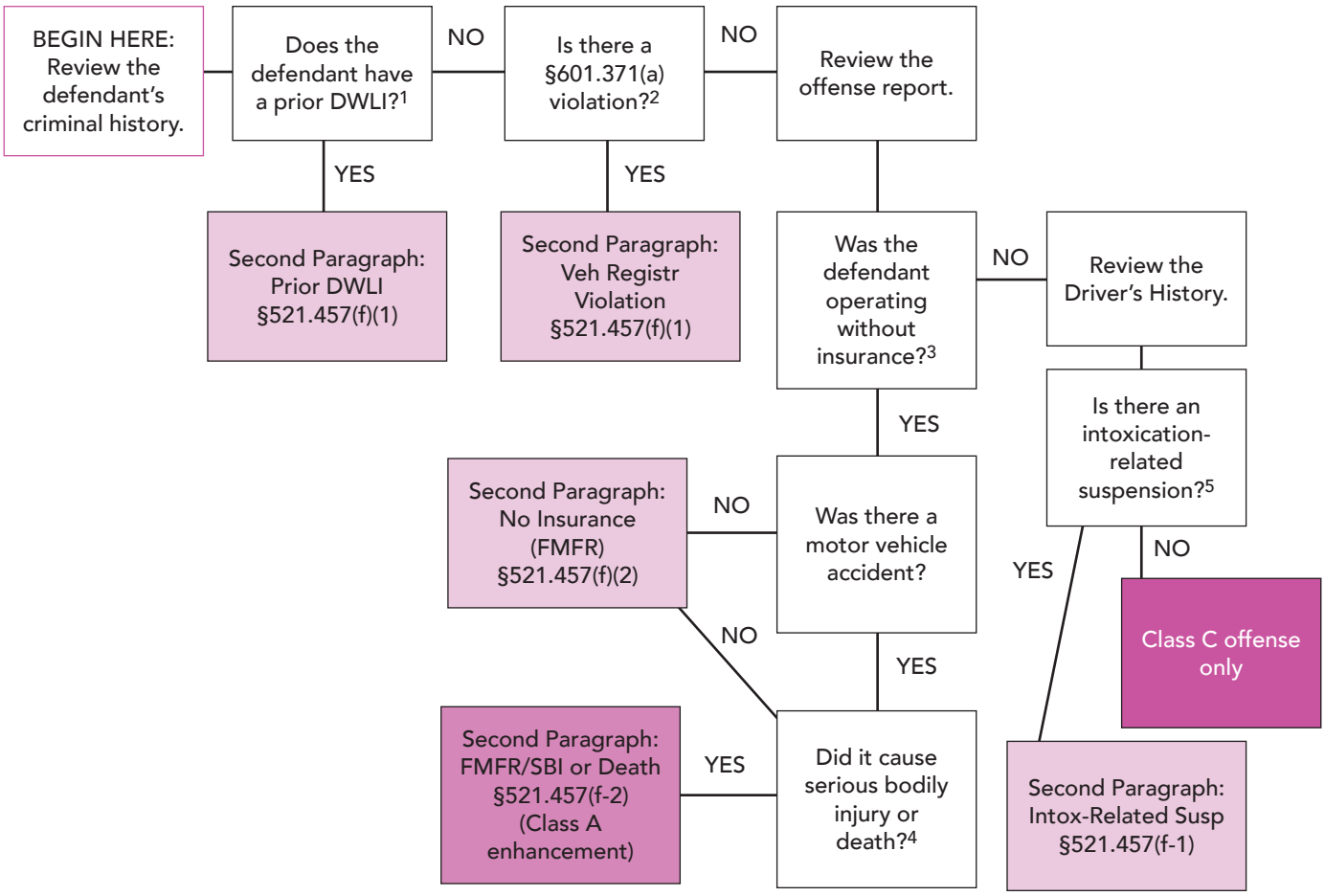
3) a previous suspension for an "offense involving the operation of a motor vehicle while intoxicated" (subsection (f-1)).

Once in a great while you may see an enterprising peace officer charge a defendant with a violation of what became known as "Eric's Law," that is, §521.457(f-2). This is the lone Class A offense provided for in the statute, and it requires failure to maintain financial responsibility as the base Class C offense and a defendant who "caused or was at fault in a motor vehicle accident that resulted in serious bodily injury to or the death of another person." In that instance, your second paragraph will be drafted from subsection (f-2).

On this flowchart, start at the block marked "BEGIN HERE" in the top left. However, you may start your review for the second paragraph in the offense report, criminal history, or driver's history if desired. Note also that there may be more than one option for the second paragraph; the terminations are not exclusive. If no termination is achieved (that is, you find no enhancement), then the offense is a Class C misdemeanor and should be filed as such.

It is possible to charge the first paragraph of a DWLI without the DL history, e.g., where the offense report states the active suspension(s). However, it is always best to have it and review it before beginning your selection of charging paragraphs.

Once you've got both paragraphs, you've just become the division DWLI expert. Not so bad after all. Good luck—and teach those traffic scofflaws a lesson! ❇



Endnotes

1 An enhancement paragraph based on a previous DWLI conviction is structured as is any other offense. Note that if the law enforcement agency fails to provide the judgment details for a previous Class C conviction, you may have some searching to do if the conviction was outside your jurisdiction. The driver history summary provided with the TCIC report doesn't provide the docket number in the conviction summary. A DPS full-certified abstract history does provide docket numbers, however. A reminder that §521.457(g) states the following about a previous DWLI conviction: "For purposes of this section, a conviction for an offense that involves operation of a motor vehicle after *August 31, 1987, is a final conviction*, regardless of whether the sentence for the conviction is probated." Therefore, a probated sentence will suffice if it meets the date qualification.

2 Section 521.457(f)(1) also provides an enhancement for violations of §601.371(a) "as that law existed before September 1, 2003." Section 601.371(a) makes it an offense if a motor vehicle owner "knowingly permits" another person to operate a motor vehicle on a highway while that vehicle's *registration* is suspended. There is little likelihood that a violation of §601.371(a) "as that law existed before September 1, 2003," would ever be used as an enhancing provision, but you should be aware that the provision exists.

3 The only way to verify operating without insurance is through the offense report. There should be enough facts to determine that the defendant was operating with no insurance, such as an admission or a database check that comes up "unconfirmed." Note that §601.191 creates an offense if a person operates a motor vehicle in violation of §601.051, which requires an insurance policy, a surety bond, a deposit, etc., to establish financial responsibility. A caution, though: If the law enforcement agency has also cited the defendant for a Class C Failure to Maintain Financial Responsibility offense *out of the same transaction*, you cannot use this enhancement for the DWLI.

4 Note that in rare instances, you may see a Class A DWLI under subsection (f-2). Under (f-2), the defendant must have been operating in violation of §601.191 (FMFR) *and* caused or was at fault in an accident that resulted in SBI or death to another person.

5 The intoxication-related suspensions are provided in the Enforcement Action tables on pages 21 and 22. Examples of these are intoxication surcharges, department DWI suspensions, and ALR-related suspensions. Note that a single intoxication-related suspension can form the basis for *both* the first and second paragraphs of a DWLI.

Photos from our Newly Elected Boot Camp

I had a kid and disappeared for six weeks

What to do when an employee needs a leave of absence (like I did)

On October 6, I rushed out of the office with hardly a word to anyone. I had gotten "the call" from my wife. My son, William, was on his way into the world just a little bit earlier than expected. We're all thankful that the skilled doctors at Trinity Mother Frances Hospital in Tyler were able to get my wife and son through the unplanned Caesarean section without any major complications, but it quickly became clear that my son would need to spend an indeterminate amount of time in the Neonatal Intensive Care Unit (NICU).

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

Prior to William's arrival, my elected, Mike Jimerson, and I had discussed how long I would be out. I had purposefully saved my two weeks' worth of vacation days to use when William was born. I hadn't planned to stay out longer than that. Mike, a father himself, knew everything might not go according to plan so, as a contingency, we discussed me "maybe" staying out a third week to help my wife and son get settled in.

What we hoped would be a few days in the NICU turned into five. Those five days stretched into 10, then 15, before the doctors ultimately gave us the all-clear to go home after 17 grueling days in the hospital. I had missed three full weeks of work before my wife and I ever took William home. Then I missed another three weeks before I returned to the office the week of Thanksgiving. Luckily, by then, this extended leave of absence was foreseeable, and my office had a contingency plan in place in the event that I missed significant time.

An employee's need for a leave of absence will not always be so foreseeable. For that reason, it is important for prosecutor office managers to know when, for how long, and for what reason an employee might be legally entitled to a leave of absence. My hope is that this article will answer those questions and a few more.

Family and Medical Leave Act (FMLA)

Back in 1993, President Bill Clinton and Congress shared a mutual concern for the job security of American employees who found themselves suffering from a serious medical condition or needing to care for a sick relative or a new baby.[1] Add a splash of Equal Protection concerns, and you have the recipe for the Family and Medical Leave Act (FMLA).

President Bill Clinton signed the FMLA into law on February 5, 1993, with an effective date of August 5 that same year. The FMLA is codified in Title 29, Chapter 28 of the United States Code, and its express purpose is to balance the demands of the workplace with the needs of families, to promote the economic stability of families, and to promote national interests in preserving family integrity.[2] The FMLA accomplishes this purpose by allowing employees to take reasonable leave for medical reasons, the birth or adoption of a child, and for the care of a child, spouse, or parent with a serious health condition.[3]

Eligible employees

There is a two-prong test to determine whether an employee is eligible for a leave of absence under FMLA. The employee must have been employed for at least 12 months and, during the previous 12 months, performed at least 1,250 hours of service.[4] When calculating the hours worked, do not count vacation, paid time off, or sick time. Only hours actually spent in service to the employer count. Excluded from the definition of eligible employee is any employee of an employer who is employed at a worksite at which such employer employees fewer than 50 employees if the total number of employees employed by that employer within 75 miles of the worksite is less than 50.[5] When calculating the number of employees, do not limit yourself to simply those individuals in your office. The number of employees, for purposes of the FMLA, will be the number of individuals employed by the county.

If the topic of FMLA leave comes up during a conversation with an employee within your office, be sure to confirm his eligibility for leave before making any assertions or promises that he will get time off under the act. If an employer makes an honest mistake and tells someone he is an FMLA-eligible employee, he can be estopped from raising non-

eligibility as a defense to suit if the employee reasonably relies on that representation and takes action to his detriment.[6]

Appropriate reasons for leave

There are five situations that entitle eligible employees to a leave of absence under FMLA. Regardless of which situation prompts the leave, the eligible employee is entitled to 12 workweeks of leave during a 12-month period.[7]

1 Birth of a child. The first situation addressed by the FMLA is probably the most common situation. An eligible employee is entitled to leave because of the birth of a child in order to care for the child.[8] Equal Protection concerns definitely come into play here. This provision applies equally to male and female employees. In the case of male employees, take note that the law does not require the male employee be married to the mother, so unmarried fathers-to-be are still to be afforded leave under the FMLA if eligible. If both parents are employed by the same employer, the aggregate number of workweeks of leave to which they are both entitled is limited to 12.[9]

2 Adoption or foster care. On a similar note, the second situation allows eligible employees to take leave if a child is placed with them for adoption or foster care.[10] There are two important things to note about the adoption/foster care situation. First, the age of the child being adopted or fostered doesn't matter. The section applies to any minor child. Second, some courts and the U.S. Department of Labor have said that a formal legal relationship is not necessary,[11] so an employee who takes on the day-to-day responsibility of caring for and financially supporting a minor child just might be eligible for FMLA leave. As with the birth of a child, if both adoptive parents are employed by the same employer, the aggregate number of workweeks of leave to which they are both entitled is limited to 12.[12]

3 Family with a serious health condition. The third situation allows eligible employees to leave when a spouse, child, or parent has a serious health condition.[13] There are several important points to consider with respect to this third situation. First, since *Obergefell v. Hodges,*[14] the term "spouse" will apply to same-sex couples in the same manner it applies to heterosexual couples. Next, if an employee requests FMLA leave to care for a child it must be 1) a minor child or 2) an adult child who is disabled for purposes of the American with Disabilities Act.[15] If spouses are employed by the same employer and take leave to care for a sick parent,[16] the aggregate number of workweeks of leave to which they are both entitled is limited to 12.[17]

4 An employee's serious health condition. The fourth situation allows leave under FMLA when the employee herself has a serious health condition and is unable to perform her job functions.[18] Obviously, this situation will apply when an eligible employee is unable to come to work at all; it may also arise when an employee can work but is not able to complete all the functions of her position.

The biggest issue with respect to the third and fourth situations is what constitutes a serious health condition. According to the U.S. Department of Labor, the most common serious health conditions that qualify for FMLA leave are:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate you or your family member (for example, unable to work or attend school) for more than three consecutive days and that require ongoing medical treatment (either multiple appointments with a health care provider or a single appointment and follow-up care, such as taking prescription medication);
- chronic conditions that cause occasional periods when you or a family member are incapacitated and require treatment by a health care provider at least twice a year; and
- pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).[19]

When an employee seeks FMLA leave for a serious health condition he suffers or because he needs to care for a family member suffering from a serious health condition, the employer may require certification from a health care provider.[20] The request for certification must be in writing and must detail the employee's specific obligation to provide certification and the consequences for failing to do so.[21] Certification of a serious health condition is sufficient if it states:

- the date on which the serious health condition commenced,
- the likely duration of the condition,
- appropriate medical facts about

Continued on page 28

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the condition within the knowledge of the health care provider, and

- a statement that the employee is unable to perform his job functions.[22]

If the certification is insufficient, an employer has a duty to inform the employee of the deficiency and provide him with a reasonable opportunity to cure it.[23]

If, as an employer, you have reason to doubt the validity of the certification an employee offers, the FMLA provides for second opinions.[24] The employer must pay for this second opinion, and the second evaluation can be performed by a health care provider the employer designates or approves.[25] The health care provider designated by the employer *cannot* be employed on a regular basis by the employer.[26] If the second opinion differs from the first, the statute says that the employer can pay for a third (!) opinion from a health care provider mutually agreed upon by the employer and employee.[27] This third opinion will be the final one and will be binding on both the employer and employee.[28]

Unlike in the first three situations, the statute does not prohibit a scenario where Employee A has a serious medical condition and needs 12 weeks of leave and Employee B, who is married to Employee A, needs 12 weeks of FMLA leave to care for her husband.

5 Active military duty. The fifth situation that qualifies for FMLA leave happens when an employee has a spouse, child, or parent who is on covered active duty (or has been notified about an impending order to covered active duty in any branch of the military).[29] Under this provision, eligible employees may take leave for a qualifying exigency while the military member is on covered active duty, is called to covered active duty status, or has been notified of an impending call or order to covered active duty.[30]

I've never had the great privilege to serve in any branch of the United States military, so the first time I read this, I had two questions. First, what exactly is "covered active duty?" "Covered active duty" for members of the Regular Armed Forces is a member's duty during deployment with the Armed Forces to a foreign country.[31] For members of the Reserve components of the Armed Forces (the National Guard and Reserves), covered active duty is a member's duty during deployment with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation.[32]

I next wondered what is considered a qualifying exigency. Luckily, our good friends at the U.S. Department of Labor give guidance on the issue. The U.S. Department of Labor has identified nine broad categories of qualifying exigencies:

- issues arising from the military member's short notice deployment (i.e., deployment within seven or less days of notice). For a period of up to seven days from the day the military member receives notice of deployment, an employee may take qualifying exigency leave to address *any* issue that arises from the short-notice deployment.
- attending military events and related activities. This is going to cover an expansive list of events. Think official ceremonies, programs, and informational briefings sponsored by the military or military service organizations.
- certain childcare and related activities arising from the military member's covered active duty. For example, arranging childcare in advance of a deployment or changing schools.
- certain activities arising from the military member's covered active duty related to care of the military member's parent who is incapable of self-care. For example, meetings with hospice or social service providers.
- making or updating financial and legal arrangements to address a military member's absence while on covered active duty.
- attending counseling for the employee, the military member, or the child of the military member when the need for that counseling arises from the covered active duty of the military member and is provided by someone other than a health care provider.
- taking up to 15 calendar days of leave to spend time with a military member who is on short-term, temporary Rest and Recuperation leave during deployment. The employee's leave for this reason must be taken while the military member is on Rest and Recuperation leave.
- certain post-deployment activities within 90 days of the end of the military member's covered active duty, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military, and addressing issues arising from the death of a military member, including attending the funeral.

- any other event that the employee and employer agree is a qualifying exigency.[33]

If the spouse, child, or parent of the employee receives a serious injury or illness that requires the employee to care for them, the employee will be entitled to 26 weeks of leave for the 12-month period.[34] This is called military caregiver leave. An employee will not be allowed to have any more than 26 weeks of leave combined between ordinary FMLA leave and military caregiver leave.[35]

Structuring the leave of absence

The FMLA provides guidance on how the leave of absence should be structured. If an employee requests to take leave intermittently or on a reduced schedule, §2612(b) is the section that gives guidance on the issue.

In general, leave taken as the result of a new birth or an adoption should not be taken by an employee intermittently or on a reduced schedule unless the employee and the employer agree otherwise.[36] If your county has a policy manual, see what it says about FMLA leave. If employees in one department are allowed to take FMLA for a new baby or an adoption intermittently or on a reduced schedule, it could impact your department should a lawsuit ever arise out of an employee being denied intermittent leave.

Leave taken because of an employee's serious health condition or that of the employee's child, spouse, or parent can generally be taken intermittently or on a reduced leave schedule when medically necessary.[37] If an employee takes leave intermittently or on a reduced schedule, she will still be entitled to the full 12 weeks of leave annually.[38] This situation is difficult on small prosecutors' offices because, as mentioned before, you look at the total number of people employed by the whole county, not just the prosecutor's office, for FMLA eligibility. The most rural county will likely have 50-plus employees scattered across its many departments, so it would be subject to the FMLA, even if the office losing an employee to FMLA leave has only three or four full-time people. A situation where intermittent or reduced leave is necessary can present itself in a number of different ways, such as for ailments such as a bad back, knee, or shoulder. Mental health issues could also give rise to a situation where an employee would need intermittent or reduced leave. Employers can require certification for intermittent or reduced leave that explains the medical necessity for intermittent or reduced-schedule leave.[39]

If a person requests intermittent leave or a reduced leave schedule under the military care giver provision or when a parent, spouse, child, or the employee herself has a serious health condition (the third and fourth situations detailed above), and that is foreseeable based on planned medical treatment (e.g., recurring physical rehab appointments or blood work), the employer can require the employee to transfer to an available alternative position for which the employee is qualified and that 1) has equivalent pay and benefits and 2) better accommodates recurring period of leave than the employee's regular position.[40] For example, if a prosecutor assigned to a trial-intensive position requires intermittent leave to participate in physical rehabilitation sessions stemming from injuries suffered in an automobile accident, her intermittent absences could very well have a detrimental effect on your office's ability to prepare and try cases before a jury. This provision would allow an employer to assign that prosecutor to a different position—intake, for example—that would be more accommodating to regular absences.

Salary and benefits while on leave

When an employee takes leave under FMLA, that leave is unpaid.[41] Individual employers are free to pay employees for the leave they take under FMLA, but they are not required to. If an employer provides paid leave for fewer than 12 workweeks (or 26, if appropriate), the remainder of leave taken by the employee is unpaid.[42] For example, if your county offers six weeks of paid maternity/paternity leave as part of its benefits package, an employee who takes 12 weeks' leave under FMLA would get the benefit of the county's paid leave for the first six weeks, and the remaining six weeks would be unpaid.

What happens to eligible employees' accrued vacation time and sick time when they take leave under the FMLA? The statute provides that an *employee may elect* or an *employer may require* an employee to substitute any accrued paid vacation leave, paid personal leave, or paid sick leave for any part of the employee's leave under the FMLA.[43] An

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employer is not required to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide such leave.[44] I utilized this provision when I took leave for the birth of my son. My county doesn't provide paternity or maternity leave as part of its compensation package, so to ensure that my pay was not interrupted by my leave of absence, I applied my accrued vacation and sick time to my FMLA leave. Had my county been so inclined, it could have *required* me to apply my accrued vacation and sick time to the leave to prevent me from taking unpaid leave under the FMLA and then, after the FMLA leave was over, take my accrued vacation time to extend my absence from the office. It is up to the employer to decide its policy on requiring employees to take accrued sick days or vacation time.

Taking leave under the FMLA does not result in the loss of any employment benefit accrued prior to leave.[45] However, the FMLA does not entitle any employee, upon being restored to his regular position, to the accrual of any seniority or employment benefits during any period of leave or any right, benefit, or position of employment other than that which they would have been entitled to if they hadn't taken the leave.[46]

During any leave, the employer shall maintain coverage under any group health plan in exactly the same manner as would have been provided if the employee had not taken the leave.[47] The employer can recover the cost of the premium that the employer paid for maintaining coverage for the employee during any period of unpaid leave if 1) the employee fails to return to work after the period of leave has expired and 2) the employee fails to return to work for a reason other than a continuation, recurrence, or onset of a serious health condition that would entitle him to leave or other circumstances beyond his control.[48] An employer may require employees who claim to be unable to return to work to provide certification by a health care provider.[49]

Restoration to position[50]

When an employee returns from FMLA leave, he is entitled to restoration to the position that he held when he left.[51] Once the employee submits a statement from a health care provider that he is fit to return to work, the employer's duty to reinstate him is triggered under the FMLA.[52]

The employee's right to reinstatement is *not* absolute. An employee isn't entitled to return to his prior position if he would have been terminated or demoted regardless of whether he took FMLA leave.[53] For example, assume that an employee has been repeatedly failing to report to work on time despite repeated admonitions. Because of this habitual tardiness and the employee's failure to correct the behavior, his supervisor decides to terminate him, but before the supervisor informs the employee of his termination, the employee contracts a sudden but serious health condition and goes on FMLA leave. While on leave, the supervisor notifies the employee that he has been terminated—which will look horrible on paper and will probably get your office sued. It may even create at an inference of impropriety on the supervisor's part.[54] However, at trial the employee would bear the burden of proving that the employer's reasons for terminating his employment were illegally motivated.[55]

Alternatively, an employee may be restored to an equivalent position with the same benefits, pay, and other terms and conditions of employment.[56] To be an equivalent position, the new position must be "virtually identical to the employee's former position in terms of pay, benefits, and working conditions. … It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[57] The opportunities for promotion and salary increase must be the same.[58] Courts will even consider whether other employees view the new and old positions as equally desirable.[59]

Conclusion

As an employee who has benefited from the existence of the Family and Medical Leave Act, I can tell you that it can be a huge blessing to those who qualify for its protections. As an attorney who advises county officials on the FMLA's administration in my county, I can tell you it can be an incredibly daunting piece of legislation. To administer it correctly, familiarize yourself with the many requirements placed on both employees and employers. Do yourself and your employees a favor: Stay informed about the requirements of the FMLA, administer it fairly, and *don't get sued.* ❇

Endnotes

[1] 29 U.S.C. §2601(a).

[2] 29 U.S.C. §2601(b).

[3] 29 U.S.C. §2601(b)(2).

[4] 29 U.S.C. §2611(2)(A).

[5] 29 U.S.C. §2611(2)(B)(ii). Admittedly, this exception is unlikely to apply to most county employees.

[6] *Minard v. ITC Deltacom Comms.*, 447 F.3d 352, 359 (5th Cir. 2006).

[7] 29 U.S.C. §2612(a)(1).

[8] 29 U.S.C. §2612(a)(1)(A).

[9] 29 U.S.C. §2612(f)(1)(A).

[10] 29 U.S.C. §2612(a)(1)(B).

[11] *Martin v. Brevard Cty. Pub. Schs.*, 543 F.3d 1261,1265-66 (11th Cir. 2008) held that an *in loco parentis* relationship was sufficient and that a biological or legal relationship was not necessary.

[12] 26 U.S.C. §2612(f)(1)(A).

[13] 29 U.S.C. §2612(a)(1)(C).

[14] 576 U.S. ____, 135 S.Ct. 2584 (2015) holding that marriage is a fundamental right guaranteed to same sex couples by both the Equal Protection Clause and Due Process clause.

[15] *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 587 (6th Cir. 2007).

[16] Important note: The statute specifically says "sick parent" under subsection C, despite the fact that subsection C also covers sick spouses and children. I was unable to locate a case that provided a clearer interpretation of this subsection. For that reason, I would be leery of recommending someone limit a set of spouses to just 12 weeks combined if they were caring for someone other than a parent.

[17] 29 U.S.C. §2612(f)(1)(B).

[18] 29 U.S.C. §2612(a)(1)(D).

[19] https://www.dol.gov/whd/fmla/fmla-faqs.htm. Retrieved on 1/30/2017.

[20] 29 U.S.C. §2613(a).

[21] *Branham v. Gannett Satellite Info. Network, Inc.*, 619 F.3d 563, 572 (6th Cir. 2010).

[22] 29 U.S.C. §2613(b)(1)-(3), (5). When the employee is taking leave to care for a family member, the employee will need a statement from a healthcare provider that states the employee must care for a son, daughter, spouse, or parent and the estimated amount of time needed to care for the family member. 29 U.S.C. § 2613(b)(4)(A).

[23] *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 579 (6th Cir. 2007).

[24] 29 U.S.C. §2613(c).

[25] 29 U.S.C. §2613(c)(1).

[26] 29 U.S.C. §2613(c)(2).

[27] 29 U.S.C. §2613(d)(1).

[28] 29 U.S.C. §2613(d)(2).

[29] 29 U.S.C. §2612(a)(1)(E).

[30] *Id.*

[31] https://www.dol.gov/whd/regs/compliance/whdfs28mc.pdf. Retrieved on 1/30/2017.

[32] *Id.*

[33] https://www.dol.gov/whd/regs/compliance/whdfs28mc.pdf. Retrieved on 1/30/2017.

[34] 29 U.S.C. §2612(a)(3).

[35] 29 U.S.C. §2612(a)(4).

[36] 29 U.S.C. §2612(b)(1).

[37] *Id.*

[38] *Id.*

[39] 29 U.S.C. § 2613(b)(5)-(7).

[40] 29 U.S.C. §2612(b)(2).

[41] 29 U.S.C. §2612(c). Important note: Many employees in your office will be exempt employees under the Fair Labor Standards Act (FLSA). If one of those exempt employees takes unpaid leave under the FMLA, his status as an exempt employee under the FLSA *will not* be affected.

[42] 29 U.S.C. §2612(d)(1).

[43] 29 U.S.C. §2612(d)(2)(A)-(B). Please note that this is somewhat of a simplification of the statute's requirements. The statute differentiates between FMLA taken because the employee himself is suffering from a serious health condition and the other provisions. Consult the statute for a more detailed explanation.

[44] 29 U.S.C. §2612(d)(2)(B).

[45] 29 U.S.C. §2614(a)(2).

[46] 29 U.S.C. §2614(a)(3)(A)-(B).

[47] 29 U.S.C. §2614(c)(1).

[48] 29 U.S.C. §2614(c)(2).

[49] 29 U.S.C. §2614(c)(3). Please consult this section for more specific detail regarding certification.

[50] There is an exemption to the employer's obligation to reinstate certain highly compensated employees found in 29 U.S.C. §2614(b). Please consult this section if you are dealing with an employee who is among the highest paid 10 percent of employees within 75 miles of the facility where the employee is employed.

[51] 29 U.S.C. §2614(a)(1)(A).

[52] *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1004(6th Cir. 2005).

[53] *Simpson v. Office of the Chief Judge of the Circuit Ct. of Will Cty.*, 559 F.3d 706, 712 (7th Cir. 2009).

[54] *Id.*

[55] *Id.* See also *Moorer v. Baptist Memorial Health Care Sys.*, 398 F.3d 469, 488-89 (6th Cir. 2005).

[56] 29 U.S.C. §2614(a)(1)(B).

[57] *Smith v. East Baton Rouge Parish Sch. Bd.*, 453 F.3d 650,651 (6th Cir. 2006).

[58] *Id.*

[59] *Id.*

20 time and productivity hacks

Below are tips and tricks you can use to save time.

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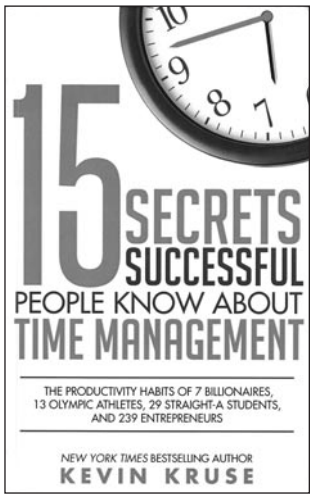

By Kevin Kruse
Best-selling author and entrepreneur

1 Always cook more than one meal at a time. There is a lot of inefficient time in cooking. The planning, shopping, prep work, cooking, cleaning. If I cook dinner, which is often because I enjoy cooking, I'll make sure I get two or three different meals out of it. I personally don't mind eating the same healthy dinner three nights in a row—I mainly eat for health during the week, not pleasure.

2 Off-load your memory with your camera phone. I have a horrible memory, but I've learned to off-load short-term memory items to my phone. Some of the things I might take pictures of: my hotel room number, where I parked my car, the label from a good bottle of wine, a book cover that a friend shows me, a whiteboard filled with great notes, or the valet parking ticket. It's an easy way to relieve stress and save a few minutes of wandering around looking for your room or car.

3 Mute your phone and shut off all notifications. Working distraction free has already been a theme throughout this book, but it is absolutely crazy to let your computer, phone, or other devices "shout" at you with notifications. My phone is on silent at all times, unless my kids are out at night and I want to make sure I can respond in an emergency. There is no need to be notified every time someone DMs you on Twitter, PMs you on Facebook, or emails you.

4 Drink a healthy protein shake for breakfast. Right now, you are probably skipping breakfast to save time, or you are stopping at a Starbucks or Dunkin Donuts to grab coffee and a donut. Both are bad ideas. Remember it's about productivity, not time, and drinking a protein shake gives you energy and alertness all morning, boosting your metabolism so you'll actually burn more calories than if you skip breakfast. And as fast as your dash into a donut shop is, making a shake is faster than parking, walking in, waiting in line, waiting for your coffee, and walking back out.

5 Never watch live TV. Why? Because of the commercials. Just DVR every show you want to watch so you can skip through the commercials. Unless it's a realtime sporting event or the Bachelor is giving his final rose, do you really need to watch a TV show the moment it's broadcast?

6 Don't watch TV at all! David Meerman Scott is a marketing and sales strategist, keynote speaker, and bestselling author of 10 books including The New Rules of Marketing & PR and Newsjacking. In an interview for this book he told me:

> According to Nielsen, the average American spends 158 hours each month watching television! That's 1,896 hours per year. Damn. That would be enough time to write an awesome book or start a company. You want a six-pack? Exercise instead of watch TV. Eliminate television and you gain nearly 2,000 hours a year. Imagine what *you* could do!

7 Use your drive-time wisely. Think about how many hours a year you spend driving in the car. Commute times, driving to clients, long trips to your parents' house—even if you just drive 30 minutes each way to work, that is over 200 hours a year, or almost 10 days of time. We often reflexively just think of this as dead time on our calendar and crank up our favorite music and tune out the world. Instead, think of phone calls you need to make, whether work-related or to friends and family members. Consider listening to podcasts (which can cover the daily news), "how to" programs, or even learning a foreign language. Of course you can use podcast apps such as Stitcher (www.Stitcher.com) to easily find great programs and listen to them at double the speed to save even more time!

8 Never call people without setting an appointment ahead of time (unless it's social, of course).

How often do you call unannounced and get someone's voicemail? "Hey Jane, just wanted to catch up to hear how the sales meeting went; call me back." And then Jane calls you, and you're busy so she gets your voicemail: "Hey, it's Jane, just returning your call. Call me back." And on and on, like a voicemail ping-pong game. Instead, send a calendar invite or email that just says, "Jane, let's connect on the phone so I can get debriefed on the sales meeting. Is tomorrow at 11:00 a.m. good? If not, suggest a few openings on your day." Notice "a few" so you don't end up with email ping-pong trying to find time on each other's calendars.

9 **Avoid busy times out in the real world if at all possible.** This secret will save many minutes a week and many hours in the year. It's as simple as shifting when you do things you have to do. Instead of shopping for groceries on a busy Saturday morning, do it late Friday night or early Sunday morning instead. Don't schedule trips to clients close to rush-hour drive times. Don't go into the bank during lunch hours.

10 **Use dual monitors**. Adding a second monitor to your computer setup is one of the easiest ways to gain massive efficiency for your computer tasks. It completely eliminates that need to toggle between two different windows. I actually work with one monitor on one computer and two monitors on another computer, so technically I have three monitors going at the same time. But even with just two, you can then easily type in your word processor while reviewing research material on the Internet, preview code in one window while debugging in the other, or if you aren't on a focus sprint, yes, you can monitor email traffic or view your calendar in one window while being constructive in the other.

11 **Have a stop-doing list**. The great business thinker Jim Collins has often said that your "stop doing" list is just as important, if not more important, than your to-do list. In his 2003 article (www.jimcollins.com/articletopics/articles/best-new-years.html), he talks about how great companies practice this, and he himself uses New Year's resolution time to work on his stop-doing list. Simplicity and minimalism can free the mind, free your schedule, and enable you to do great work.

12 **Remind people of the "end time."** There was a time when I reported to the CEO of a large company and had assumed major new responsibilities. I quickly started drowning. My CEO's assistant offered to follow me around to help. At the end of two weeks, she said, "One thing that you need to do is really commit to the end time. Don't let people keep you longer than they were scheduled for." Great advice. Ever since, I start every meeting, and especially every phone call, with, "Before we get started, I see we are scheduled for 30 minutes, and I do have a hard stop 3 o'clock." This way everyone knows in advance that it won't be a casual, leisurely meeting that just runs its own course. This tip is especially critical if you schedule calls for only 10 or 15 minutes.

13 **Hang out with productive people.** Seems silly, but it's so powerful. If your best friends at work are the ones taking 90-minute lunches all the time, you're likely to do the same. If your social circle routinely does happy hour and discusses what happened on reality TV the night before, you're likely to continue doing the same. Consider upgrading your work friends and your other friends. If for some reason you can't find productive time ninjas around you, hang out with them online. I've joined Facebook groups for entrepreneurs, writers, runners, and on and on. It's a great way to "hang" with people who are motivating each other, sharing their productivity tips, and keeping each other on the path to success.

14 **Tell people around you to leave you alone.** As the Wall Street Journal reported in its September 11, 2013, edition, the biggest distraction to work isn't email or instant messenger-it's face-to-face interruptions. If you work from home, make it clear to your family that work is work, and they can't interrupt you. If you're in the office, consider hanging a "Do Not Disturb" or "Back at [time]" sign on your door or running yellow caution tape across your cube entrance. And if you're the boss, consider setting aside a couple hours of day throughout the office for quiet time.

15 **Buy birthday cards by the dozen.** Do you go out and buy a card every time a friend or family member's birthday comes up? Or do you rush out to buy a condolence card each time you need one? The next time just go out and buy 10 to 20 cards—whatever a year's worth is—and a roll of stamps and keep them in your desk drawer so they're ready to go. Think of how

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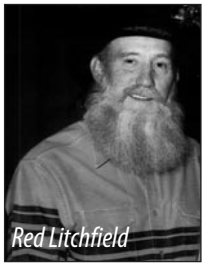
Remembering Red Litchfield

Seventeen years after Raymond "Red" Litchfield was killed in his Coryell County home, his wife, Margaret, was tried and convicted for his murder. Here's how Texas Rangers and county prosecutors brought her to justice.

By Dusty Boyd
District Attorney in Coryell County

1999 was a memorable year. Prince wrote a popular song about it, the hit HBO series "The Sopranos" debuted, and John Elway earned MVP honors in Super Bowl XXXIII with a victory over the Atlanta Falcons. It seems so long ago, but many of us can remember what experiences we had living in the last year of the 20th Century.

One local family could never forget that year because on a small, rural route northwest of Copperas Cove, Raymond "Red" Litchfield was found murdered in his home on January 29, 1999. His death haunted the Litchfield family because not only had they lost Red, but his murderer had never been brought to justice. It was a period of sadness and frustration that repeated itself for the next 16 years—until October 19, 2016, when a Coryell County jury returned a guilty verdict against Red's wife, Margaret Litchfield, for murdering her husband so long ago.


Red Litchfield

Red Litchfield was 49 at the time of his death. He was born and raised in Coryell County and had lived on his family's land outside of Copperas Cove with his wife, Margaret. His mother, Opal, had lived just 100 yards away on the same property. Red had been in the construction business his entire life, starting as a bulldozer operator, then eventually opening and managing his own home construction business. Like most country boys, Red loved the outdoors. He fished, hunted, and looked for arrowheads around the area, and he was always up for a domino game with his buddies.

Red's death

On January 29, 1999, at around 2 o'clock in the afternoon, Red was found dead in his kitchen by his wife. She told authorities that she had left that morning for work at 6:30 a.m. Red was going to stay home that day because the weather was nasty and he couldn't get any work done because of the rain. They got up that morning, had coffee (she drank regular and he drank decaf), visited, and Margaret said that as he was going back to bed, he had asked her to leave the gate open (an electronic gate at the entrance to the house that required a remote to open), as some guys were going to come out and play dominoes. Before she left, she went into the back bedroom, leaned over to kiss him goodbye, and told him, "See you later, lazy bones."

Margaret left the house that morning and went to several places for work and errands. She was a home cleaner by trade, so she went to the first home to clean that day, then to Lampasas to get her truck worked on, then back to Copperas Cove where she stopped by Chess's, a popular coffee restaurant. She told investigators she stopped there to look for Red (but he wasn't there), then went to get her vehicle registration renewed, then back to Chess's, then to the grocery store, then back to Chess's one last time before making her way home. That's when she said she found Red's body at about 2 o'clock p.m. She then called 911 and waited for emergency personnel.

The Coryell County Sheriff's Office, along with several Texas Rangers, responded to the scene to conduct the investigation. No forced entry was indicated, and nothing was missing from the residence except for Red's .22 Ruger pistol, which he kept in his bedside table. Investigators learned from the scene that the shooting began in the bedroom where Red was in his bed. Six .22 bullet casings were found in the room, and several gunshot holes were in the mattress, floor, and door. Red was first shot in bed, got up to escape the shooter, and stumbled through the bedroom, down the hallway, and into the kitchen, where his body was. His blood was found along this entire path: on the bed-

sheets and floor, the walls in the hallway, and the floor in front of the refrigerator.

EMTs noted that Red's body was "hard as a rock" and that it was in full rigor. He had three gunshot wounds, one to his side that was a through and through, one to the right side of his chest, and another on his back on his right shoulder blade. His body was taken to Dallas to the Southwest Institute of Forensic Science for an autopsy, and his death was declared a homicide. Investigators believed his time of death to be at least six hours before he was found, but at that time no expert was enlisted to help establish time of death.

Investigators first met with Margaret that night to take her initial statement about that morning's events and to collect any other information that would be useful to the investigation. She said that she knew no one who wanted to harm Red and that things had been going well for them financially and personally. Red had planned to purchase a new boat that day and was set to meet with the bank to do all of the financial paperwork. Margaret told investigators that there was no insurance policy on Red.

Investigators interviewed bank employees, friends, family, and other people who worked with Red in the construction business, and none of his family, friends, coworkers, or subcontractors knew of anyone who wanted to hurt him. Through an interview with one of the bank employees, investigators learned that Margaret had frantically called the bank the day before her hus-

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20 time and productivity hacks (cont'd)

many 15-minute trips to the store you will save in a given year.

16 **Pay bills electronically.** Do you pay bills every week or two the old-fashioned way (with checks and stamps)? Big time-waster. Just sign up for automatic bill pay (using a credit card whenever possible so you can earn points). You do need to leave a little extra money in your checking account to make sure you never run short, but it's worth the slight cash inefficiency to save all that time.

17 **Never answer a call from an unknown number.** If someone is not in your contact list, it's highly unlikely the call is from a friend, family member, or big client. The odds are high it's a sales call or a friend of a friend who was given your number. And even if the call is from someone you know, it's always best to have call time scheduled on your calendar.

18 **Get a business coach, mentor, or mastermind group.** This may sound unusual as time-management advice, but connecting with someone who has already walked the path you're on can save you a lot of time (not to mention money and frustration).

19 **Release your content through multiple channels.** Joe Pulizzi, author of Epic Content Marketing, offers this advice: "Plan your content creation in advance. Most people think in content tactics, like publishing a blog or a Facebook post. It's best to think in stories and how many ways you can tell that story: an article, a blog, a book, a webinar, multiple social media posts, an ebook, a podcast, and more. The time savings are immense if you only plan in advance."

20 **Know that done is better than perfect.** Software developers will often say, "Shipped is better than perfect." And the release of software version 1.0 is quickly followed by version 1.1, 1.2, and on and on to fix the bugs inevitably contained in the initial release. As a writer, I can report it's too easy to keep working on my book by adding new material, new ideas, and better ways of phrasing things. But published imperfectly is of more value to the world than never published at all. ❇

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band's death to reschedule his financing meeting so that she could apprise him of a debt she had incurred on a Discover credit card. She was concerned that he would learn of the debt at the bank and be upset that it could affect his financing options for the boat.

In the meantime, investigators requested that Margaret submit to a polygraph, and she agreed. The results revealed deception on her part, and investigators began to believe that she was involved in her husband's death. However, collecting the evidence to prove her involvement was challenging. She had clear alibis for where she had been that morning, her whereabouts were corroborated by a host of witnesses, and her story was consistent and did not change. Plus, there was no apparent motive.

The case eventually grew cold as no new leads were secured. Rangers retired, and other investigators were reassigned as two new sheriffs were elected over the years. Red's sister, Faye Powell, bought an ad in the local Copperas Cove newspaper every year on the anniversary of Red's death seeking any information that would help in solving his murder. This went on for over 15 years.

My involvement

I was elected District Attorney in 2012 and took office in January 2013. About a year into my first term, Faye's husband, James Powell, approached me and asked me to look at the case again. The family firmly believed that Margaret was involved in the murder and requested that I consider evaluating the case to determine if anything could be done. At my direction, my legal assistant pulled the old file, and we began to review the events as they happened in 1999. I engaged my new Ranger, Jason Bobo, who was already familiar with the case because Faye had reached out to him as soon as he was assigned to this area.

Upon initial review, I had the same concerns as the family: that Margaret either knew more about or was more involved in her husband's death than she initially represented. The facts surrounding the shooting itself caused me to believe that the murderer would have to know intimate, personal information about Red the day he was killed. More questions than answers soon developed, and we believed those questions would be best asked through the grand jury process.

At the grand jury, we called all the previous witnesses, even Margaret Litchfield on two separate occasions, and collected as much of the old information as possible (as well as some new). During that time Margaret's story made some significant turns, more importantly how and when she last saw her husband. In 1999, she claimed the last time she saw him, he was returning to bed and that she leaned over and kissed him goodbye, telling him, "See you later, lazy bones." However, in her testimony to the grand jury in 2013, she claimed that the last time she saw him alive, Red was naked and smoking pot at the kitchen counter. This was a serious deviation in her story, even with 15 years passing since the murder.

We also gathered information about Margaret's whereabouts that day that suggested she had intentionally traveled to and stopped at locations throughout the area to create her alibi. Additionally, we determined that the Litchfields' financial condition was not as robust as Margaret told investigators in 1999. The payout of a life insurance policy, which Margaret had initially lied

Standing, left to right: Ranger Jason Bobo, First Assistant District Attorney Scott Stevens, Legal Assistant Melissa Tull, and District Attorney Dusty Boyd. Seated in front are James and Faye Powell, Red's brother-in-law and sister.

about to the original investigators, had a significant impact on the investigation. What she wrote on the applications for the policies' claims was inconsistent with her original statements to police. Once grand jurors considered the information, they returned an indictment for murder against Margaret Litchfield.

In the meantime, we tried to establish a reasonable time of death on Red. Dr. Kendall Crowns, a medical examiner from the Travis County Medical Examiner's Office, worked on this for us. This was a crucial part of the case because in 1999, investigators didn't identify a possible time of death. The only information at that time was a notation from the responding paramedic that she believed Raymond to be deceased at least six hours. To get an expert opinion on this issue, Texas Ranger Jason Bobo and I traveled to Austin to visit with Dr. Crowns, taking with us pictures of the crime scene, reports from the EMTs, and the autopsy report. Dr. Crowns believed that Red's death occurred prior to 6:30 a.m., which we always felt was true. Because pinpointing an exact time of death can be very difficult, Dr. Crowns established a window of time based on the pictures, statements, EMT reports, and the autopsy report, that Red's time of death was anywhere from six to 18 hours before his body was found, but in his opinion more likely around the 12-hour mark. That meant that Margaret would have been in the house when Red was killed.

Additionally, we reached out to Tom Bevel of Norman, Oklahoma, to assist us in the crime scene reconstruction. It was imperative that we establish that the shooting began in the bedroom while Red was in bed. If that were true, the shooter would have had to pull up to the house, navigate two dogs that weren't friendly to strangers, enter the residence, walk through the house to the back bedroom where he slept, get the .22 Ruger from his bedside table, walk to the other side of the bed, and begin shooting. These facts indicate that the shooter had personal, intimate knowledge about Red and the house to carry out such a crime. Mr. Bevel confirmed the original investigators' belief that the shooting began in the bedroom, and he eventually testified about his conclusions based on his review of the crime scene photos, sketches, and investigators' reports.

At this point, we felt that we were prepared to make a strong case against Margaret Litchfield. With a better understanding of the time of death, a confirmation of the sequential events of the shooting itself, and the interview with the bank employee who talked to Margaret about the debt she had incurred, we were ready for trial.

Nearby gunshots

As we were putting the finishing touches on our trial preparation, we learned that one of the Litchfields' neighbors, who had told investigators back in 1999 that he heard gunshots around noon the day of Red's murder, was in an Illinois prison for shooting and killing his wife. Understanding that the defense could possible point the finger at him, we secured a subpoena to bring him from Illinois and have him testify at trial. Steve Miller, the neighbor, testified that he had heard several gunshots at the noon hour. He had also observed Red's house at about that time and said that no one was there, and there was nothing unusual at the house that caused him to believe that the shots came from the Litchfields' place. Investigators in 1999 had known about the gunshots and had learned that several soldiers from Fort Hood who lived in that area had been target practice shooting, and the shots Steve Miller had heard had come from them. At that time, Miller didn't even own or keep a weapon.

As the trial progressed, the most compelling evidence against Margaret came from the banking issues. The bank clerk who had taken her call in 1999 regarding Red's appointment with the bank testified that it was a conversation she would never forget because Margaret's demeanor on the phone was so erratic. Margaret had called frantically the day before Red's death asking to move his appointment with the bank, which was scheduled for the next day, because she needed time to disclose a debt to her husband. Additional bank records found by Ranger Bobo showed that Margaret would draw funds out of Red's construction account to cover another account in a bank in nearby Killeen. It was obvious that the Litchfields' financial situation was not as stable as Margaret indicated in 1999. Additionally, despite her representation that there were no insurance policies on her husband at that time, we learned that several policies existed. In fact, she had received $30,000 from one of them, which she never told law enforcement.

The jury took three hours for

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deliberations before returning a guilty verdict. Judge Trent Farrell of the 52nd Judicial Court sentenced her to 60 years.

Conclusion

Looking back on how we approached this 17-year-old murder case, I realize how important it is to give certain cases a second and third look. Re-evaluating information (and then testing that information against its original source) and enlisting help from the law enforcement community on how that information has changed can make an old or cold case take a drastic turn. In this case, our re-evaluation of what led up to the murder of Red Litchfield ultimately led to closure for his family and justice for our community. ❇

Juvenile statements

Taking statements from juveniles suspected of committing crimes is different from taking statements from adults. Here is how to avoid pitfalls and ensure the statement is admissible in court.

Many prosecutors and peace officers might dread learning about the law surrounding juvenile statements. Those who deal primarily with the adult justice system may not realize the many differences between a juvenile suspect's custodial statement and an adult suspect's statement. For example, the law requires that a juvenile under arrest must be placed in a "juvenile processing office" (more on what that means later) and that everything be completed in such an office within six hours. Additionally, there are many hurdles to overcome before a juvenile's custodial statement is admissible. What follows in this article are several of the traps prosecutors and officers must watch for, as well as how to avoid and overcome them.

By Sarah Bruchmiller
Assistant District Attorney in Williamson County, and
Hans Nielsen
Assistant District Attorney in Harris County

Age can be an issue

In some instances, officers might take a custodial statement from a 17-year-old adult suspect whom the Family Code still considers a juvenile because he committed an offense while under age 17. Because the Family Code defines a child as a person under age 18, the law requires officers to follow the Juvenile Justice Code for those adult suspects who committed their crimes when they were juveniles but who are 17 years old when interviewed in custody.[1] The Juvenile Justice Code's stringent requirements, such as taking the suspect to a magistrate for his warnings and for those warnings to be recorded, must be followed for those 17-year-old suspects.

In situations where a suspect is now 18 or older and he is being questioned for an offense that occurred when he was a juvenile, Article 38.22 of the Texas Code of Criminal Procedure applies.

Voluntariness

In both custodial and noncustodial situations where a juvenile's statement is taken, the law requires, as it does with adults, that the statement be voluntary. When deciding a juvenile's ability to volun-

tarily provide a statement to law enforcement, courts must review whether any "official, coercive conduct" was "of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker."[2] People other than a police officer can commit official coercive conduct—a teacher, employer, loss prevention employee, security guard, Department of Family Protective Services employee, and even a judge could be the source of official coercive conduct.

A few examples of coercive conduct would be using violence or the threat of violence to obtain a statement—so would an excessively long period of questioning, depriving a suspect of sleep or food, or the promise of a specific substantial benefit, such as a store employee's assurance that she would not file charges if a suspect confessed to shoplifting. A real-life example actually involved a judge. While he was giving a juvenile his magistrate warnings, the judge told the child that the potential punishment was only a year in jail, when in fact the juvenile was facing a possible life sentence for first-degree felony aggravated robbery. Because the juvenile wrongly believed he would be facing only a year in jail, he confessed to the aggravated robbery with the mistaken belief that he would not be exposed to such a significant sentence. The juvenile's confession based on that misinformation made his confession involuntary.[3]

Issues unique to juvenile law do not apply to adult suspects. For instance, a juvenile's sophistication, age, criminal history, and worldly experiences must be considered when a court decides whether he understood and voluntarily waived his rights and confessed of his own volition.[4] The courts must look at the totality of the circumstances when making their determinations, and therefore, prosecutors must establish the voluntariness of any juvenile's statement with a preponderance of the evidence. If at all possible, prosecutors can do so not only with evidence from the officer who took the statement but also from current and former teachers, juvenile probation officers, neighbors, and in some cases from the juvenile's own relatives. In Harris County, a psychologist typically examines a detained juvenile and conducts IQ testing. Those examination and testing results, along with testimony from any experts who interviewed the child, can support a finding that the child was of sufficient intelligence and sophistication to have provided a voluntary statement.

Juveniles not in custody

In some cases, arresting a juvenile might not be appropriate—for instance, when an investigation of a sexual assault requires several steps (and several days) to interview witnesses and gather evidence before it is complete. In such a situation, it is a good idea to take a noncustodial statement from the child so that the requirements for taking a custodial statement under the Family Code are not necessary. As long as the victim's safety is not an issue, it is the best practice to advise officers not to take the juvenile suspect into custody immediately after a victim has made outcry. An officer can take a juvenile's statement in a noncustodial setting, such as an assistant principal's office in a school or some other public place. The officer should make sure to tell the juvenile that he is not under arrest, and after the child gives his statement, the officer should allow the child to leave the meeting. If justified, the officer can follow up with an arrest at a later time.

Note that a unique situation exists for noncustodial statements in cases involving children in the custody of the Department of Family and Protective Services (often referred to as CPS, as Child Protective Services falls under the DFPS umbrella). For children who have been removed from their homes and are in CPS custody, the requirements for taking a custodial statement apply[5] (more on such statements later). This situation sometimes arises in sexual assault cases when a child suspect is removed from his home and placed in a DFPS residential facility after the victim's outcry and while law enforcement investigates the allegations.

A child in DFPS custody is in a similar situation to that of an adult who is questioned while in police custody on a charge unrelated to the offense police are investigating. An officer taking a statement from a child in DFPS custody must treat that child and take his statement the same way as if the child were in police custody. Many officers do not realize this exception and believe that because they have not arrested the child, they can take a statement without following the requirements for a custodial statement. Failure to follow the law in this unique situa-

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tion means the statement is inadmissible in court.

Juveniles in custody

When a juvenile is in an officer's custody, the child must be taken without unnecessary delay to one of six locations enumerated by statute or to a juvenile processing office.[6] The locations are:

- the juvenile's parent's or guardian's custody with their promise to bring him to court,
- a juvenile detention facility designated by the juvenile board,
- a secure detention facility,
- the office or official designated by the juvenile board,
- a medical facility, or
- a school if the school is in session and if the principal accepts the juvenile.

Most of the time, this means taking the child to a juvenile processing office for the "issuance of warnings" and the "receipt of a statement."[7] An officer can take him only to a place designated as a juvenile processing office to take a statement from him or to conduct other matters, such as identifying the juvenile or processing paperwork incident to an arrest.

In those situations where an officer arrests a juvenile and takes him directly to one of the six enumerated locations listed in the statute, then an officer is allowed to ask for the juvenile's release into his custody. The officer may then take his statement in a location other than a juvenile processing office. The legislature has essentially said that that the juvenile processing office is only a six-hour temporary stop for a juvenile after his arrest and before he must be finally placed in one of the six enumerated statutory locations.

In any evidentiary hearing, a prosecutor must put on evidence that the office where the warnings were given and the office where the statement was received were juvenile processing offices. In Harris County, the Juvenile Board has specifically designated all the offices of any Harris County magistrate or any location where a magistrate delivers warnings as juvenile processing offices. Specific rooms in various law enforcement agencies' offices have also been designated as juvenile processing offices. Many police agencies in Harris County will take a child to a magistrate's office or courtroom to issue warnings and then take the child to a designated juvenile processing office at their own agency's office for the receipt of the statement.

Deviating from the juvenile processing office statute is usually not a good idea. For example, taking a juvenile to the location where property was stolen after he agrees to show police where it is hidden is not permissible.[8] In the *Roquemore* case, officers obtained an oral confession and recovered stolen property before they transported the child to a juvenile processing office. While the confession was initially found to be admissible by the First Court of Appeals because the officer did not ask the juvenile any questions (he simply confessed to the offense in the back of the patrol car without any prompting or interrogation by police), the Court of Criminal Appeals found that the 25-minute stop to recover the property was an unnecessary delay. Even though the high court agreed with the Court of Appeals and ruled that the child's admission was volunteered and without any police interrogation, the Court of Criminal Appeals held that the evidence regarding the recovery of the stolen property and the testimony concerning the stolen property should not have been admitted into evidence. Ultimately, on remand from the Court of Criminal Appeals, the First Court of Appeals held that the admission of this evidence was harmless error.[9]

Courts have carved out some exceptions to this unnecessary delay language, though. In the *Contreras* case, the Court of Criminal Appeals found that a 50-minute delay was reasonable when police attended to the victim and secured a homicide scene.[10] In the *Dang* case, the 14th Court of Appeals ruled that a 2½-hour delay in taking a juvenile to a juvenile processing center was necessary when officers secured a homicide scene at night with SWAT officers.[11] The *Dang* court stated that it would look at the facts and circumstances of each case to evaluate each scenario. Obviously, the best advice for officers is to make sure that once a juvenile is arrested, they immediately take the child to a designated juvenile processing office if they intend to take the child's statement. If there is a delay, a prosecutor should be prepared to put on detailed evidence in any suppression hearing explaining the reasons for the delay.

Notice to a parent or guardian

Once a juvenile is placed in custody, law enforcement must "promptly

Requirements for custodial juvenile statements

- Statements must be voluntary.
- A magistrate must give the child statutory warnings.
- Parents or guardians must be notified of the juvenile's arrest.
- The child must be taken to a juvenile processing office or a location enumerated by statute.
- Officers must complete these tasks (issuing a magistrate's warnings, obtaining a statement, photographing and fingerprinting the child, and completing any paperwork) within six hours.
- Juveniles must not be left alone in a juvenile processing office.
- Juveniles' statements must be written or recorded.

give notice" to the juvenile's parent or guardian that he is in custody and to provide "a statement of the reason for taking the child into custody."[12] At any later proceeding, it is essential that prosecutors put on witnesses to testify about officers' attempts to notify a juvenile's parent or guardian.

Officers are required to inform the parent or guardian for what offense the child was arrested, but they are not required to tell the parent or guardian that they intend to interrogate the child.[13] In the *Hampton* case, the Court of Criminal Appeals further clarified the meaning of "a statement of the reason for taking the child into custody."[14] Officers had informed Hampton's parents that their child was arrested for absconding from juvenile probation and that they had a warrant for his arrest. They did *not* inform the parents that the child was also going to be questioned for a murder, even though that is what the detective intended. The Court of Criminal Appeals ruled that there was no statutory requirement to re-notify a juvenile's parents before questioning a juvenile once officers have initially complied with §52.02. The Court held that the reason for taking the juvenile into custody, not any other subjective reason, is the officer's legal justification.

In addition, the law requires a prompt notification to a parent or guardian under §52.02. Failure to notify a child's parent or guardian at all clearly violates the requirement; waiting several hours before officers have even attempted to notify them can also violate the statute. Neither is acceptable. While it is not always possible to reach a juvenile's parent or guardian, officers must make prompt attempts after a juvenile's arrest.

In cases in which parental notification has been delayed, the courts have established a four-factor test to analyze whether any delay was justified:

1) the length of time the child was in custody;
2) whether notification occurred after the police obtained a statement;
3) the ease with which notification was ultimately made; and
4) what police officials did during the delay.[15]

In one capital murder case, police did not reach the juvenile's mother for four hours after his arrest.[16] While the police were busy working the crime scene and taking the juvenile's statement, there was very little evidence that they had tried to contact his parent and only contacted his mother after the child had confessed. The court found it significant that officers were able to contact his mother after only one attempt to reach her and that during that four-hour period before notifying her, the juvenile had struggled over whether he wanted to waive his rights and give a statement. The Court of Appeals reversed the trial court's judgment and remanded the case for a new trial based on officers' violation of the parental notification statute and on the fact that the juvenile did not voluntarily waive his rights before he gave his statement.

Prosecutors who have hearings in which notification is an issue *must* clearly provide evidence to establish officers' attempts and efforts to reach the juvenile's parents and the reason for any delays. In situations where a juvenile's parents were promptly notified, it is always important to put on evidence proving that this notice occurred.

If the parental notification statute is violated, there is one way a prosecutor may still be able to prevail. The Court of Criminal Appeals has ruled that if any violation of this statute occurred, there must be a causal connection between the failure to promptly notify and the taking of the statement.[17] If there were some evidence that an officer delayed the parental notification of the juvenile's arrest in order to obtain a statement from the juvenile, then the court may rule that there is a

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causal connection between the delay and the statement; therefore, the statement should be suppressed. For example, if the juvenile's mother testifies that had the police called her, she would have asked to speak to her child or would have gone to the station to advise him not to give a statement without a lawyer, then the court may rule there is a causal connection. If the court finds there may be a causal connection, then the burden shifts to the State to show an attenuation of the taint. In addition to that testimony, evidence from the juvenile that he would not have given a statement to the police if he had talked to his parent would also help prove the causal connection, resulting in a likely suppression of the statement.

In following this ruling, the First Court of Appeals found no evidence to support a causal connection. In *Pham*, there was no evidence that Pham wanted to speak to his parents or to a lawyer.[18] The court also noted that once his parents were notified, they waited a day to visit him, and the defense presented no evidence about what the juvenile's parents would have done if they had been notified earlier. Therefore, the court determined that Pham's causal connection argument was "only speculation."

If the court finds a causal connection, the State may still prevail if there is evidence that subsequent actions make the violation less significant (otherwise known as attenuation of the taint).[19] An attenuation of the taint argument is the equivalent of a Hail Mary pass in football: It is usually a desperate attempt to correct an officer's major statutory violation. There are no caselaw examples of the State successfully attenuating the taint for this area of juvenile law. However, a hypothetical example might be where a juvenile indicated that he did not want his parents notified and that he wanted to give a statement without their presence—then any delay in parental notification possibly could be attenuated. In this scenario, officers should restate the *Miranda* warnings already given by the magistrate and clearly establish on the recording or on the written statement that the juvenile wanted to give his statement without a parent being notified or present. In addition, if a child was taken to a juvenile processing office, and (unsuccessful) attempts to contact a parent before a statement was taken were made, then it is possible that these facts could establish an attenuation of the taint. Because officers are limited to holding the juvenile for a maximum of six hours in a juvenile processing office, and because their attempts to notify a parent will take time out of that six-hour window, there may be a successful attenuation of the taint argument to be made.

Six-hour window

Once the juvenile has been arrested and is in the juvenile processing office, there is a six-hour period for officers to complete certain tasks, such as issuing a magistrate's warnings, obtaining a statement, photographing and fingerprinting the child, and completing any paperwork.[20] The main reason for this six-hour holding period is to ensure that a juvenile's statement is not coerced by delaying his release, so it's important that a juvenile's statement be taken before these six hours are over. Courts are more likely to excuse any delays past this six-hour limit as long as the reason for the delay was not due to a lengthy interrogation of the juvenile to obtain a statement.

As a practical matter, if an officer can't obtain a statement in six hours, it is unlikely that he will be able to obtain a voluntary statement in a longer period of time. In addition, the statute requires that a child should not be left unattended in a juvenile processing office.[21] Therefore, officers should never leave a juvenile alone, and prosecutors should be ready with testimony to prove that this statute was honored. For example, the officer could testify that an officer either observed the child in person or via closed-circuit camera.

The law does not require a parent or guardian to be present when officers interrogate a child in custody at a juvenile processing office, but if a parent asks to be present, it is usually wise to honor that request at some point while the child is in the office. Family Code §61.103 states that parents and guardians have the right to meet privately and speak with the child for a reasonable period of time. However, the law also states that officers may limit parental access based on time, place, and condition restrictions. In addition, a child's statement cannot be suppressed for a violation of a parent's right of access to her child under the Family Code.[22] If the child agrees to let his parent or guardian be present or requests that his parent be with him in a juvenile processing office, then law enforcement *must* honor

that request.[23] In cases where parents or guardian are present at a juvenile's request, reviewing courts are more likely to rule the juvenile's statement to be voluntary.

A case out of Galveston illustrates the importance of having only officers familiar with juvenile statement requirements handle investigations involving juveniles.[24] In this case, a juvenile was investigated for an aggravated sexual assault. After the officer went to the juvenile's home and told him and his grandmother that he was the focus of an investigation, the child then went with his grandmother to the police station. While he was there, a magistrate gave him warnings (though the magistrate failed to inform the child that his statement could be used as evidence against him), and the investigating officer interviewed him in a room normally used to interrogate adults. (The officer admitted later that he did not routinely work on juvenile cases.) The interview room was not designated as a juvenile processing office, and the investigating officer admitted in testimony that he did not know what constituted such an office. The officer also locked the door to the room and was carrying his weapon during the interview. Finally, the juvenile's grandmother asked the investigating officer if she could accompany her grandson into the interview room, and the officer said no. Once the juvenile confessed to the offense, he was taken into custody.

The Court of Appeals ruled his statement was unlawfully obtained while the juvenile was in custody, and it reversed the trial court's judgment and remanded the case for a new trial. Because the investigating officer failed to take him to a juvenile processing office and the magistrate failed to provide the proper warning, the case was ripe for reversal on those two grounds alone. It might have also been reversed for the officer's failure to allow the juvenile's grandmother in the interview room (though it wasn't appealed on that issue). While an officer does not have to tell a child that he has the right to have a parent in the juvenile processing office during the taking of a custodial statement, an officer who knows that a parent wants access should ask the child (and record both the question and the answer) whether he wants his parent to be present during the interview. If all other factors point to a juvenile's maturity and capacity to answer the question truthfully and the juvenile says no, an appeals court is less likely to be concerned about an officer denying a parent's request to be present while the juvenile's statement is taken.

Recording a statement

An officer who takes a statement from a juvenile must decide if he wants to take a recorded or a written statement. The best option is for officers to record a juvenile's statement with an audio or video recorder because it provides the best evidence for a judge or jury in court.

Before the statement is taken, a magistrate must be alone in her chambers with the juvenile when giving magistrate warnings unless there are any safety issues, in which case the law allows for an officer or bailiff to be present. However, that bailiff or law enforcement officer may not be armed in the child's presence.[25] If a magistrate requests that an officer be present, a prosecutor should be prepared to present evidence in any hearing as to the reasons why and to establish that the officer was not armed. In most cases, though, an officer will not be present during the warnings, but he will need to turn a recording device on before departing chambers and leave the device in the room while the magistrate reviews the statutory warnings with the juvenile. Just like with an adult statement, a child must knowingly, intelligently, and voluntarily waive each right stated in the warning.[26]

We should note one tricky thing about recording a magistrate's warnings and a juvenile's statement. Family Code §51.095 requires that the warnings be "part of the recording" of the juvenile's statement—the statute was written in the days of audio cassettes and VCR tapes, long before digital recordings were common. It's not yet been resolved whether the warnings and the statement must be in the same digital file,[27] but the Court of Criminal Appeals has strictly applied §51.095 in prior cases by finding that a failure to comply with the statute bars admission of the statement.[28]

Even though the court has looked at causal connections with regards to other Family Code statutory violations (as noted above with the parental notification statute), it has not applied the causal connection holdings directly to a violation of the requirements relating the juvenile statements in §51.095. Therefore, in situations where one juvenile processing office is used for the mag-

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istrate warnings and another for taking the statement, it is best for officers to keep the digital recording device on from the time the magistrate gives warnings until officers have finished taking the juvenile's statement. If that is not possible, then officers should at least press pause (rather than stop) on the recorder to have a single digital file and prove that the warnings were given prior to the juvenile making a statement. In cases where the magistrate gives the warnings in the same juvenile processing office in which the statement is taken, officers should just leave any digital recording device on the entire time. This practice would presumably lay to rest any legal issues regarding the requirement that the warnings be part of the recording of the statement.

For those officers who instead choose to take a written statement from a juvenile, the law imposes the same requirements as a recorded statement. The statement must be voluntary and not the product of any official coercive conduct. In addition, the magistrate must issue the warnings to the juvenile before officers obtain the written statement, and those warnings must be in writing. Taking the statement first and then bringing the juvenile to the magistrate is not permissible. Once the magistrate has issued the warnings and is satisfied that the juvenile understands them, the officers are then free to take the child to a juvenile processing office or one of the other locations enumerated in the Family Code to take the juvenile's written statement. If the statement is taken in a juvenile processing office, the same six-hour rule applies as with an oral recorded statement. An officer does not have the juvenile sign the statement in his presence; he must take the juvenile back to the magistrate for the magistrate to obtain the juvenile's signature on the statement. The magistrate must be "fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily."[29] Finally, the magistrate must sign a written statement verifying that all of these statutory requisites have been met.[30]

For a recorded statement, the law requires only that a juvenile be brought back if the magistrate requests it. If the magistrate does make that request, she may view the recording with the child or have the child view it to determine if the statement was given voluntarily. If the magistrate determines that it was made voluntarily, then she must make a determination of voluntariness in writing.[31] Any prosecutor who is introducing a juvenile's statement must put that magistrate on the witness stand in front of a judge in a suppression hearing and in front of a jury in other proceedings to prove that the child voluntarily waived his rights and that his statement was voluntary. The magistrate's written finding of voluntariness should also be introduced into evidence.

There are other ways in which a juvenile's custodial statement may be admissible under the Family Code, and they should be familiar because they mirror the law in the adult court world. For example, a juvenile's statement is admissible when he provides an oral statement that is "found to be true and that tends to establish the child's guilt, such as the finding of secreted or stolen property, or the instrument with which the child states the offense was committed."[32] Another way an oral statement may be admissible is if the statement was "*res gestae* of the delinquent conduct or the conduct indicating a need for supervision or of the arrest."[33] In addition, even if a statement was obtained improperly under the Family Code, as long as that statement was made voluntarily, a juvenile's statement may be used for impeachment purposes in a courtroom.[34] Furthermore, if a juvenile is arrested in another state and those officers follow their state's law in taking the juvenile's statement, that statement will be admissible in a Texas court.[35] The same is true with a federal law enforcement officer who takes a juvenile's statement in compliance with the laws of the United States.[36]

Conclusion

While the law on juvenile statements is full of potential pitfalls for the inexperienced peace officer and prosecutor, this article aims to help you avoid some of them. Proper training of officers and an emphasis on picking up the phone and consulting with a juvenile prosecutor before taking a juvenile's statement can go a long way toward avoiding these problems. For prosecutors, it is important to understand that a hearing on a motion to suppress a juvenile confession is very different from such a hearing in an adult case: You will need to put on some very different evidence and testimony to

pre2vail on appeal. Consider this article as a starting point on what to look for when reviewing a statement's admissibility in court and how to guide officers taking juveniles' statements. ❇

Endnotes

1 Tex. Fam. Code §51.02(2). All subsequent code references are to the Family Code unless otherwise noted.

2 *In re Z.L.B.*, 115 S.W. 3d 188, 190 (Tex. App.—Dallas 2003).

3 *Diaz v. State*, 61 S.W.3d 525 (Tex. App.—San Antonio 2001, no pet.).

4 *Martinez v. State*, 131 S.W.3d 22, 35 (Tex. App.—San Antonio 2003, no pet.).

5 §51.095(d)(3).

6 §52.02(a).

7 §52.02 (b)(4)–(5).

8 *Roquemore v. State*, 60 S.W. 3d 862 (Tex. Crim. App. 2001).

9 *Roquemore v. State*, 95 S.W. 3d 315 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

10 *Contreras v. State*, 67 S.W.3d 181 (Tex. Crim. App. 2001).

11 *Dang v. State*, 99 S.W.3d 172 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

12 §52.02(b)(1).

13 *In re S.R.L.*, 546 S.W. 2d 372 (Tex. Civ. App.—Waco 1976, no writ).

14 *Hampton v. State*, 86 S.W. 3d 603 (Tex. Crim. App. 2002).

15 *Vann v. State,* 93 S.W.3d 182 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

16 *Hill v. State*, 78 S.W. 3d 374 (Tex. App.—Tyler 2001, pet. ref'd).

17 *Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim. App. 2002).

18 *Pham v. State*, 125 S.W.3d 622 (Tex. App.—Houston [1st Dist.] 2003), *aff'd by* 175 S.W.3d 767 (Tex. Crim. App. 2005) *cert. denied*, 546 U.S. 961, 126 S.Ct. 490 (2005).

19 *Pham* and *Gonzales v. State*, 175 S.W.3d 767 (Tex. Crim. App. 2005), *cert. denied*, 126 S.Ct. 490 (2005).

20 §52.025(b)(d).

21 §52.025(c).

22 §61.106(3).

23 §52.025(c).

24 *In re D.J.C.*, 312 S.W. 3d 704 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

25 §51.095(a)(B)(l).

26 §51.095(a)(5)(A).

27 *Id.*

28 *Comer v. State*, 776 S.W.2d 191 (Tex.Crim. App. 1989), *Baptist Vie Le*, 993 S.W.2d 650 (Tex. Crim. App.1999).

29 §51.095(a)(1)(B).

30 §51.095(a)(1)(B)(i).

31 §51.095(f).

32 §51.095(a)(2).

33 §51.095(a)(3).

34 §51.095(b)(2)(A).

35 §51.095(b)(2)(B)(i).

36 §51.095(b)(2)(B)(ii).

NEWSWORTHY

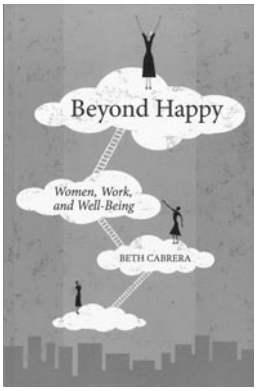
Law & Order Award winner

Prosecutors joined State Representative Joe Moody (D-El Paso) in his Capitol office last month to congratulate him on his Law & Order Award recognizing his work last session on the House Criminal Jurisprudence Committee. Speaker of the House Joe Straus (R-San Antonio) has tabbed Rep. Moody (center, holding plaque) to be the chairman of that important committee this session. Also pictured with him (from left to right) are: TDCAA Executive Director Rob Kepple, El Paso DA Jaime Esparza, Montgomery County Asst. DA Tiana Sanford, and TDCAA Director of Governmental Relations Shannon Edmonds.

How to be mindful

"The present moment is filled with joy and happiness. If you are attentive, you will see it." —Thich Nhat Hanh

Reprinted from *Beyond Happy: Women, Work, and Well-Being* by Beth Cabrera, with permission from ATD Press, Alexandria, Virginia.



By Beth Cabrera

On a cold Friday morning in January 2007, a man pulled out his violin in a Washington, D.C. Metro station and started playing Bach. He was there for about 45 minutes while people rushed past him, many on their way to work. One man slowed his pace a bit to listen before hurrying on his way. A woman dropped a dollar in the hat without stopping. Several children tried to stop to listen to the music, but each one of their parents urged them to continue walking.

Out of more than a thousand people who passed by while he was playing, only seven stopped to listen momentarily, and 27 gave money for a total of $32.17. Not a single person applauded. The man playing the violin in the Metro station that morning was Joshua Bell, one of the best musicians in the world.[1] But people were in too much of a hurry to listen. How many things might we miss because we are too busy rushing from one place to another?

One of the first things you can do to start being more mindful is to slow down. As you go through your day, try not to rush. Make an effort to eat more slowly, to walk more slowly, to drive more slowly—doing everything just a bit slower can make a big difference. Start your day more slowly. When your alarm goes off in the morning, lie in bed for a minute and notice the sensations of your breath. Set an intention to be mindful throughout your day.

Find moments in your day to STOP:[2]

- **S stands for stop.** Simply pause from what you are doing.
- **T stands for take a breath.** Notice your breath coming in and out of your nostrils. Feel your chest expand, then contract. Take another long, deep breath. Note the sense of calm that deep breathing can trigger.
- **O stands for observe.** Bring your awareness to your body. What sensations do you notice? Now pay attention to any emotions you may be experiencing. How do you feel at this moment?
- **P stands for proceed.** Continue on with whatever you were doing.

Business and constant distractions can make it challenging to remember to be mindful once you are off and running. It helps to find cues to remind you to bring your attention to the present moment. You could set an alarm to go off at certain times or schedule breaks on your calendar. Another option is to use transitions as cues. Each time you park your car take a moment to sit in stillness before getting out. As you wait for your computer to boot up, take a moment to bring your attention to your breath. Before you pick up the phone to call someone, pause to notice how you are feeling. Practice mindfulness when you walk to meetings. Put away your phone and focus on your steps or smile at the people you pass. When you sit down to a meal take a minute to notice the colors, smells, and taste of the food. Using transitions as moments of mindfulness can significantly increase the amount of time we spend in the present moment.

Don't multitask

Increase your mindfulness by doing only one thing at a time. This allows you to give your complete attention to any activity in which you engage. You can practice present moment awareness at any time. The key is to focus all of your attention on what you are doing. How often do you check your smartphone? Is there a sound that notifies you each time you get a new text or email message? Every time you check your phone you are checking out of the present moment.

Technology is a huge distraction, making it really hard to be mindful. Writing this book helped me learn how important it was to close down my email completely so I could focus on writing without distractions. I used to be a big multitasker. I'd eat

lunch while preparing a presentation, check email while talking on the phone, chop carrots while watching the news (luckily I still have all of my fingers!), and read the latest article on work-life conflict while standing in line at the grocery store.

On the rare occasion when I was only doing one thing, my mind was usually doing something else. I would plan my day while walking the dog or driving to work. I would think about what I should blog about, what phone calls I needed to make, or what to cook for dinner. Now I try to stay present in these moments. I've found that if I set aside a specific time in my day for planning, it helps me to stay in the here and now at other times. I also practice mindfulness when I'm waiting for someone or am stuck in traffic. These are occasions that used to really frustrate me, but now I take a deep breath and try to appreciate a minute of calm. I feel grateful for a moment of being rather than doing.

Staying focused on one thing is easier when you keep distractions to a minimum. When a colleague drops by your office to tell you something, take a break from what you are doing, look up from your computer, and silence your phone so you can really listen to him or her. Attentive listening helps you stay focused on the present. It also increases the positive emotions of others because they appreciate that you are listening to them. The next time you are in a meeting, keep your phone out of sight so you won't be tempted to check it.

The best way to avoid email distractions is to schedule specific times throughout the day to check your email. It might help to know that you will be much more efficient if you do just one thing at a time. Research on dual-task interference has found that your productivity can be reduced by as much as 40 percent when you switch between tasks.[3] One study showed that constant emailing and text-messaging reduced people's mental capability by an average of 10 IQ points. This effect is two to three times stronger than the effect of smoking marijuana.[4] Checking your messages less often will increase your focus and reduce your stress throughout the day.

Want to see for yourself how much multitasking slows you down? Here is an experiment for you to try. It involves performing the following two tasks:

1) write the numbers 1 through 27. Then,

2) write this sentence: "Do only one thing at a time."

First, time yourself as you switch between tasks: Write a 1, then the letter D, then a 2, then the letter o, etc. Then, time yourself performing the two tasks without switching: that is, write the numbers 1 through 27, then the full sentence.[5] It takes most people up to 50 percent less time when they perform the tasks one at a time. How about you?

Staying in the present moment when you are with your family or friends is also very important. When you are having a family dinner, turn off your phone and focus on the conversation. Go for a walk with your spouse, ask him about his day, and listen to what he says. Read a book to your children or play a game with them, without looking at your phone even once. Many of us have to work from home. In fact, being able to work from home is exactly what many women need in order to make work work for them. If you do work from home, setting boundaries is very important. Make sure to find time to disconnect so that you can be present with your loved ones. Being mindful requires putting your work away and unplugging from your devices so that you can spend quality time with the people around you.

Connect with nature

Spending time outside helps you to be mindful. There is so much in the natural world to engage you that it can fully occupy your attention, making it easier to keep your thoughts focused on the here and now.

I certainly notice this when I'm at the beach. I become so enthralled by the ocean that my mind doesn't wander to other things. Spending hours sitting at the water's edge listening to the waves roll in and watching the sand slowly bury my feet, I gaze at the pelicans as they fly so close to the water in perfect formation; I smile, listening to the laughter of my kids as they jump over the waves. I look for shells—sand dollars and sharks' teeth are my favorite finds—and am completely focused as I walk on the beach with my head bent, searching for a treasure from the sea. When I'm at the beach, there is always another wave or bird or shell to hold my attention. I am immersed in the here and now.

You can benefit from the mindfulness that nature brings by spending time outside wherever you happen to be. Studies show that spending 20 to 30 minutes out of doors in

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nice weather boosts positive emotions.[6] On pleasant days, take your work outside. Sit on a bench to read the latest financial report or have a walking meeting to hear the update from your direct report. Eat lunch outside. Start that herb garden you've been thinking about. Take up golf. Explore the hiking trails near your home. Buy a hammock. Anything you can do to connect with nature will help you practice mindfulness.

Pause

When your manager stops by your office to tell you he's asked your colleague to head up the new project you had asked to lead, before telling him what you think, take a mindful pause. This will allow you to choose a thoughtful response rather than reacting blindly. Try counting to 10 or taking several deep breaths; anything that creates a space between the stimulus and your response will do. Now bring attention to the emotion you are experiencing. Reflect on where the emotion is coming from and try to reframe the situation. Often the emotion comes from your own history; perhaps something in your past has made you especially sensitive to what just happened.

Try to see the other person's point of view to better understand his perspective. Look for something positive. Ask yourself what you might learn from the situation or how it might help you grow or strengthen your relationship. Finally, consider ways you might respond to the situation that would have a positive outcome. Practice letting emotions move through you, like clouds moving across the sky. Acknowledge the emotion and then choose how you will respond.[7]

Meditate

Meditation is a more formal practice that helps you to cultivate mindfulness by training you to focus your attention. In addition to helping you to be more mindful, meditation has many other benefits—decreased stress, anxiety, and insomnia, as well as a lower likelihood of developing certain health problems such as heart disease and Type 2 diabetes. It increases your selfawareness and your empathy and improves your memory.

Many people think they don't have the time or ability to meditate. But if you can breathe, you can meditate. Just a few minutes a day can make a difference. Start by setting an intention to meditate. Sit in a quiet place and focus on your breath. Notice the sensations in your body as you breathe in and out. Feel the cool air as you inhale and your chest rises and your belly expands, then, as you exhale, notice how your chest falls and warm air exits your nostrils. Scan your body from head to toe, checking for places where you might be tense and relaxing them.

If thoughts come to mind, acknowledge them and then return your attention to your breath. See how long you can stay focused. I can assure you your mind will wander. If you are breathing, you will have thoughts. The key is not to get frustrated or discouraged when you become distracted. You can't stop thinking, but you can return your attention to the present moment, refocus on your breath, and begin again and again and again.

The more you train your brain to focus attention on the present moment, the easier it gets. Some suggestions for trying to stop your mind from wandering are to count your breaths or scan your body as you focus on relaxing different body parts or repeat an affirmation such as "I'm at peace" or "All is well."

It helps to not start with an unreasonable goal. Begin by meditating for just a few minutes at a time. Each time you meditate you exercise your attention muscle, the stronger it will become over time. Commit to meditating every day, even if some days you have only two minutes. As it gets easier with practice, you can build up to more time. You will find that meditating makes you feel so good that you will make a point to find the time for it.

Of the many different strategies for increasing positive emotions, learning to be more mindful has probably had the biggest impact on my life. I have an achievement-driven, impatient personality—rushing around trying to do five things at once while thinking about what to do next—but I am getting much better at making intentional efforts to slow down and enjoy the present moment.

Being mindful can be very difficult in the always-on world we live in. We are so busy, overscheduled, and overcommitted that we just don't have time to slow down, to be present. And if we do, we worry that we might lose our edge or that others will think we aren't committed to success. But the truth is, doing fewer things at once makes us all more effective. Slowing down can increase our energy so we can do more. Being

mindful gives us clarity to make better decisions. And focusing our attention on what we are doing at this very moment doesn't take a minute more of our time.

If you still aren't convinced of the value of being mindful, consider what Mark Muesse, one of my college professors, is fond of saying, "Life is a series of present moments. If you fail to show up for these moments, you've missed your life." ❇

Endnotes

1 Gene Weingarten, "Pearls Before Breakfast: Can One of the Nation's Great Musicians Cut Through the Fog of a D.C. Rush Hour? Let's Find Out," *Washington Post Magazine*, accessed January 6, 2017, www.washingtonpost.com/lifestyle/magazine/pearls-before-breakfast-can-one-of-the-nations-great-musicians-cut-through-the-fog-of-a-dc-rush-hour-lets-find-out/2014/09/23/8a6d46da-4331-11e4-b47c-f5889e061e5f_story.html.

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4 David Rock, *Your Brain at Work: Strategies for Overcoming Distraction, Regaining Focus, and Working Smarter All Day Long* (Harper Collins, New York, 2009).

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Why should elected officials use social media?

As district and county attorneys, our main job is to seek justice and serve the people in our communities. One great vehicle for educating citizens on how your office does that is through social media.

As elected officials, we are the only ones who can inform the public on what we do and how we are uniquely qualified to do it. And as the people holding those positions, we have access to all the data we need to keep the public informed because the incumbents.

There are many different methods to disseminate the information generated in a prosecutor office. We can speak at local community events or civic organizations; the local media could run a story about the office; we can even send out press releases. The biggest flaw with these methods is that someone else controls them. What if no one invites us to speak? What if the media isn't interested in running a story and doesn't care about a press release?

Social media is an excellent medium to get information to the public. It is inexpensive and *we* get to determine the content. Not like TV, radio, or the newspaper where I might give an interview on a topic, the reporter puts the story together, and later I watch, read, or listen to the story and it doesn't convey the message I had planned. Or worse yet, we might spend time carefully drafting a statement for the press, and the statement is never even used.

With social media, we determine the message. We determine the frequency. We determine the public image we want people to see. We have total control of what we put out there for the citizens of our communities to hear.

By Dusty Gallivan
County Attorney in Ector County

Types of social media

Any Internet-based site where an individual determines the content and makes the content available for others can be considered social media. If you are unfamiliar with the various social media platforms, they include Facebook, Twitter, Instagram, Snapchat, Google+, and even YouTube.

I personally have Facebook, Twitter, Instagram, and LinkedIn accounts, plus a YouTube channel, and I just recently started SnapChat. I have experimented with all of them and they each have advantages and disadvantages. If the goal is to document what you are doing using pictures, then Instagram and SnapChat

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are the best. LinkedIn is ideal for maintaining a business profile and communicating with your professional network. I have not had much luck with Twitter, even though I have tried many different strategies.

In my experience, Facebook is the best outlet for communicating with the public. The average Facebook user is a voter and actively involved in his community. Facebook users are more likely to appreciate the content you provide as well as be engaged with your page. That said, Instagram and YouTube are also useful tools to complement a Facebook page. Plus, the pictures and videos you post on Facebook can also be re-posted on Instagram and YouTube so you are disseminating the same information on different platforms and reaching wider audiences.

I started my Facebook page the day I was sworn into office. I originally hired a social media firm to handle everything, but I quickly realized that as an elected official, my needs were much different from a commercial business, so I took over all my social media outlets a few months later. Because I primarily use Facebook, I try to post once a day, which gives me the opportunity to communicate something positive about our office on a regular basis. There are many different opinions on how often you should post, and it depends in part on the platform, but as long as you are consistent and post relevant content, people will respond.

I should note that what you post will be a function of the type of profile or page you create. If you opt for an official "Office" page on Facebook, then the content must adhere to office policies and will be subject to open records requests. An Office page's content will be very different from what you post for a political "re-elect me" page. On a political page, you can still post information about the office you hold, but you can also create posts on politics, social issues, and your position on an issue in the news. I decided on a political page because I wanted the freedom to create as much content as possible and not be limited by county policy. Of course, with a political page, any costs associated with the page are my responsibility.

I use social media for three main purposes: to educate the public, to reach other media outlets with stories, and to assist in my re-election to office. Here's a little bit about each of those goals.

Educating the public

Our job is to serve the public. This means many different things, but it includes keeping the public informed. In our 24-7 news society, people are constantly looking for information. If an elected official isn't providing it, the public wonders why not. Social media gives us a platform where we can satisfy people's demand for information.

For example, game rooms are an issue in our county. I've used Facebook to educate the public about the issue and get people's feedback. As you might guess, some say that game rooms are not a problem and that law enforcement shutting them down is just the government trying to get money. However, the vast majority let me know what problems game rooms cause. I also used Facebook to tell the public what we are doing to limit the negative effects of game rooms. Although we may not ultimately be successful, social media allows us to tell citizens that we are doing something about the crime in our community.

I also post about how many cases we have resolved in a given time period or about a specific type of case (for example, DWI). I also regularly post an Employee of the Week, where I acknowledge the contributions of a specific staffer. When we have a trial, I post the results. I also periodically talk about commissioners court if there is an interesting agenda item.

One of the biggest things people overlook is to share a post from someone else. I consistently share posts from the Ector County District Attorney or local sheriff. This not only provides my followers with valuable information, but it also exposes my Facebook page to different people.

Remember that the same people who read your online posts also make up the jury pool. Incorporating information about the criminal justice system as part of your social media presence may benefit your office at the next jury trial. Of course, don't post about pending cases, but a post about how DWIs effect the community and how we need stronger sentences to combat the problem is certainly fair game, and voters will appreciate the information.

One of the things I have done is let people know how selective we are concerning the cases we prosecute: how we screen every case, reject those that we can't prove beyond a

reasonable doubt, and prosecute only those people we believe are guilty of the offense. All of this is true, but we couldn't say any of it when selecting a jury.

Reaching conventional media

Another benefit is that the traditional media searches for stories via social media. If you post something about your office, there is a chance the local media will either run a story based solely on your post, or a reporter may call for an interview on that topic. I have had this happen a couple of times a month since I started using Facebook. And because I provided nearly all the content for the story, the message conveyed by the local media story is almost identical to my own.

I have found that a Facebook post can be more effective than a press release. When we started the "no refusal" program to obtain blood search warrants for those suspected of DWI, I sent out a traditional press release and held a press conference. A few local media outlets attended and ran stories that day, and that was the end of it. I also used Facebook to promote the program, and not only did the media run follow-up stories on it, but I was also able to communicate directly with the public. Several citizens asked questions about the program, and I was able to answer them and alleviate some of their concerns. Plus, we were able to promote local law enforcement, which is always a positive.

Re-election

Social media is an excellent way to position yourself for re-election. If you are consistently posting content about your office, the public has constant access to you and has built a relationship with you through your online presence. It's like going door to door—but with a much wider and more effective reach.

If an opponent tries to attack your record, you need only point to all the content you have provided on social media. If you have been giving the public accurate information about all aspects of your office, there should be more than enough data that will counter almost any argument an opponent will make. The more information you can provide to the community, the more they will trust you, and the more they trust you, the more likely they will vote for you. (Remember, you are an attorney *and* a politician—not a good combination on the trust meter in the public's eyes!)

Additional guidelines for posting

Don't worry too much about whether you'll have enough content to post regularly. It is amazing how much subject matter you can create once you start thinking about it. Say you go to a Rotary Club meeting—that's a post. If you speak at a community function—that's a post. Describing some duty of your office—that's a post. You will find content literally everywhere.

Just remember, this isn't a personal page where you tell friends and family about the new rosebush you planted in your front yard. It is a professional page whose main goal is to provide useful information to the general public. No offense, but the average voter doesn't care about your garden. Your posts, regardless of the outlet you use, need to be professional but also personal. The post should not be cold and distant—you want readers to relate to you. Think of it as just talking with someone over a business lunch: You would be cordial and you would provide useful information but not personal details.

A typical post should be short. This isn't a blog, although you could maintain a blog for longer posts and put links to the blog on Instagram or Facebook. You should have enough information to make the point but not so much to bore the reader. A good post has enough information so the reader will understand but will also want to ask questions. The reader's engagement is your goal. The more engaged a reader is, the more he or she is involved in your success. People want to feel that they know you and can relate to you.

If the information you want to convey will take more than a few sentences, consider linking to an article that explains the message, or create a blog post and link to it rather than posting something that reads like a court brief. Every month I write a blog post where I explain what we accomplished that month. The blog entry is usually about 500 words, way too long for a Facebook post, so I just give a very short summary on my Facebook page and link to the full blog post. The summary provides enough information that people know we did something and if they want more info, they can click the link.

Make time to respond

Once you start engaging readers, be prepared for negative comments.

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Unless you won the last election with 100 percent of the vote, not everyone wants you in office. *Do not* argue with a reader in the comments section. Everyone has a right to his opinion. One of the great things about social media is exercising our free speech. Remember, while people have the absolute right to express their opinions, if they are rude, vulgar, or just hateful, you have the right to delete their comments on your post. They can exercise their free speech on their own posts.

Think of your social media posts like a town hall meeting. The goal is to inform the public and answer questions. You will certainly want to answer someone's legitimate questions in a timely manner, but you will have to decide if a negative comment is worth a response. Personally, I will respond to a negative comment if the poster made either a misstatement of the law or an incorrect assumption. Most of the time, this is met with a positive response. On occasions where an individual just wants to argue, I respond no further. Other readers will appreciate your replies, even to negative comments, because that means you are willing to listen and engage, even if you disagree.

Managing a social media presence doesn't have to be time-consuming. I personally enjoy creating content and interacting with people, so I spend more time on social media than is required (just ask my wife). Most people could spend about 10 minutes a day creating and posting something. I try to create as many entries as possible at one time, then schedule them to be posted throughout the week. This gives me the flexibility to make changes if need be but also lets me consistently post content, even when I'm busy on other tasks.

The one thing you will need to make time for at least once a day is to engage with people on social media. If someone asks a question, you need to provide an answer, even if the answer is you don't know or you can't tell him because of confidentially concerns. If someone asked you a question at a town hall, you wouldn't just ignore him, would you? People expect answers to questions in a reasonable time. I usually try to answer someone's question right on the post so other people can see the response. Occasionally, I have used Facebook's instant message feature if I felt I couldn't share an answer publicly.

Conclusion

The time we spend on social media creating content and informing voters will be time well-spent. Since I started using Facebook, I have had more people come up to me at the grocery store, in restaurants, and even at the office just to say how they appreciate the content and that they wished every elected official would share information about his office the way I do. Although it can take time, I certainly believe it is worth the investment. I can personally attend only so many civic organizations meetings, so many lunches, and so many other events, but I can reach a nearly unlimited number of people via social media. ❇