THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 38, Number 3 • May–June 2008

"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

There's something about Mary[1] …

Mary and Ted Roberts, both attorneys, were convicted of extorting money from Mary's former lovers. Here's how Bexar County prosecutors unraveled their lies.

By Bill Pennington and Tamara Strauch
Assistant Criminal District Attorneys in Bexar County

Bexar County Criminal District Attorney Susan D. Reed didn't have to read beyond the front-page article of the *San Antonio Express-News* in June 2004 to see where her office's next major investigation was headed. The newspaper article told of Ted and Mary Roberts, married attorneys whose lives included a troubled marriage, Internet affairs, lawsuits between former law partners, and blackmail.[2] Little time was wasted before a call was placed to the local company of the Texas Rangers (common practice when our office initiates an investigation) for their help in investigating the Robertses; soon thereafter, Ranger Chance Collins was working with Investigator C.J. Havrda from our office's White Collar Crime Division to sort out the couple's criminal activity from mere moral indiscretion. Over the next year, these investigators painstakingly reconstructed the activities of these two attorneys, which read like something out of a made-for-TV movie.


Bill Pennington & Tamara Strauch

Background

The investigation revealed that Ted and Mary Roberts were not your stereotypical criminals. Ted, licensed in 1991, specialized in medical malpractice cases; Mary, licensed in 1993, did some work in probate and estate planning but spent much of her time as a stay-at-home mom to three children. The Robertses' marriage was far from per-

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Also in this issue:

PLUS:

TDCAF News

By Emily Kleine
TDCAF Development Director

The foundation is in full swing

The Texas District and County Attorneys Foundation has been growing by leaps and bounds in recent weeks, thanks to the energy generated by the Champions for Justice event in Fort Worth on April 17. The event, honoring longtime Tarrant County Criminal District Attorney Tim Curry, has allowed me the pleasure of meeting with several new sponsors in the Fort Worth area. Be on the lookout for an extended recap of the event in the July–August issue of this journal.

I have been on the road to West Texas and the Galveston area. Midland, Ozona, Sonora, and Odessa came through with generous contributions, thanks to encouraging support from **Teresa Clingman** (Midland County District Attorney), **Laurie English** (112th Judicial District Attorney), and **Bobby Bland** (Ector County District Attorney). And a very special thanks to the **John L. and Maurine Cox Foundation** (Midland), which underwrote the cost of the additional books needed for our recent DWI Summit, Guarding Texas Roadways.

I also traveled southeast to visit with **Mike Guarino** (Galveston), **Jerilynn Yenne** (Brazoria County Criminal District Attorney), and **Kurt Sistrunk** (Galveston County Criminal District Attorney). Kudos to Mike, Jeri, and Kurt for their willingness to generate funding for the foundation in their local communities.

As always, I remain enthusiastic to visit with you regarding the foundation. If you would like to have an event in your area, honor or memorialize a friend, colleague, or family member, or simply discuss ideas pertaining to the foundation, please call me at 512/474-2436.


Bobby Bland


Laurie English


Teresa Clingman


Mike Guarino


Kurt Sistrunk

For a list of recent gifts to the Texas District and County Attorneys Foundation, please turn to page 6.

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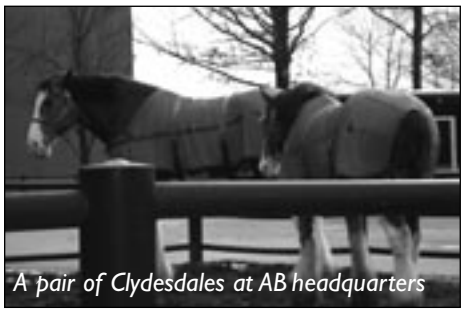
the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

Thanks to those folks with the Clydesdales and our local hosts!

I would like to extend my personal thanks to everyone at the Anheuser-Busch Companies for their sponsorship and support of the Guarding Texas Highways: 2008 DWI Summit. The plans for a statewide DWI training program broadcast through the formidable Busch Satellite Network hatched a year and a half ago at a meeting hosted by **John Nau**, owner of Silver Eagle Distributing in Houston, and **John Kaestner** and **Francine Katz** from the AB corporate offices. We were pretty proud of our DWI training efforts up to that point, but we asked for support through the Texas District and County Attorneys Foundation to spread that training to more people. John Nau talked about using the satellite network to broadcast our live training, and the folks from St. Louis were intrigued by the idea.

Those of you who attended the training at your local Budweiser distributorship on March 7 can appreciate just how much time and effort everyone put into the program. The numbers were impressive: We had over 1,000 attendees statewide and even had to cut off registrations a couple of weeks before the program because we had exceeded our capacity. The summit was our first peek into live television training, and we came away awfully impressed with the energy and skill that AB Governmental Affairs Director **Steve Mastorakos**, producer **Bill Conerly**, BSN Director **Dave Waldman**, on-air host **Sandy Miller**, and their entire team put into this effort.



A pair of Clydesdales at AB headquarters

Another great aspect of this training was the work of our local hosts. Many of you volunteered to be faculty for the program at the 32 broadcast locations, and this training would not have worked if you hadn't risen to the challenge.

We also need to thank the folks at the **Texas Department of Transportation** for their enthusiastic support of our training efforts and the **John L. and Maurine Cox Foundation**, which so graciously contributed to the TDCAF when we ran out of funding for the course materials (due to the vast number of registrations). We couldn't have done it without all of this help and support; thank you so much!

And thanks to the A-Team

We were pretty impressed with the professionalism of the people at Anheuser-Busch. But I think I am safe to say that *they* were impressed with the trainers we brought to the show. Thanks to **Maureen McCormick**, ADA in Mineola, New York; **Warren Diepraam**, ADA in Houston; **Richard Alpert**, ACDA in Fort Worth; and our own **Clay Abbott**, DWI Resource Prosecutor in Austin. These four are experts in their field, and we were privileged that they shared their knowledge and experience with us.

If you missed the program, it included some must-see highlights:

Maureen's riveting account of a New York case where an intoxicated driver slammed into a limousine, whose in-car camera caught the whole thing on tape; Clay's colorful descriptions of how to prepare your officers to testify well at trial; Warren's easy-to-reproduce courtroom demonstration of eye nystagmus; and Richard's A-to-Z demonstration of proper blood evidence collection. Thanks to you all!

Hello to our new Board members

Bill Turner, the Brazos County DA and this year's President, has made two new appointments to the association and foundation boards. Welcome to **Jaime Tijerina**, Kenedy County Attorney, who was appointed to the County Attorney at-Large position. Welcome also to **Lee Hon**, Polk County CDA, who takes the Region 5 Director post. Jaime fills a spot left vacant when **Scott Brumley**, Potter County Attorney, was elevated to the Secretary/Treasurer spot, and Lee was appointed when **Chuck Rosenthal**, Harris County DA, resigned from office.

Looking for funding? Don't come to Austin.

There's an old saw around the Capitol that the worst place to go for help with a problem is the Texas Legislature. That's probably in recognition that most of your problems—and their solutions—are local, and anyway, the legislature meets only once every two years.

A recent report in the *Houston Chronicle* newspaper supports that truism. It turns out that Texas state government spending per capita is the lowest in the country. That is viewed as good news by most, and Texas actually gets a B+ grade for the quality of governance by the Pew Center on the States. But this should be a good reminder to those of you who are responsible for your office budgets. In the long term, you probably can't expect the state government to suddenly become a significant contributor to your bottom line. The state contributes about $35 million a year to prosecution, most of which is for elected DA prosecutor salaries, elected county attorney salary supplements, and a modest office supply fund for DAs. That figure is easily eclipsed by the Harris County DA's budget alone. It is unrealistic to think that the state would ever be in a position to dedicate significant additional funding to prosecution offices around Texas. We need to continue to rely on the variety of state, local, and discretionary funds that keep the wheels turning.

Extra-special SAFP beds?

In March I received a letter from the Texas Department of Criminal Justice about the expansion of the Substance Abuse Felony Punishment (SAFP) program. I've never gotten such a letter before, so I figure these are pretty special beds that you need to know about. That may sound a little sarcastic, but indeed SAFP beds have been sought-after for awhile now, so this is good news.

Here are the numbers. Before 2007 we had 3,250 SAFP beds and a waiting list of over 800 offenders. By December 2007 that wait list was down to just above 300 offenders. In April 2008 we will see an additional 588 SAFP beds in East Texas, bringing capacity to around 3,800, and another 912 contract beds are pending. All of these additional beds should be up and running by September 2008. So, if you do the math, the addition of these SAFP beds may indeed be something to write home about!

And I have been warned that these may be more numbers than you can stand, but here goes: The 500-bed contract DWI treatment facility is now operational, and one TYC facility with 606 beds has now been transferred to TDCJ.

A former TDCAA law clerk in triple Jeopardy!

Many of you have talked with **Jason Dizon**, one of our able former law clerks, when you called looking for some legal assistance several years ago. Jason is now an assistant DA in New York, and he is looking to come back to a Texas prosecutors' office soon. But you may have seen him last month on the popular TV game show, "Jeopardy!" Jason had a three-day run and totaled $49,900 in winnings before being knocked out.

Jason is in fact not the only former TDCAA employee to attain game show stardom. A few years back you may have seen our former research attorney, **Markus Kypreos**, on "Shop Till You Drop!," a show that required him to run around a grocery store and throw items into a shopping cart. He and his game show partner came away big winners, scoring many fabulous prizes, including a home carpet cleaning system and cruise to Hawaii.

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Recent gifts to the TDCAF

Amarillo National Bank, Friend of TDCAF, Amarillo
J. Russell Ash, Attorney at Law, Big Lake
The Bank & Trust, Friend of TDCAF, Sonora
Nelson Barnes, Assistant District Attorney, Belton
Ed Bass, Friend of TDCAF, Fort Worth
Lee Bass, Friend of TDCAF, Fort Worth
Sid Bass, Friend of TDCAF, Fort Worth
Patrick C. Batchelor, Special Prosecutor, Corsicana
Joseph M. Black, IV, Criminal District Attorney, Harrison County
Dan Boulware, Attorney at Law, Fort Worth
Michael P. Carnes, Assistant Criminal District Attorney, Rockwall County
Amon G. Carter Foundation, Friend of TDCAF, Fort Worth
Lee and George Christie, Pope, Hardwicke, Christie, Schell, Kelly & Ray, L.L.P., Fort Worth
John and Maurine Cox Foundation, Friend of TDCAF, Midland
Crockett National Bank, Friend of TDCAF, Ozona
Tim Curry, Criminal District Attorney, Tarrant County
Arthur "Cappy" Eads, Attorney at Law, Belton
James M. Eidson, Criminal District Attorney, Taylor County
Lyndon English, Adios Wrecker Service, L.L.P., Friend of TDCAF, Ozona
Tim Evans, Attorney at Law, Fort Worth
Elton A. Faught, District Attorney's Investigator, Ector County, *in memory of Scott Gardner, Arlie Jones, and Abel Marquez*
Vern Foreman, Foreman Electric Service Co., Inc., Friend of TDCAF, Odessa
Jack C. Frels, Retired Attorney, Houston, *in memory of Michael Shelby*
The Honorable Larry Gist, Senior Criminal District Judge, Beaumont
Joel Glenn, Friend of TDCAF, Fort Worth
Happy State Bank, Friend of TDCAF, Amarillo
Cynthia Hall, Assistant Criminal District Attorney, Brazoria County, *in memory of Jim Mapel*
Dale S. Hanna, 18th Judicial District Attorney
Russell Hardin, Jr., Attorney at Law, Houston
Howard Wallace Hatch, Jr., 64th and 242nd Judicial District Attorney
Jana A. Jones, 271st Judicial District Attorney
Mr. and Mrs. William D. Kleine, Friends of TDCAF, Midland
Martha V. Leonard, Friend of TDCAF, Fort Worth
John MacLean, Attorney at Law, Fort Worth
Mr. and Mrs. William R. Magnussen, Friends of TDCAF, Fort Worth
Sylvia Mandel, Assistant Criminal District Attorney, Tarrant County
Gregory T. Miller, Assistant Criminal District Attorney, Tarrant County
Richard J. Miller, County Attorney, Bell County
C.B. Moncrief, Friend of TDCAF, Fort Worth
Clifton and Sheridan Morris Foundation, Friend of TDCAF, Fort Worth
Renee Ann Mueller, District Attorney, Washington and Burleson Counties
Ozona National Bank, Friend of TDCAF, Ozona
Mr. and Mrs. Robert L. Patton, Friends of TDCAF, Fort Worth
Joe R. Smith, Criminal District Attorney, Tyler County
SouthWest Bank, Friend of TDCAF, Odessa
Western National Bank, Friend of TDCAF, Odessa
Michael R. Wilson, Criminal District Attorney's Investigator, Orange County, *in memory of John Dunham*

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Joe Brown appointed to the TYC Advisory Board

Congratulations to **Joe Brown**, CDA in Sherman, for his recent appointment by Speaker of the House Tom Craddick to the Texas Youth Commission Advisory Board. We have all watched as TYC has struggled to regain its footing in the wake of scandals and management issues, and an advisory committee made up of victim advocates, mental health experts, and criminal justice professionals has been appointed to assist in that effort. Joe has served for six years on the board of the Grayson County Child Advocacy Center and has been active in his juvenile justice community. Congratulations, Joe, and please keep us informed on the advisory board's activities.

Welcome!

Welcome to two of our newest district attorneys. **Kenneth Magidson**, a current Assistant United States Attorney and former Harris County ADA, was appointed as the Harris County DA in March. In addition, welcome to **Luke Inman**, who was appointed as the 100th Judicial District Attorney out of Wellington after **Stuart Messer** was appointed to the bench. ✤

the President's Column

By Bill Turner
District Attorney in Brazos County

Some cases leave their mark

Last Saturday my wife and I were enjoying a greasy hamburger at a local restaurant when an old friend and his wife joined us at the table. The conversation soon turned to crime in the county, and my buddy reminisced about his grand jury service from 20 years ago. He remembered one case in particular involving child abuse and recalled wanting to leap over the table after hearing the suspect's excuse for the assault. After telling the story, he said that he was amazed at how long that single experience stayed with him and how he often thought about it. He wondered how prosecutors keep their sanity when dealing with these kinds of cases.

From assault to child pornography to homicide cases, they all include disturbing images that remain with prosecutors. There are also cases that profoundly affect how we do our job in the future. They are all cases that leave a mark. I called a few prosecutors to ask about the cases that have stayed with them. They had no trouble identifying specifics. The only problem was trimming their stories to just a few cases. Here is what they had to say.


Martha Warner

Martha Warner, DA in Bee, Live Oak, and McMullen Counties

A number of cases stay with me, but one of the most significant was the first one I tried as a special prosecutor. A young man and his brother were driving in a caravan with their family. They were returning to San Antonio after enjoying a fishing trip on the coast. The defendant had been drinking at a concert all day and drove up on the two cars from behind. The collision flipped the Jeep the two brothers were in. They were ejected, and one brother died from head injuries. The defendant fled the scene, but a truck driver gave chase and eventually blocked his path. We tried the case to the court, and the defendant was sentenced to 20 years.

It was dealing with the family that left an impact. The enormity of what we do as prosecutors hit me as I was talking with the surviving brother and his parents. After working on that case, I felt like I was called to be a prosecutor, so I hung up my civil practice and started making about one-third as much money as a prosecutor. I did it because I felt like I was doing what I was supposed to do. I was making a difference in people's lives.

As I have matured as a prosecutor, the significance of our work recently hit home when I tried several gang members that carried out a hit on a fellow gang member. The victim had just been released from the pen and was trying to quit the gang. It was my position, and the jury agreed, that every life is important and nobody deserves to be murdered.

Randall Sims, DA in Potter and Armstrong Counties

The case I will never forget happened in Collingsworth County in 1997. It was the first homicide in that county in over 50 years, and it happened to a family I knew well. My friend's mom was found flat on her back in her bedroom with a number of knife and fork wounds. At the crime scene there was a disagreement as to whether the body and underlying carpet should be transported to the pathologist or if a crime scene unit should come to the house before the body was removed. I am glad I stood my


Randall Sims

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ground and insisted on the crime scene investigation because it yielded a hair from the victim's leg that DNA experts matched to the defendant.

I was allowed to speak to the young man who said he found the body, and after we talked I told the police he was our suspect. A search of the suspect's house recovered shoes with the victim's blood on them—evidence that destroyed the defendant's claim that he never entered the room.

In preparing for trial I spent a lot of time with crime scene experts, and that proved invaluable. The defendant took the stand and lied about how he rolled the body over to check on her. On cross-examination I laid on the floor and had him roll me over three different times. Then I abruptly ended my cross. A lot of the onlookers were upset with me for not doing more, but they did not know the rest of the story. The next day I recalled the crime scene expert. As he took the stand, I heard the defendant's investigator tell the defense attorney: "I think he is just about to prove he didn't roll that body over." It ended up being the most important part of the trial.


Joe Ned Dean

The case stays with me for a number of reasons. First, it taught me to trust my instincts and stand my ground when I am on a crime scene. Second, it taught me how critical it is to meticulously prepare and then carry out that plan. Finally, and maybe most importantly, it taught me what crime victims really go through. I was so close to this family that they came to me with all their questions. It was the most pressure I have ever been under because I was so attached to the family but knew how detached I had to remain to do my job effectively. I hope no family ever has to go through that again, but this case taught me a greater appreciation for the day-to-day impact a homicide has on the victim's family.

Joe Ned Dean, DA in Trinity County

The most significant case I have ever handled was when I was a judge. The case was John Paul Penry, and it changed the law of capital murder. But as far as cases that leave their mark, there are a couple that come to mind from when I was a prosecutor.

The first case involved a murder that was based on a previous fight. I knew the victim because earlier I had sent him to TYC. The problem started when my victim whipped the defendant. Later, the defendant returned with a gun, killed the victim, and threw the gun in the Trinity River. There wasn't much evidence, but the defendant talked to an inmate in jail and we were able to convince a jury to convict him. The sentence was 50 years. After the trial, I realized how relieved the community was because the defendant was a dope dealer who had been terrorizing the neighborhood.

The second case started at the courthouse square where a motorist came to report that a drunk driver had almost run him off the road. The intoxicated driver followed the motorist to the square where there would have been a pretty good fight, but police intervened. Four officers drew their weapons but when one of them saw that the driver had a snake charmer shotgun in his truck, he busted through the line of other officers and tackled the driver. After the driver was handcuffed, the officer was walking him to the jail when they came upon the officer's hat lying on the ground. When the driver got to the hat, he stomped on it. The officer grabbed him by his handcuffed hands and ran him into the door of the jail so hard it knocked the hinges loose. The officer claimed the injuries came from the original tackle and that he did not use excessive force.

We tried the officer twice for official oppression, but both cases ended in a mistrial. I think that part of the problem was that the victim was a bull. His family told me that when he was a kid, he would run his head into light posts for fun. Eventually the officer agreed to give up his badge, and we dropped the charges. The case has made it hard to get along with law enforcement. After it was over the victim told me: "I may be a drunk, but I am not a liar." I told him I believed him.

Rene Guerra, DA in Hidalgo County

Back in the 1980s, my wife and I went to Chicago to visit some friends and go on a golf outing. We stayed with a family who showed us around and had a barbecue for us. When we got back home to Texas, I was told about a capital murder

that happened at a liquor store. The defendant was the nephew of the family who had just hosted us.


Rene Guerra

I tried to show the family our evidence, but they wanted to believe a cousin was responsible for the crime. I offered the young man a life sentence, but he turned it down. The jury returned a death sentence in 45 minutes. I lost a friendship after that.

I learned that if you believe your oath and follow your oath, some people may not believe you have the public's interest at heart. But we've got to do what we've got to do.

Conclusion

Prosecutors have up-close exposure to the human condition. We see people at their worst and at their best. As eye witnesses to suffering, we often see people endure the most trying times of their lives, putting us in a unique position to make an impact. Most people think prosecutors are about convictions and sentences, and while those results are a significant part of our work, the cases that seem to stay with us are the ones that leave us recognizing the mark we have made on someone's life. ✤

Newsworthy

Kyson Johnson honored by A Texas Advisory Council on Arson

Kyson Johnson, a special assistant in the specialized crime division of the Dallas County District Attorney's Office, has been named Prosecutor of the Year by A Texas Advisory Council on Arson (ATAC). Johnson was honored for his work in fighting cases of arson and insurance fraud in Texas.

Johnson is the first prosecutor from the Texas Department of Insurance's Fraud Unit to work for a district attorney in the fight against insurance fraud. An Iraq war veteran, Johnson presented 24 cases for indictment dealing with insurance fraud, theft, and securing execution of a document by deception during his first three months with the Dallas County District Attorney's office. In 2007, Johnson garnered 52 indictments, 34 convictions, $54,000 in fines, and $641,000 in restitution.

His most notable case in 2007 dealt with a staged accident ring where he successfully convicted all nine defendants who had staged 72 automobile accidents in the Dallas/Fort Worth area and had defrauded 21 insurance companies. Congratulations on this honor! ✤


Kyson Johnson (left) with ATAC president David Mitchell

DWI Corner

By W. Clay Abbott
TDCAA DWI Resource Prosecutor

An unanswered question from the DWI Summit

First, let me thank people too numerous to list by name for the great effort at making our DWI Summit, Guarding Texas Roadways, such a success. Thanks to all of the support from our executive director, Rob Kepple, and others at TDCAA, great faculty who were so generous with their time and talent, tremendous expertise from the folks at Anheuser-Busch Companies, and support from local hosts in 32 cities. The summit went great due to your above-the-call support. What a tremendous opportunity to provide assistance in these most difficult cases to over 1,030 prosecutors and officers from every part of the state!

Next I will gear up to go back on the road for follow-up training in those cities that didn't have satellite access for the summit's broadcast. If you are interested in a local program this summer, watch TDCAA's website (www.tdcaa.com) this June for an application form. We plan to incorporate the best parts of the summit into our regular training.

Countering drivers' excuses

One of the questions that kept surfacing during that satellite training, both in news stories and in my e-mail in-box, was: "What can we do with a defendant's silly explanation at trial for various signs of intoxication?" While every case demands an individualized response, I have some solid suggestions for officers and prosecutors to nullify these last-minute trial explanations. (My apologies in advance that this article is mainly aimed at police officers. Prosecutors, if your officers need to know this info, copy this column and pass it out. Better yet, build your own officer training around it. If we prosecutors are not getting the following valuable evidence in our DWI cases, we should be sure our officers know we need it.)

The best counter to a defendant's explanation for her bad driving (lately, cell phone conversations or texting is a popular explanation) is officers' solid questioning at the scene of the initial traffic stop. Often officers are afraid to ask drivers to explain their actions, but that is a serious misstep. Fear that the offender will have an excuse for a traffic violation, nystagmus, lack of mental abilities, lack of physical coordination, and the refusal to take a breath test is misplaced. The roadside stop is the exact place for such questioning! At the traffic stop, a driver doesn't have time to concoct a believable story, but you can bet that after several months with capable defense counsel, the defendant will have a halfway reasonable explanation for every clue the officer notes in the police report and video. (I know it may come as a shock that defendants might lie or that defense counsel could suggest through cross-examination alternatives to impairment.) The best time to get to the truth is when the defendant is most likely to *tell* the truth, and if not the truth, then at least the most ineffective lie.

Conduct 'Mom's sobriety tests'

Remember that all jurors had mothers, just like yours, who conducted their own field sobriety tests when those jurors came home as teenagers, just like your own mom did. My mother made me wake her up and give her a hug; then she asked me silly questions about my night, all while smelling my breath for alcohol, scanning for bloodshot eyes, and checking my ability to converse with all of my faculties. Mom's sobriety tests, while not as well researched, tested, and verified as the SFSTs, are far better accepted by and

understandable to the average juror. So before officers on the stand ever get to SFSTs, they must fully explain that they conducted Mom's sobriety tests on the defendant too. This is where DWI cases are won. While defense counsel will always put *officers* on trial for their execution of SFSTs, the *defendant* is the focus of Mom's sobriety tests. As a note to prosecutors, don't forget how important an officer's initial observations are during jury selection. And officers, nothing in a DWI investigation is as important as this first contact and conversation you have with the defendant. Don't rush it. Spend as much energy developing this set of skills and techniques as you do any other.

When an officer stops a vehicle for poor driving performance or a traffic violation, he must ask the driver to explain why she committed the violation or dangerous behavior. The question should be conversational, not accusatory—it should provide a fair opportunity to explain. The officer should confirm or rebut this excuse with his own observations. Later (after arrest) it is also very helpful to broach the issue again; it is amazing how easy it is for the suspect to remember the truth and how hard to remember a lie. Keep in mind that the jury should and does expect the officer's investigation to be fair, and his ability to explain why he pulled the defendant over is the very essence of fairness. Will the defendant lie? Perhaps—but ask yourself whether the lie at the scene will be better or worse than the one crafted for trial. The explanation the defendant gives on the roadside can be investigated, but it can't once it is made in court. Ask to see the dropped soda, cigarette burn, cell phone, or whatever the defendant says took her attention away from the road and caused the bad driving.

Three possible responses

The defendant has only three responses to an officer's request for an explanation. First, she can deny what the officer saw. Such a response is not a problem in court—the officer should win this battle of credibility. And denying the officer's observations also suggests that the defendant is unaware of her dangerous driving behavior. What better evidence of impairment?

Secondly, she can admit the behavior with an explanation. This response is certainly not a disaster for the prosecution—the defendant just admitted to the probable cause for the stop. Prosecutors *dream* of this kind of evidence in a suppression hearing.

Finally, the well-coached and experienced drunk driver can invoke her right to silence. Such is her right; so be it. Jurors will still view the officer as very fair and concerned that the truth comes out, which is a better result than if the officer had never asked the question.

Remember too that the officer's questions are documented on video. His observations are now locked into our main piece of evidence along with the defendant's unrehearsed and probably most frank explanation. This documentation helps the officer put essential details in his reports and recall details at trial, which is very valuable. Officers and prosecutors are doomed to fail if they are, or appear to be, afraid of the truth.

"Why" questions

The officer should also ask "why" questions during the SFST performance. For example, an officer observing HGN should ask, "Have you ever been diagnosed with any eye problems?" Again, every defendant ever tried for DWI has "natural nystagmus"—just listen to any defense cross-examination. Investigate if a driver claims eye trouble at the scene: Who is her doctor, when did the eye injury happen, what treatment is she receiving, etc. Again, a suspect's initial excuse will not be as believable as the one defense counsel makes after discovery or on cross when the defendant sits silently, cloaked in the 5th Amendment.

All suspects on the roadside want one thing more than anything in the universe: They want to go home, not to jail. Most will avail themselves of every opportunity to talk their way out of an arrest. If in answering these "why" questions, they establish legitimate explanations for their bad driving (other than intoxication), the officer can make the right call and let them go. Being open to such options makes the officer much more credible.

But never forget that one of the stages of intoxication (right between "I should sing in public" and "Dang! My clothes are too hot") is "I can outsmart this officer." Some offenders have learned the hard way that they can not outsmart officers when caught driving while impaired—they might still retain the *ability* to remain silent as well as the *right* to remain silent. In such a total-refusal case, I have one other suggestion: Turn the in-car video camera around

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during the drive to jail. Don't ask questions, just let the camera observe the suspect in the cruiser's backseat. Video-taping your own driving is of limited utility (although after viewing hundreds if not thousands of DWI videos, I could find my way from anywhere in Lubbock County to the jail). What your camera records during the drive has the best chance of bringing something admissible to the prosecutor. Is the defendant sleeping? Nice touch. Ranting? Even better! Praying? My personal favorite.

All of these questions should be asked before the officer finishes his roadside investigation and makes an arrest decision. That being the case, the defendant is not in custody. Because she cannot be the target of custodial interrogation when not in custody, the defendant's statements should be admissible without *Miranda* warnings or waiving her rights. These techniques must be applied as early as possible in the investigation and as completely as the stop will allow.

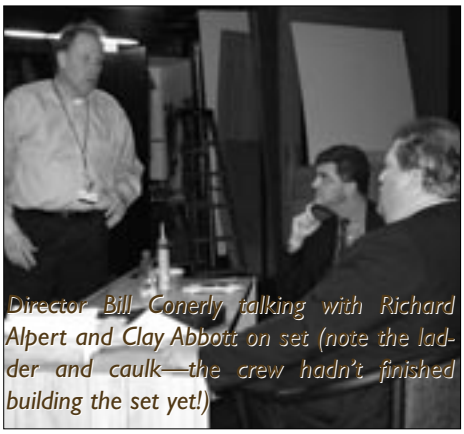
Finally, after the DIC-24 is read, the defendant refuses a breath test, and the defendant is *Mirandized* and waives her rights, ask her why she does not want to take a breath test. I bet very few can cite as many creative but idiotic reasons for refusing the test as a DWI attorney can. Far more clever defense counsel are worried about flesh-eating bacteria on sealed Intoxilyzer mouthpieces than intoxicated suspects are. Silence also works here. No impaired suspect will ever wax as eloquently as a defense attorney on voir dire or as a well-coached defendant on the stand.

Prosecutors, make sure that all of this information gets in front of the jury on direct. It will drain the effectiveness of those defense-favorite "isn't it possible" questions on cross. ✤

Editor's note: For more in-depth coverage of interrogation techniques, see chapter 2 of TDCAA's excellent Confessions *book, written by Denton County Assistant Criminal DA John Stride and Collin County Assistant Criminal DA John Rolater.*

Behind the scenes at the DWI Summit in St. Louis

What the camera operator saw of the set: Richard Alpert and Clay Abbott


Director Bill Conerly talking with Richard Alpert and Clay Abbott on set (note the ladder and caulk—the crew hadn't finished building the set yet!)


The view from the control room, which looks out onto the set


Clay Abbott in the makeup chair


Maureen McCormick and Sandy Miller are miked and ready for the show.

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Photos from the DWI Summit around Texas

Beaumont

Fort Bend

Waco

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There's something about Mary … (cont'd)

fect. In the summer of 2001, Mary had placed her profile, titled "not nearly enough fun (or sex) in my life," on an adult Internet dating site. In the profile, she described herself as a "married, professional woman who is full of desire, but not having her needs met." Over the next several months, she either contacted or was contacted by numerous men with whom she arranged coffee or lunch meetings where she determined whether they met her requirement of being "an extremely discreet man … for an erotic and intellectual relationship." More than one did. She also made special efforts to get back in touch with men she had known in the past.

From August through October 2001, Mary engaged in sexual relations with five different men, three from the Internet and two from her past, often at hotels but also at her own home and in her vehicle. During these months she communicated with her paramours by cell phone and email. The relationships' complexity is demonstrated, for example, by a six-day trip Mary took with her husband to California, when she made 11 phone calls and exchanged 16 emails with five men.

Near the end of October, it appeared that Mary's web of deceit began to unravel. Ted, suspicious about her activities, hired a private investigation firm to forensically analyze Mary's computer. The private investigators pulled numerous deleted emails from her hard drive. Although it was reported in the news (and there was some speculation within our office) that Ted possessed full knowledge of Mary's affairs prior to contacting the PI firm, that is unlikely. According to one of the private investigators, when he first provided Ted with the text of Mary's emails, Ted showed genuine emotion and predicted, "When I confront [those men], they'd better bring their checkbook because they're going to be writing a check to my favorite charity: me." Additionally, we subpoenaed the Robertses' counseling records which chronicled multiple sessions where the topic of Ted's discovery of the affairs was discussed.

Ted confronted Mary immediately, but any anger was very short-lived. His office staff described him as being upset—for about a day. Ted then began researching the backgrounds of these men, including the names of their wives and information about their businesses. Although only Mary will ever know the criteria she used, she had been very selective in her affairs, choosing only professional, married men, several of whom were corporate executives. Once Ted had this information, he carefully drafted summaries of his wife's email conversations with these men and the dates of phone calls between Mary and each man, making sure that no man's summary contained any reference to any other man Mary was involved with.

He then utilized an obscure provision of the Texas Rules of Civil Procedure, Rule 202, which allows a party to seek judicial permission for a deposition to be taken prior to filing a civil suit. Rather than filing the document in court and seeking an order for deposition, Ted filled a draft of the document, entitled "Petition to Investigate Potential Claims," with prurient allegations of the men's sexual encounters with Mary. He then noted his "causes of action" were based on various violations of the Texas Penal Code: obscenity, public lewdness, and deviate sexual intercourse. He concluded by noting that he would be "required" to notify company officers and the man's wife of the deposition because they were "persons with adverse interest entitled to notice." (Interestingly, in each of the petitions, Mary was also listed as a "person with adverse interest" despite the fact that she actually assisted in typing several of the petitions. At trial, Mary explained she participated out of fear that her family would break up following Ted's discovery of her affairs.) It is noteworthy that Ted's secretary left his employment during this time, taking with her copies of several of the petitions because she believed that Ted was engaging in improper conduct. Finally, Ted attached highlighted copies of the Texas Penal Code provisions cited in his petitions and, in one case, actually included smiling family portraits of Ted, Mary, and their children.

Once the petitions were prepared, either Ted or Mary personally delivered them to the men. At no time did the

petitions disclose that Mary was involved with other men, nor did the petitions mention that Ted and Mary were in the process of purchasing a new home valued at more than three times the value of their current residence. In fact, the petitions and their attachments led the reader to believe that Ted and Mary were in the process of divorcing based solely on Mary's infidelity with that petition's recipient. The allegations and attachments also led the recipient to believe he had committed crimes. Finally, the documents compelled the recipient to conclude that his business and personal reputation would be ruined if the petition were filed and became public record. Some of the men consulted attorneys who characterized the Rule 202 petitions as baseless and considered them a shakedown. Although one attorney recommended his client file a grievance with the State Bar regarding Ted's actions, the man declined to do so as that action would also bring his extramarital activities to light.

During negotiations, Ted supported his demand for "damages" by showing the bill for the forensic computer work, expenses of his "ruined" California vacation, costs of counseling sessions, and fees of two attorneys whom Ted claimed he needed to take over his legal practice during this time period. Four of the men, unaware others were shown the same damages, agreed to compensate him; a fifth man, who was presented with a petition, did not agree to pay. Ted never filed any of the 202 petitions.

In his discussions with three of the four paramours who paid money to keep the petitions private, Ted also stated that part or all of their money would go to a recently established charity, the "Roberts Foundation for Children." One man was instructed to make his check out to "Ted H. Roberts, Trustee." Two others, represented by counsel, insisted on seeing the foundation's articles of incorporation, bylaws, and IRS exemption requests before they released any funds. These documents were eventually provided to the men's attorneys, and both men wrote checks to the new foundation. The records showed that the Roberts Foundation for Children was incorporated on December 28, 2001, with Ted and Mary serving as both its officers and directors. It was dissolved on January 22, 2004, after nearly all of its funds had made their way into the Robertses' business and personal bank accounts.[3]

The fourth paramour was not told his money would go to charity. His $15,000 payment was made directly to the forensic investigation firm and to the two attorneys whom Ted said were necessary to keep his firm running while he recovered from the trauma surrounding his wife's infidelity. (Interestingly, several months later these attorneys wrote a check in the identical amount back to Ted; we don't know what Ted did or said to get this money back.) All four men were told that Ted and Mary would make a sizeable contribution to the Roberts Foundation for Children, but Ted and Mary never contributed a single penny to their own foundation.

In total, Ted and Mary collected $155,000: $30,000 from the paramour instructed to make his check out to Ted as "trustee"; $10,000 from a second paramour who made his payment directly to the Roberts Foundation for Children; $100,000 from a third paramour, of which $70,000 was given directly to the foundation; and the $15,000 payment from the fourth paramour mentioned above. The petitions had been presented to the five men in November 2001, and Ted and Mary received all of the payments, with the exception of the two checks totaling $80,000 to the foundation, by December 19, 2001. It was important for Ted and Mary to obtain these funds by this date because they closed on their new home that very same day.[4] With $60,000 from two of her lovers, Ted and Mary could afford the $93,000 down payment they needed at the house closing, and they borrowed the difference from their credit cards. The paramours had bought silence; the Robertses had bought a new house.

The Robertses' old house

The Robertses' new house

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Shakedown comes to light

With a new home courtesy of Mary's former lovers, money in accounts available to them as the "officers" of their own foundation, and the victims of their blackmail unwilling to call attention to their own extramarital affairs, it looked like Ted and Mary would have gotten away with their crimes—except for a fortunate (for us) set of events. At the same time Ted and Mary were closing on their new home, Ted's law partner, Robert V. West, decided to end their partnership. When he left the office, he too had taken with him copies of the Rule 202 petitions which he found improper. The 202 petitions were introduced during a hearing in a subsequent lawsuit regarding financial dealings between the law partners. The *San Antonio Express-News* took an interest in the case and published the June story that called our elected criminal DA's attention to the Robertses and their affairs.

One of the first things Ranger Collins and our office did was to get copies of the 202 petitions introduced in the civil proceeding. This task proved both difficult and time-consuming because the civil court had sealed these records and, despite our request for them as part of a criminal investigation, the ultimate decision to release the records required the involvement of an appellate court.[5] Once our office obtained the petitions, the five men were contacted, and we issued subpoenas for any records relating to their payments to the Robertses. Ultimately, the five men who were served with the Rule 202 petitions cooperated with the investigation, although with differing degrees of willingness. All of them believed that this ordeal was behind them to the extent that only one had told his wife about the affair prior to our office contacting them. Ultimately, one man delayed that uncomfortable revelation until the day before Ted's jury selection began.

Most still had their original 202 petitions, which proved helpful at trial (discussed more in detail later). Those who paid provided information regarding the checks written to the Robertses, revealing to us the numbers of some of the Robertses' bank accounts, which in turn, led us to their other accounts. Those who had retained attorneys still had some original correspondence with the Robertses relating to the petitions, payments, and foundation. In fact, two of the men had copies of the foundation's bylaws, and one had a copy of a request for tax exempt status that Ted Roberts claimed to have filed with the IRS. Most of them also had original documents signed by Ted and Mary purporting to be "confidential settlement agreements" where all parties agreed not to disclose anything about the events or otherwise make them public. Finally, all five men were interviewed regarding their contact with Mary and their discussions with the Robertses regarding the payments.

Additionally, with knowledge of the Robertses' bank accounts, we learned the names of the former employees of the Robertses' law firm and interviewed them.[6] From these interviews we learned Ted's former secretary had kept copies of the 202 petitions to which she had access. These documents included Ted's handwritten notes that listed what he intended to ask from each paramour and detailed the amounts that clearly showed he was seeking the recovery for the same "damages" from more than one party.

Finally, we determined the extent of Mary's involvement in the scheme. Aside from typing some of the petitions and acting as both an officer and director of the Roberts Foundation for Children, Mary actually delivered two of the petitions herself and arranged a meeting where Ted delivered a third petition. In one case, she went so far as to include a note attached to a petition of a paramour whom she knew was represented by counsel suggesting, "I don't know how much of the material you would want to share with [your attorney] or anyone else." Additionally, Mary was responsible for the actual movement of most of the funds in the foundation's accounts to accounts belonging to her and her husband.

Charging the Robertses

After we reviewed the information from the investigation, it became clear that Ted and Mary had engaged in good old-fashioned blackmail and extortion. Texas, however, has done away with both of these crimes, consolidating them within the theft statute.[7] We decided to allege the Robertses' crimes as thefts.[8] That is, the money the paramours paid was given without their effective consent because they were induced by the Robertses' deception and coercion.[9] In looking at how the Robertses approached these victims, we believed

each victim was led to believe that 1) Ted and Mary's marriage was ending; 2) each paramour was the sole person responsible for their divorce and the only person with whom Mary had been unfaithful; 3) Ted would file the 202 petition if the victim did not pay; 4) filing the petition would result in notification of the victim's wife and employer; 5) he had committed crimes that would result in criminal charges with collateral consequences to his personal and professional life; 6) Ted had created a charitable foundation to which he and rich associates would make substantial contributions; and 7) much, if not all, of any payment the victim made would benefit needy children. Based on these notions, we alleged specific parts of the definitions of deception and coercion as negating any effective consent by the victims.[10] Each victim was alleged in a separate count for each defendant, and each defendant also had a count where the amounts taken from each paramour were aggregated pursuant to "one scheme or continuing course of conduct."[11] Therefore, each defendant had a five-count indictment consisting of two state jail felonies, one 3rd-degree felony, and two 2nd-degree felonies, including the aggregation count, which was based on the monetary amounts paid by each victim. The result was a three-page, single-spaced indictment for each defendant.

The trials

The trials of Ted and Mary were conducted separately. The same attorneys represented both defendants and, after they waived any potential conflict, the judge granted a severance based on their lead counsel's representation that he would present inconsistent defenses. By agreement, Ted went to trial first.

His defense was simple and unsurprising. He contested few facts of the case, resting entirely upon the belief that what he did was not a crime. Ted had gone to great lengths to make his actions look legitimate. On the surface it might appear, as the defense claimed, that "this is what lawyers do all the time." But we asked the jury to look deeper.

In this respect, the original highlighted 202 petitions obtained during the investigation were significant. Each had attached copies of Penal Code pages that contained Ted's yellow marks drawing the reader's attention to specific provisions. Perhaps demonstrating Ted's lack of understanding of criminal law, some of these provisions were not even crimes but rather the underlying definitions. Allegations in the petitions claimed that Ted could bring suit for their violation. Clearly, the petitions' intention was to make the recipient believe—as one paramour stated from the stand—that "I'd committed a crime." It seemed clear that Ted was attempting to "accuse a person of [an] offense" and create "a false impression of law" such that the paramours would submit to his demands.

The similarities of how each paramour was approached, including references to the creation of the Roberts Foundation for Children and the implicit representations that Ted and Mary were divorcing, were also emphasized during our prosecution. The "false impression of fact" regarding the Robertses' donation of a substantial amount of money to their foundation was easily refuted by showing that the only funds ever received by the foundation came from the paramours. The "false impression of fact" created regarding Ted and Mary's relationship was brought out through the earnest money contract for their new home initiated during the time Ted was negotiating with the paramours and the use of part of the proceeds at closing. Testimony from Ted's former secretary that Ted and Mary had never appeared closer or more loving than while he was working on the 202 petitions also supported it. Also significant to these impressions was our belief that Ted never intended to file any of the petitions because such an action would be even more embarrassing for him and Mary than for the five victims. This belief was supported by the fact that, after their activities were reported in the *San Antonio Express-News,* the Robertses became involved in a civil suit for damages against the paper for invasion of privacy and intentional infliction of emotional distress.[12]

The most significant "false impression of fact" related to the representations that the Roberts Foundation for Children would engage in charitable endeavors. Painstaking review of every check written from or deposited into the couple's primary bank accounts provided some of the best evidence against them. The Roberts Foundation for Children accounts showed that of the $80,000 given to the foundation, over $70,000 went directly to the Robertses and their law firm, while much of the remainder went to an outside law firm

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that prepared the organizational documents required by the paramours' attorneys and for a seminar Mary attended in Austin, ironically, to teach attendees how to run a charitable organization. The Robertses had already withdrawn $50,000 from the foundation bank account less than three months after it was opened.

In addition to the foundation accounts, we reviewed virtually all checks written in every bank account the couple maintained from several months before Mary began her affairs until after the foundation was dissolved. While doing so, we also reviewed all deposits into those accounts. While the Roberts Foundation for Children accounts were being pilfered, Mary and Ted did not make a single personal donation to any charitable organization relating to children. It also showed the money siphoned from the foundation was taken during a time when the Robertses, although claiming to be in financial trouble, were spending money on expensive clothes and furniture and at least one more vacation to California. Evidence surrounding the foundation was, undoubtedly, the best part of the case against the Robertses. We filed numerous business records affidavits relating to thousands of pages of bank records, and Ranger Collins testified how the paramours' deposits arrived at their ultimate destination: the Robertses' pockets. Over multiple defense objections regarding relevance, the significant withdrawals were displayed to the jury using an imager and a large screen.

Ted's defense presented evidence that Ted wanted to start a foundation for children prior to Mary's affairs and "expert" testimony from a former Texas State Bar president who offered his opinion that all of Ted's activities comported to the highest legal and ethical standards. He failed to mention until confronted during cross-examination that *he* was the attorney suing the *San Antonio Express-News* in the pending civil suit and that he was doing so on a 40-percent contingency fee basis.

"When I confront them, they'd better bring their checkbook because they're going to be writing a check to my favorite charity: me." — defendant Ted Roberts

The State's closing arguments ended with a PowerPoint slide consisting of an unflattering photo of Ted above the now infamous quote, "When I confront them, they'd better bring their checkbook because they're going to be writing a check to my favorite charity: me." As the jury exited the courtroom, the quote remained displayed on the screen near the door.

The jury convicted Ted of three of the five counts of theft—from the paramours who paid Ted based on his promise to fund the foundation. (Though we did not have an opportunity to speak with Ted's jurors afterwards, the foreman was interviewed by the media and said that the jury focused on those victims who donated directly to the charity.) Ted, who had no criminal record, had elected to be sentenced by the judge and received five years in prison. His case is pending appeal, but his license to practice law has been suspended.

Mary's trial was a near repeat of Ted's, including the same defense expert. The major exception was that Mary's defense claimed that she was not really involved in the thefts, which might be expected because we were trying her as a party. Unlike Ted, Mary testified in her own defense. She claimed to have acted in only a secretarial capacity when typing the Rule 202 petitions. She further claimed that, although she did no research and gave no thought to the legality of Ted's actions, she relied on Ted's knowledge of what he was doing. Finally, her withdrawal of funds from the foundation was done solely because Ted instructed her to. She also characterized these withdrawals as "loans," which is prohibited by Texas law and the foundation's own articles of incorporation.[13]

While such a defense may have worked for someone with less education, the jury did not accept that explanation from Mary, a licensed attorney and real estate agent with two master's degrees. The jury convicted her on all five counts. Like her husband, she elected to go to the court for sentencing and was given 10 years' probation. Mary's law license is currently suspended. The Robertses' marriage, however, remains intact.

Lyrics defining life

One of the more entertaining parts of this prosecution occurred when Mary was on the witness stand. She was trying to explain why she placed her profile on an adult dating site and ended up having sexual relations with multiple men. She testified that Ted had earlier placed his profile on the Internet, and she did the same hoping he would respond to it. She said, "It's like—what's that song? 'If you like piña coladas / And getting caught in the rain.'" She was referring to Rupert Holmes' song "Escape," where a man answers a personal ad only to find that his girlfriend had placed it.[14] Her hope was that Ted would respond to her ad and that their marriage would be saved. She had no explanation for how her plan went so far off track.

As we sat listening to her testimony, we couldn't help thinking it sounded more like another song, "Lookin' for love in all the wrong places / Lookin' for love in too many faces."[15] ✤

Endnotes

1 *There's Something About Mary* (20th Century Fox 1998).

2 Maro Robbins and Joseph S. Stroud, "Sex, lawyers, secrets at heart of sealed legal case," *San Antonio Express-News*, June 13, 2004, at 1A, 12A.

3 We considered prosecuting the Robertses under Texas Penal Code §32.45 as a misapplication of fiduciary property, but we decided to proceed with the cases as traditional thefts because we believed the Robertses had created their foundation as a sham from the beginning.

4 The other two checks to the Roberts Foundation for Children were received in February and March of 2002.

5 The legal proceedings to unseal these records would provide sufficient content for a separate article so we won't go into detail here.

6 Federal authorities also interviewed many of these individuals although no federal charges were filed.

7 Texas Penal Code §31.02.

8 Texas Penal Code §31.03. Consideration was also given to charging the Robertses with Misapplication of Fiduciary Property under §32.45 of the Texas Penal Code, but two problems confronted us. First, it was difficult to identify who would act as the complainant for what was, essentially, a sham charity. Second, we faced the practical (although technically not legal) dilemma of ignoring how the Robertses got contributions to the charity and restricting our prosecution solely to the fact they failed to fulfill the charitable requirements of their articles of incorporation and Texas civil statutes.

9 Texas Penal Code §31.01(3)(A).

10 For deception, we alleged "creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true" from Texas Penal Code §31.01(1)(A), and "failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true" from Texas Penal Code §31.01(1)(B). For coercion, we alleged "a threat, however communicated … to accuse a person of any offense" from Texas Penal Code §1.07(a)(9)(C); "to expose a person to hatred, contempt, or ridicule" from Texas Penal Code §1.07(a)(9)(D); and "to harm the credit or business repute of any person" from Texas Penal Code §1.07(a)(9)(E).

11 Texas Penal Code §31.09.

12 These causes of action were ultimately dismissed by the district court. *Lowe v. Hearst Commons., Inc.*, 487 F.3d 246 (5th Cir. Tex. 2007).

13 Tex. Rev. Civ. Stat. Art. 1396-2.25 (Vernon Supp. 2007).

14 Rupert Holmes, "Escape," on *Partners in Crime* (1979).

15 Johnny Lee, "Lookin' for Love," on *Lookin' for Love* (1980).

Scholarship applications due July 1

Applications for the Investigator Section scholarship are now being accepted; application forms are available at www.tdcaa.com. Just search for "scholarship." At least one $750 scholarship will be awarded annually. Children under legal guardianship of a current TDCAA member; who are under 25 years old; who are currently enrolled in an accredited college, university or vocational-technical school; and who have a cumulative GPA of at least 3.0 are eligible. Completed applications and essays are due to TDCAA by July 1.

Contributions to memorial fund now accepted

In the March-April issue of this journal, Dallas County Investigator Brent Robbins wrote about a heart-wrenching case where Marilyn Gates was killed by an intoxicated driver. Mr. Robbins will present a check to the Marilyn Gates Memorial Fund Scholarship when he travels to New Hampshire (where the Gates family lives) in June. The scholarship has previously been limited to $500; the hope is to at least double that amount. Anyone interested in contributing to the fund can send money to: Brent Robbins, Denton County Criminal District Attorney's Office, 1450 E. McKinney St., Suite 3100, Denton, TX 76209.

CRIMINAL LAW

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

A prosecutor's guide to contempt of court

Contempt is rarer in real life than in TV courtrooms, so many prosecutors have never handled such a case. Here's a primer on this procedure-heavy piece of law.

Television has taught us that with the magic words "You're in contempt!" and the bang of a gavel, the offending person may be found in contempt for non-speech conduct and is hauled away by a bailiff to sweat out a night in jail, and order is magically restored to the courtroom. The actual practice of contempt is, of course, not quite as seen on TV. In most courtrooms, contempt is much more rarely seen, and it entails more procedure than many think. Whether faced with the threat of contempt for actions in court or asked by the judge to assist in contempt procedures for a defiant witness, prosecutors should be aware of the basic procedural requirements of contempt law.


Andrea Westerfeld

Classification

What sort of notice is required? Must a hearing be held? What rights does the accused have? Can you appeal? The answers to these questions depend on what type of contempt is alleged. Contempt may be either direct or constructive, and either civil or criminal.

Direct vs. constructive contempt. The type of contempt most often featured on television is direct contempt, which involves disobedience or disrespect occurring in the court's presence. Because the judge directly witnessed the offensive action, he may immediately punish the violator. Direct contempt stems from the court's inherent power to punish violations in its presence.[1]

By contrast, constructive contempt involves disobedience which occurs *outside* of the court's presence, such as failure to comply with an order. Because it occurred outside of the court's presence, this type of contempt requires witnesses to be proven. The court is thus required to give the contemnor written notice, hold a hearing, and afford the contemnor the opportunity to call witnesses and defend herself against the charges.[2]

Civil vs. criminal contempt. The most important classification of contempt is civil or criminal. Despite the name, this classification has nothing to do with the underlying case. Civil contempt may occur in a murder trial as easily as criminal contempt stems from a divorce. Rather, the classification is dependent on the purpose of the contempt: Civil contempt seeks to correct a violation, while criminal contempt punishes the violator.

Civil contempt is also known as "coercive" or "remedial" contempt because it seeks to remedy the violation of a court order.[3] The purpose of the contempt is to persuade the contemnor to obey a previous order. This is the classic situation of a witness being jailed until he agrees to testify. The judge may assess a fine, imprisonment, or both, and the sentence may be determinate or open-ended. The only requirement is that the contempt is conditional—the contemnor may escape the sentence by complying with the court order. In this way, the contemnors are said to carry "the keys of their prison in their own pocket."[4]

Criminal contempt, on the other hand, is also known as "punitive" con-

tempt because it seeks to punish a violation.[5] The lawyer fined for swearing in court is an example of criminal contempt. It is unconditional—the punishment stands regardless of what the contemnor may later do to comply with the court order. Criminal contempt thus requires due process and a higher standard on appeal because of this punitive nature. Criminal contempt in Texas is punishable by a maximum fine of $500 and confinement for no more than six months.[6] But each violation of a court order may be punished, so a lawyer could, for example, be sentenced to a $500 fine for each day he violated a discovery order.

Prosecutors should be particularly aware of criminal contempt, as it is considered a *crime* and can thus bar prosecution for the same conduct.[7] If, for example, a person is found in criminal contempt for failure to pay child support, the State may not be able to prosecute him for criminal nonsupport for the same instances of failing to pay.[8] The State should charge different dates than the contempt order to be sure not to run afoul of double jeopardy. Similarly, a person held in contempt for lying to the court may not subsequently be prosecuted for perjury for the same lie.[9]

It is possible for a contempt order to be both civil and criminal if it contains elements of each. For example, a judge may jail a lawyer for three days for failing to comply with a discovery order and order him to remain in jail until he complies. The initial unconditional sentence—confinement for three days even if discovery is given immediately—is criminal contempt, while the conditional portion of the sentence—where the contemnor only remains in jail until the discovery is provided—is civil contempt.

Requirements of due process

No notice is required for direct contempt, whether civil or criminal, unless it is assessed against an officer of the court.[10] This is due to the court's "inherent power to punish" for actions occurring before it and because the contempt immediately follows offending behavior. But constructive contempt requires written notice of how, when, and by what means the party committed the alleged contempt.[11] This notice can be in the form of a motion for contempt, a show-cause order, or any other equivalent process. Furthermore, because this is a due process issue, merely following the standard rules of service is not sufficient. Sending a notice to the defendant's home[12] or to his attorney,[13] serving notice by publication under the Rules of Civil Procedure,[14] or even orally notifying him[15] is not sufficient if the defendant can show he had no *personal* knowledge of the setting and was not purposely avoiding service.

The courts do not appear to have addressed precisely how *much* notice is required. The only opinions that deal with a specific timeframe focus on failure to pay child support, which has its own 10-day notice requirement. In other situations, as little as three days' notice has been held sufficient.[16]

Due process must also be satisfied at the contemnor's hearing. Contempt proceedings are quasi-criminal in nature—that's true even for civil contempt because imprisonment is a possibility; thus they must comply with criminal standards of due process.[17] A person is entitled to counsel at a contempt hearing and has the right against self-incrimination.[18] But there is no inherent right to a jury trial. A person held in civil contempt has no right to a jury trial, and the right exists in cases of criminal contempt only if "serious" punishment is imposed.[19] Serious punishment is confinement for more than six months or a fine greater than $500. This determination is cumulative, so a series of smaller sentences for multiple violations can be combined to amount to a "serious punishment."[20] Finally, the hearing requirement may be satisfied by affidavits.[21] The court is required to give the contemnor "a meaningful opportunity" to explain his behavior, but it is not required to hold a live hearing.

Although the court's power to punish through contempt is broad, contempt is meant to be exercised rarely and is presumed *not* to exist.

Proof of contempt

Although the court's power to punish through contempt is broad, contempt is meant to be exercised rarely and is presumed *not* to exist.[22] Three elements

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must be satisfied to prove contempt: 1) a reasonably specific order, 2) a violation of the order, and 3) the willful intent to violate the order.[23] To be specific enough to support a constructive contempt finding, an order must spell out the details of compliance in clear, unambiguous terms so that a person knows exactly what she must do to comply with it. Some courts have held that an oral order is never sufficiently specific; thus, only a written court order may support a constructive contempt finding.[24] An oral order may support a *direct* contempt finding, but it must still be clear what the court has ordered the person to do.[25]

Noncompliance with an unambiguous order of which a person has notice raises the inference that the violation was willful.[26] But a person is in contempt only if he has the ability to comply with the court's order but chooses not to.[27] A person may not, for example, be jailed for failing to turn over property not in his possession. But for this exception to apply, the inability to comply must be *involuntary*.[28] If a person puts himself in a position where he is unable to comply with the order, then he may still be held in contempt.

Appeal

There is no appellate process for contempt orders, but a contemnor may seek relief through a writ of habeas corpus.[29] A writ will issue only if the contempt order is void, meaning it is beyond the court's power or the contemnor was not afforded due process. A contempt order is beyond the court's power if it violates the Texas Constitution. Notably, the Texas Constitution prohibits imprisonment for debt, so a contempt order based solely on a failure to pay a debt is void. This does not apply, however, if the failure is to pay child support or a criminal fine. In both cases, this is considered failure to perform a legal duty, not failure to pay a "debt." If a person is held in contempt but not imprisoned, then he may be able to seek relief through a writ of mandamus.[30] The standard is similar to a writ—the contemnor must show that he is unquestionably entitled to relief.

Other provisions

A person may not be released on any sort of bond from a contempt order.[31] If the trial court permits a bond, then the person is no longer illegally confined and a writ will not issue. But if the Court of Criminal Appeals issues the writ, then it can order the contemnor released on bond pending the conclusion of its hearing.

There is a special provision, however, for officers of the court held in contempt;[32] it applies to all four types of contempt. Officers of the court include attorneys, bailiffs, clerks, court reporters, and other similar officials. An officer of the court must be released on a personal recognizance bond pending a hearing to determine his guilt or innocence. He is also entitled to a hearing in front of a judge other than the offended judge. The presiding judge of the administrative district in which the contempt occurred must appoint another district judge to preside over the hearing. This is the only time a court other than the offended court is legally authorized to assess contempt. Because contempt is part of the inherent powers of the court, a court is otherwise not authorized to find a person in contempt for violating another court's order.

A written order is required before a person may be confined for contempt, direct or constructive.[33] If the contempt is civil, then the order must clearly lay out what is required to purge himself of contempt. But the court may order the person detained for a reasonable time while the written order is prepared.

Conclusion

With luck, you will never have to use the information from this article. But if you do find yourself involved in a contempt proceeding, the following questions can help you quickly get a handle on the situation:

- Did the offensive behavior happen in front of the judge? Is the offender an officer of the court, meaning an attorney, bailiff, court reporter, etc.? If your answers are "no" and "yes," respectively, then you need to fulfill all due process requirements.
- Was there a court order specific enough to support a finding of contempt?
- Did the offender have the ability to comply with the order? If not, did the offender put herself in the position of not being able to comply?
- Did the offender receive personal notice of the contempt charge and the ability to defend against it in some form?

This article is far from an exhaustive study of contempt, but it provides a good base of knowledge. Whether you are contemplating courses of action,

have become involved in a hearing at a judge's request, or hear those magic words—"you're in contempt"—yourself, I hope this information will guide your next move. ✤

Endnotes

1 *Ex parte Gordon*, 584 S.W.2d 686 (Tex. 1979).

2 *Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995).

3 *In re Dotson*, 76 S.W.3d 393, 395 n.3 (Tex. Crim. App. 2002).

4 *Shillitani v. United States*, 384 U.S. 364, 368 (1966).

5 *Dotson*, 76 S.W.3d at 395 n.3.

6 Tex. Gov't Code § 21.002(b). For municipal and justice courts, the maximum is three days or $100.

7 *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Ex parte Rhodes*, 974 S.W.2d 735, 740-42 (Tex. Crim. App. 1998).

8 This issue is not settled at law. It has been suggested that criminal nonsupport and criminal contempt involve sufficiently separate elements so as to not run afoul of double jeopardy. See, e.g., *State v. Landrum*, No. 05-98-01226-CR, 2000 WL 280317, at *1 (Tex. App.—Dallas, Mar. 16, 2000, no pet.) (not designated for publication).

9 *Ex parte Busby*, 921 S.W.2d 389, 393 (Tex. App.—Austin 1996, pet. ref'd).

10 *Ex parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986).

11 *Chambers*, 898 S.W.2d at 261; see also *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 448-49 (Tex. App.—Fort Worth 2000, no pet.).

12 *Ex parte Moore*, 567 S.W.2d 523, 526 (Tex. App.—Texarkana 1978, no pet.).

13 *Ex parte Lackey*, 522 S.W.2d 735, 735-36 (Tex. App.—Dallas 1975, no pet.).

14 *Moore*, 567 S.W.2d at 526.

15 *Ex parte Vetterick*, 744 S.W.2d 598, 599 (Tex. 1988).

16 *Ex parte Hodge*, 611 S.W.2d 468, 469 (Tex. App.—Dallas 1980, no pet.).

17 *Ex parte Gonzales*, 945 S.W.2d 830, 836 (Tex. 1997).

18 *Id.*; *Ex parte Werblud*, 536 S.W.2d 542, 547 (Tex. 1976).

19 *Werblud*, 536 S.W.2d at 547.

20 *Ex parte Griffin*, 682 S.W.2d 261, 262 (Tex. 1984).

21 *Fahle v. Cornyn*, 231 F.3d 193, 196 (5th Cir. 2000).

22 *Ex parte Jacobs*, 664 S.W.2d 360, 364 (Tex. Crim. App. 1984).

23 *Chambers*, 898 S.W.2d at 259; see also *Rhodes*, 974 S.W.2d at 740.

24 *Ex parte Wilkins*, 665 S.W.2d 760 (Tex. 1984).

25 *Jacobs*, 664 S.W.2d at 364.

26 *Chambers*, 898 S.W.2d at 261.

27 *In re Gawerc*, 165 S.W.3d 314, 315 (Tex. 2005).

28 *Ex parte Sanchez*, 703 S.W.2d 955, 959 (Tex. 1986).

29 *In re Henry*, 154 S.W.3d 594, 596 (Tex. 2005).

30 *Kidd v. Lance*, 794 S.W.2d 586, 587 (Tex. App.—Austin 1990, no writ).

31 *Ex parte Eureste*, 725 S.W.2d 214, 216 (Tex. Crim. App. 1986).

32 Tex. Gov't Code, § 21.002(d).

33 *Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980).

TDCAA's upcoming seminar schedule

Civil Law Seminar, May 28–30, at the Sheraton in downtown Austin. Call 512/478-1111 for reservations.

Crime Scene to Courtroom, June 18–20, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Prosecutor Trial Skills Course, July 13–18, at the Omni Southpark in Austin. Call 512/448-2222 for reservations.

Advanced Trial Skills: Homicide, August, at the Baylor School of Law in Waco.

Annual Criminal & Civil Law Update, Sept. 17–19, at the San Luis Resort in Galveston. Both the San Luis and the Hotel Galvez are booked; call for overflow rooms at the Hilton at 409/744-5000, or keep checking the other two in case of cancellations.

Key Personnel Seminar, Nov. 5–7, at the Omni Colonnade in San Antonio. Call 210/691-8888 for reservations.

Elected Prosecutor Conference, Dec. 3–5, at the Omni Southpark in Austin. Call 512/448-2222 for reservations. ✤

CRIMINAL LAW

By Richard Martindale
Assistant District Attorney in Potter County

Drug-free zones

The dangers of allowing drug dealers to hawk their wares around our children are plainly evident. Here's how to use an important tool to keep drug offenders in prison and off the streets.

In every prosecutor's office, drug cases make up a significant portion of the workload. Everyone in law enforcement knows that the use and distribution of drugs is the root cause of many other offenses we handle, and dealing effectively with these cases directly impacts the community's safety and well-being and reduces the number of other offenses. However, because most drug offenses do not fit within the parameters of Art. 42.12, Section 3g, Texas Code of Criminal Procedure, keeping drug offenders in prison is becoming increasingly difficult.

One tool assists prosecutors in their quest for a meaningful prison term for drug offenders: an affirmative finding that the offense was committed in a drug-free zone (DFZ). The DFZ finding can, in many cases, rival a deadly weapon finding in effectiveness.

Unfortunately, the statute governing DFZs (Health & Safety Code §481.134) reads like the tax code and is often the source of much folklore and urban legends. Being cognizant of the statute's variables and how they apply to your facts is the key to using it successfully. In turn, applying this statute to a drug case will greatly enhance your ability to protect your community's most valuable resource, our children, while discouraging your community's criminal element.

Definitions

For the purposes of this article, I will refer to the area that creates the drug free zone as the "source location."

While most terms used in this section have their common meaning, there are some special issues contained in §481.134(a). The term "institution of higher education" covers most colleges and post-high school technical institutions. The additional definition of "or any other agency of higher education of as defined by §61.003, Education Code" does not add much but does include some places that may not commonly be thought of as a place of higher learning.[1]

"Playground" is a term that has led to some litigation. The statute provides that a playground is any outdoor facility not on the premises of a school that is intended for recreation, is open to the public, and contains three or more separate apparati intended for the recreation of children, such as slides, swing sets, and teeterboards. If alleging a playground as the basis of your drug free zone, tell your officers to count the apparati. For example, a slide attached to a swing set will likely count as only one apparatus. The best procedure is to take photographs of the area so that the jury may see and count for themselves the number of apparati. Also, watch the issue of whether the playground is open to the public. In *Ingram v. State*,[2] the State's failure to establish that a playground, which was located on private property, was open to the public was fatal to a drug-free zone finding.[3] Therefore, before using a playground as the source of your drug free zone, you must determine who owns the land and insure that there are no limits on who may have access to the area. Be wary of playgrounds located in apartment complexes or on private property as they will likely have limited access and therefore

fail to meet the definition.

"Premises" means the real property and all buildings and appurtenances pertaining to the real property. Do not forget that when the term "premises" is used, your zone will include the land upon which your source location is located. For example, the premises of an institution of higher learning would include the entire college campus and begins to run at the edge of the property line out to 1,000 feet. Be sure your officer measures from the edge of the property line, not from the side of a building on the property.

The most common source location is a school, which is defined as a private or public elementary or secondary school, *or a daycare center*, which is defined as a child-care facility that provides care for more than 12 children under 14 years of age for less than 24 hours a day.[4] These, of course, are scattered throughout your community and will not necessarily show up on any map. Therefore, your officers should scout the area of the offense for signs or other indicators of daycare centers. The phone book may be a good place to look too because such centers can be found in unusual places: Many health clubs, churches, and businesses may have child-care facilities.

Private schools are also source locations. Pay attention to church-based schools, private academies, and as at least one court has suggested, a private home used for home schooling, all of which may provide the basis of finding a drug free zone.[5] A thorough scouting of the area of the offense may pay big dividends. Remember that a school is a school regardless of the time of year. The statute draws no distinction between whether school is in session or out—it merely states the place.[6] Note that while subsection (a) simply defines the term "school," the enhancements in subsections (d), (e), and (f) use the phrase "any real property owned, rented, or leased to a school or school board," thus expanding the number and type of those locations to include any property owned by a school, such as the bus barn or storage facilities.

Another DFZ is a "video arcade facility," which, like a playground, must be open to the public, including those 17 or younger; must be intended primarily for the use of pinball or video machines; and must contain at least three such machines. Again, photos of the facility will go a long way in prosecuting your drug free zone case when a video arcade is your source location.

The "youth center," like the daycare center, is often overlooked as a source location. The term includes any recreational facility or gymnasium intended primarily for use by those 17 and younger and which regularly provides athletic, civic, or cultural activities. Therefore, watch for after-school programs, Boy or Girl Scout meeting places, and sports facilities used for organized groups such as Pop Warner football. During the summer months, communities will often host free lunch programs and similar activities at local parks and other places that would not otherwise be considered a drug free zone but *will be* during those times.

Charging

Charging the drug-free zone is the most difficult and most important step in the process. There are four variables to account for to determine when and how to use the statute. The first is to determine which penalty group your controlled substance fits into and how much of the substance is involved. Next, what conduct has the defendant committed, i.e., possession, delivery, or possession with the intent to deliver? Third, what location will be alleged as the source of your drug free zone? Lastly, what distance from the source location is involved?

The first three variables are relatively easy. What kind of controlled substance is involved, its quantity, and the defendant's conduct (possession or delivery) are the standard basis of any drug prosecution. Your charging instrument should read like any other possession or delivery case.

The drug free zone is where we run into some confusion. The notice of a DFZ is generally considered an enhancement provision and therefore may be given either in the indictment itself or by filing a separate notice with the trial court, similar to giving notice of intent to seek a deadly weapon finding. However, this is not true if the offense you are alleging is defined in either §481.134(b) or (d); to punish the state jail felony offenses listed in those subsections as 3rd-degree felonies, the DFZ must be alleged in the indictment[7] because the courts have held that offenses that fit into the provision of subsections (b) or (d) are separate and distinct

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3rd-degree felonies and not enhanced versions of the offenses listed in those sections.[8]

The same is true for the offense listed in subsection (e). Those offenses would otherwise be Class A misdemeanors but for the fact that the offense was committed within 1,000 feet of any real property owned, rented, or leased by a school or school board, the premises of a youth center, or on a school bus. In those cases, the allegation of the drug free zone must be set out in the indictment, as that element would be jurisdictional, in the same manner as alleging prior convictions to establish a felony Driving While Intoxicated. While no reported case has discussed this subsection for the same reasons and logic set forth by the courts concerning subsections (b) and (d) an offense pursuant to Subsection (e) would be a separate offense from one committed under Section 481.117(b), 481.119(a), 481.120(b)(2) or 481.121(b)(2) not only because they have increased punishment but also that that element vests the district with the jurisdiction to hear the matter.

I should note that subsections (b) and (d) are almost—but not quite—identical; the big difference is that "an institution for higher learning" is only a source location for felony delivery cases, NOT for felony possession or misdemeanor delivery or possession charges. (I'm not sure why state legislators determined that a college dorm shouldn't be a drug-free zone for possession cases, but perhaps it is another reminder that they, too, have children in college.) In addition, swimming pools and video arcades are only a source location for low-level delivery charges, *not* for possession charges or higher delivery charges. (Your guess is as good as any for the reasoning behind that distinction.) But regardless of the logic—or lack of logic—behind these legislative quirks in the statute, prosecutors should be aware of them when charging these cases.

Be careful in charging your offense to allege what can actually be proven. Some difficulties have arisen where the allegation provided that the premises was "owned" by the institution or school, etc. Be sure that there will be evidence to establish ownership, rental status, or leasehold. While officer testimony is often sufficient, be prepared to call a school official or other person who can verify that the property is owned, leased, rented, or whatever you have alleged. Do not let the office form plead you into a position that you cannot prove. This part seems so simple, and it is, but it is often forgotten until trial.[9]

I know by now your eyes have glazed over and you are scratching your head. Welcome to the club! As I stated earlier, the key to a drug free zone prosecution is knowing your variables and where to plug them into the matrix. I have prepared a chart on page 32, that I hope will ease some of the angst you and your officers often feel. In my office we have individual drug free zone indictment forms set up to account for as many of the variables as is reasonably possible. That adds up to over 180 such forms! They are available for download on TDCAA's website; just search for "drug free zone."

Proof

Proving your case begins with establishing whatever conduct you are charging. After all the basic elements are covered, proving the drug free zone is usually fairly simple. Health & Safety Code §481.135 provides some guidance. If the governing body of your jurisdiction adopts a resolution or ordinance approving a map produced by a municipal or county engineer that establishes drug free zones, then the map itself may be introduced at trial and is prima facie evidence of the location and boundaries of drug free zones. Obviously, obtaining passage of a resolution or ordinance is political exercise. This may take some education on the part of your office as well as local enforcement for that body. A professional presentation as to the need for an ordinance, the effect, the value to the children, the help for law enforcement and the no or minimal cost from your office partnered with officers should give the commission the chance to be on the "law enforcement team," and result in the passage of the ordinance or resolution.

If your source location does not appear on the map or if your jurisdiction has not adopted such a map, do not despair—there are still many options available.[10] Subsection (d) of §481.135 provides that any other evidence or testimony may establish the elements of the DFZ, and any maps or diagrams that are otherwise admissible may be used. Maps and geographic locations are generally considered not subject to reasonable dispute; therefore, you may offer a map of the area where the offense occurred and

ask the court to take judicial notice of the map itself pursuant to Texas Rule of Evidence 201(b). Then have an officer or other person identify the source location and the location of the offense on the previously admitted map. For the best testimony, have the witness testify as to the exact distance between the two locations that he himself measured. My experience has been that jurors want to hear the exact distance; statements such as, "The location was within 1,000 feet of the school" just does not satisfy them. The measurements may be taken in any manner: laser ranger finder, car odometer, traffic wheel, or the old-fashioned measuring tape. This part of the trial can be a true show-and-tell time. Your city or county engineer can produce very large, remarkably clear maps for in-court use. Or you may want to check with your local 911 district, as authorities there often have to-scale overview photos of the area that can be enlarged. Those computer gurus among us might know of several websites that allow you to download satellite photos that can be displayed with your PowerPoint presentation (Google Earth is one such site).

Once you have proved your underlying offense and the fact that it occurred within the proscribed distance of a DFZ, you are finished. There is no additional mental element to be proven.[11] The sole question for the factfinder is whether the defendant committed the offense in the location alleged. However, if you are proceeding under a constructive delivery or possession with intent to deliver theory, you may want to read carefully Justice Hancock's opinion in *Villalobos v. State*[12] before picking your charging theory. As pointed out in that decision, whether the intermediary is an agent of the dealer or law enforcement will determine when (and where) the offense occurred, thereby, determining if a drug free zone is involved. The court there found that because the defendant's conduct was completed outside the drug free zone the trial court improperly made the affirmative finding. The discussion of using the "offer to sale" provision of the delivery statute may also give you helpful suggestions as to how to approach your particular facts.

Lastly, for those in your office who must deal with tracking forms and the ubiquitous DPS reportable offense codes, you will notice another odd thing. As far as those codes are concerned, there are only two offenses per penalty group. There is a code for less than one gram and one for over one gram, so the proper code number for delivery of 1 to 4 grams of cocaine in a drug free zone is the same as that for delivery of over 400 grams of cocaine in a drug free zone, but delivery of less than one gram has its own number. Again, I cannot explain why; it just is what it is.

Exceptions

Subsection (g) provides that for offenses that would be increased from a Class B to a Class A misdemeanor pursuant to subsection (f), the law does not apply if the offense is committed inside a private residence and no minor was present at the time of the offense. Note, however, that this provision applies only to the offenses listed in Subsection (f). I frequently hear defense attorneys argue that we cannot proceed with the drug free zone allegation because the methamphetamine was found in the defendant's residence. That is just plain wrong!

Jury charges

Where to place the drug free zone question and verdict form is probably the most asked question in my office. The statute itself is again the source of the confusion. The statement in Subsection (b), "If it is shown at the punishment phase of the trial of the offense that the offense was committed [at the source location]," suggests that the issue is properly addressed in the trial's punishment phase. But the logic of *Harris v. State*,[13] is more compelling to me, because, as the court noted, the *Hastings* decision is premised on the false assumption that all trials are bifurcated proceedings and was decided before the U.S. Supreme Court decision in *Apprendi v. New Jersey.*[14] I believe that the proper and only place to put the question to the jury is in the guilt-innocence charge to avoid any due process claims as set forth in *Apprendi*. If the offense is listed in subsections (b), (d), or (e) (primarily the "less than one gram" or "28 grams" offenses), then the DFZ issue must be charged as an element of the offense (i.e., do you find that the defendant did knowingly or intentionally possess the controlled substance, and do you find that the defendant did commit the offense within 1,000 feet of a school?). The verdict form must have only the two choices: guilty or not guilty of the offense charged in the indictment or

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information. On the other hand, if the offense is listed in subsection (c), then the charge should be written in a manner similar to asking for a special issue deadly weapon finding (i.e., if you have found the defendant guilty, then answer the special issue: Do you find beyond a reasonable doubt that the defendant did commit the offense in, on, or within 1,000 feet of the premises of a school?). The verdict form would then have the guilty-not guilty verdicts and the special issue answer, such as "We the jury find the drug free zone allegation true / not true."

Effects

Despite the statute's complicated language, the legislature has provided prosecutors with a very powerful tool for combating drug offenses. The ramifications of a DFZ affirmative finding are often overlooked and unappreciated. Other than the provisions of subsections (b), (d), and (e)—which create actual new offenses, as explained above—§481.134 acts as a punishment enhancement law. In subsection (b), besides making an offense committed under that subsection a 3rd-degree felony, it also provides that an offense that would otherwise be punishable as a 2nd-degree felony will be punished as a 1st-degree felony, but it does not increase the fine. As stated earlier, a conviction pursuant to subsections (b) and (d) is a 3rd-degree felony. If your defendant has prior non-state jail felony convictions, they can be used to enhance his punishment pursuant to §12.42 of the Penal Code, the same as any other 3rd-degree felony.

Subsection (c) provides that if the DFZ element is shown at the trial of a qualifying offense and source location, the punishment is increased by five years and the maximum fine is doubled. For example, possession of more than one but less than four grams of cocaine (a 3rd-degree felony) committed within 1,000 feet of the premises of a school or youth center has a punishment range of 7 to 10 years and up to a $20,000 fine. However, be mindful that pursuant to the changes to the community supervision law, the maximum period of probation for a 3rd-degree felony contained in Chapter 481 of the Health & Safety Code is five years.[15] Therefore, the minimum sentence of seven years could be probated for not more than five years. On the other hand, if your defendant has a prior conviction with a judgment that contains an affirmative DFZ finding and he is now charged with an offense under subsections (c), (d), (e), or (f), the new offense *is* a 3g offense, so a judge cannot grant community supervision.[16]

Another frequently asked question is how to apply the drug free zone finding if the charging instrument also alleges prior convictions. The answer is that the five-year increase applies after the punishment with the prior convictions allegations has been assessed. For example, a conviction of a 3rd-degree felony with two prior sequential felony convictions and an affirmative DFZ finding translates to a minimum of 30 years' confinement instead of the 25 years for a habitual offender.[17]

The drug free zone finding also carries some other interesting ramifications. Subsection (h) provides that punishment increased for a conviction for an offense listed under §481.134 may not run concurrently with punishment for a conviction under any other criminal statute. Therefore, if your defendant was on probation for an offense other than another DFZ offense, and he violates probation by committing an offense covered in §481.134, the sentences must be stacked. Likewise, if your defendant is charged with other offenses such as burglary or aggravated assault, even if he enters his guilty plea to the charges during the same proceeding, the court must stack the sentences. Because subsection (h) specifically provides that punishment increased "under this section" may not run concurrent with punishment for a conviction under any other criminal statute, it appears that the sentence must be consecutive even with other drug offenses that are not part of §481.134.

Another interesting ramification of the affirmative DFZ finding is found in §508.145(e) of the Government Code; it provides that "an inmate serving a sentence for which the punishment is increased under §481.134, Health and Safety Code, is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals five years or the term to which the inmate was sentenced, whichever is less." Therefore, your defendant must serve the first five years of his sentence flat. Not many statutes give you that kind of bang for your buck! Remember this provision when preparing your punishment charge if a jury is assessing the punishment. Keep in mind this provision is particu-

larly effective on 2nd- and 3rd-degree felonies, but the statute may have some adverse consequences with sentences in excess of 20 years, as the defendants in those cases appear to become parole-eligible at the five-year mark, even if one-quarter of their sentence term would be greater than five years.

Conclusion

As law enforcement officials, we are all aware of the dangers and risks posed by the distribution and use of drugs. The frequent use of firearms makes engaging in this activity around a school or other protected place egregious. The provisions of the drug free zone statute provides us with means of making a real difference in protecting our children if we will simply apply the law in an aggressive, fair, and equal manner. ✤

Endnotes

1 §61.003(6): "Other agency of higher education" means The University of Texas System, System Administration; Texas Western University Museum; Texas A&M University System, Administrative and General Offices; Texas Agricultural Experiment Station; Texas Agricultural Extension Service; Rodent and Predatory Animal Control Service (a part of the Texas Agricultural Extension Service); Texas Engineering Experiment Station (including the Texas Transportation Institute); Texas Engineering Extension Service; Texas Forest Service; Texas Tech University Museum; Panhandle-Plains Historical Museum; Cotton Research Committee of Texas; Water Resources Institute of Texas; Texas Veterinary Medical Diagnostic Laboratory; and any other unit, division, institution, or agency which shall be so designated by statute or which may be established to operate as a component part of any public senior college or university, or which may be so classified as provided in this chapter.

2 213 S.W.3d 515, 518-19 (Tex.App.—Texarkana 2007, no pet.).

3 The court noted that the presence or lack of fencing around the apparatus was not dispositive of the issue. Further, the court stated, "The fact the property was located near a residential area and contained playground equipment shows no more than that some children may use the facility—not that the public at large had access or permission to use the property. It is not uncommon for a group of homeowners in a neighborhood to provide a playground and limit its use to the children living in the neighborhood."

4 Human Resources Code, §42.02(7).

5 *White v. State*, 59 S.W.3d 368, 370-71 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

6 See *Ulloa v. State* (2005 WL 2473805 Tex. App.—Austin, not designated for publication).

7 *Campbell v. State*, 237 S.W.3d 712, 714 (Tex. Crim. App. 2007); *Young v. State*, 14 S.W.3d 748, 752-53 (Tex. Crim. App. 2000); *Harris v. State,* 125 S.W.3d 45, 50-51 (Tex. App.—Austin 2003, pet. dism.).

8 *Harris v. State*, 125 S.W.3d at 52; *Johnson v. State*, 2007 WL 806317 (Tex. App.—Dallas, not published).

9 You may have noticed that the statute is silent as to the sale or possession of the penalty group 1-A substance, LSD (§481.1121) Also, there is no state jail-level offense of possession of a Penalty Group 4 substance. I cannot explain those facts, other than to say that is the way the statute is written.

10 *Young v. State*, 14 S.W.3d at 753-54; *Fluellen v. State*, 104 S.W.3d 152, 158-59 (Tex. App.—Texarkana 2003, no pet.); *White v. State*, 59 S.W.3d at 369-71; *Ulloa v. State*, 2005 WL 2473805 (Tex. App.—Austin not published).

11 *Williams v. State*, 127 S.W.3d 442, 445 (Tex. App.—Dallas 2004, pet. ref'd); *Dallas v. State*, 2008 WL 192440 (Tex. App.—Dallas not published).

12 (2006 WL 566464 Tex. App.—Amarillo).

13 125 S.W.3d at 51-52.

14 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

15 CCP Art. 42.12, §3(b)(2)(B).

16 CCP Art 42.12, §3g(a)(1)(G)(ii).

17 *William v. State*, 127 S.W.3d at 445.

Charges in drug free zones and their punishments

Possession felonies w/in 1,000 ft of school, daycare, youth center, or on school bus		**Punishment**
PG1:	<1g	3rd-degree
PG1:	=>1g<4g	7–10 yrs, up to $20,000 fine
PG1:	=>4g<200g	7–20 yrs, up to $20,000 fine
PG1:	=>200g<400g	10–20 yrs, up to $20,000 fine
PG1:	=>400g	15–99 yrs, up to $200,000 fine
PG2:	<1g	3rd-degree
PG2:	=>1g<4g	7–10 yrs, up to $20,000 fine
PG2:	=>4g<400g	7–20 yrs, up to $20,000 fine
PG2:	=>400g	10–99 yrs, up to $20,000 fine
PG3:	<28g	state jail felony
PG3:	=>28g<200g	7–10 yrs, up to $20,000 fine
PG3:	=>200g<400g	7–20 yrs, up to $20,000 fine
PG3:	=>400g	10–99 yrs, up to $100,000 fine
PG4:	=>28g<200g	7–10 yrs, up to $20,000 fine
PG4:	=>200g<400g	7–20 yrs, up to $20,000 fine
PG4:	=>400g	10–99 yrs, up to $100,000 fine
Marijuana	=>2oz>4oz	state jail felony
Marijuana	=>4oz<5lbs	3rd-degree felony
Marijuana	=>5lbs<50lbs	7–10 yrs, up to $20,000 fine
Marijuana	=>50lbs<2,000lbs	7–20 yrs, up to $20,000 fine
Marijuana	>2,000lbs	10–99 yrs, up to $100,000 fine

Misdemeanors w/in 1,000 ft of school, daycare, youth center, or on school bus	**Punishment**
Poss. PG4: <28g	Class A
Poss./Del. Misc. Subs 481.119(b)	Class A
Del. Marij <1/4oz (no remun)	Class A
Poss. Marij <2oz	Class A

Delivery felonies w/in 1,000 ft of institution of higher learning, playground, school, daycare, youth center, on school bus, or w/in 300 ft of swimming pool or video arcade		**Punishment**
PG1:	<1g	3rd-degree felony
PG1:	=>1g<4g	1st-degree felony
PG2:	<1g	3rd-degree felony
PG2:	=>1g<4g	1st-degree felony
PG3 or 4:	<28g	3rd-degree felony
PG3 or 4:	=>28g<200g	1st-degree felony
Marijuana:	=>1/4oz<5lbs	3rd-degree felony
Marijuana:	=>5lbs<50lbs	1st-degree felony

Delivery felonies w/in 1,000 ft of institution of higher learning, playground, school, daycare, youth center, or on school bus		**Punishment**
PG1:	=>4g<200g	10–99 yrs, up to $20,000 fine
PG1:	=>200g<400g	15–99 yrs, up to $200,000 fine
PG1:	=>400g	20–99 yrs, up to $500,000 fine
PG2:	=>4g<400g	10–99 yrs, up to $20,000 fine
PG2:	=>400g	15–99 yrs, up to $200,000 fine
PG3 or 4:	=>200g<400g	10–99 yrs, up to $20,000 fine
PG3 or 4:	=>400g	15–99 yrs, up to $200,000 fine
Marijuana:	<1/4oz (no remun)	state jail felony
Marijuana:	=>50lbs<2,000lbs	10–99 yrs, up to $20,000 fine
Marijuana:	=>2,000lbs	15–99 yrs, up to $200,000 fine

AS THE JUDGES SAW IT

By David C. Newell
Assistant District Attorney in Harris County

Questions

1 A jury convicted James Crook in a single criminal action of 13 counts of barratry which arose out of the same criminal episode. In each count, the jury assessed punishment at 10 years' confinement with a recommendation of community supervision. The jury also assessed a $10,000 fine on each count without a recommendation of probation for this portion of Crook's sentence. The trial court placed Crook on probation for seven years on each count and ordered these periods of probation to run concurrently. The trial court also ordered the $10,000 fines to run concurrently. The State appealed, claiming that the trial court could not order fines to run concurrently.

How much does Crook owe?

$10,000 _____ $130,000 _____

2 Police found Adriane Otto behind the driver's seat of her maroon van stopped on the side of the road with the car running. Otto was asleep, slouched back, and shirtless. One officer awakened her with a "sternum rub." Startled, she awoke. She voiced her displeasure to the officers in colorful language. When she got out of the van, she appeared unsteady and confused. She smelled of alcohol, admitted she had had a lot to drink, and failed the HGN test. She did not provide a sample of her breath.

The State charged her with felony DWI with the intoxication based on alcohol alone. During the trial, Otto admitted to drinking two glasses of wine at dinner. But she claimed she went to a sports bar afterward, and a guy had slipped something in her drink. In response to this testimony, the State requested a concurrent-causation instruction in the jury charge. The charge allowed the jury to hold Otto criminally responsible for her intoxication if it found beyond a reasonable doubt that the intoxication would not have occurred but for the defendant's conduct, as charged in the indictment, operating either alone or concurrently with another cause. Is the inclusion of this instruction proper?

yes _____ no_____

3 Tom Coleman testified in an evidentiary hearing on writs of habeas corpus filed by four of the "Tulia" defendants who sought to challenge their convictions. Swisher County District Attorney Terry McEachern represented the State during those hearings as well as the underlying criminal prosecutions. After the hearing, an investigation began into possible perjury charges against Coleman. McEachern requested a special prosecutor be appointed to handle the cases against Coleman. The trial court granted McEachern's recusal motion and appointed two attorneys, Rob Hobson and John Nation, "as special prosecutors to engage in all acts necessary to present the Swisher County Grand Jury in any cases concerning offenses involving Tom Coleman, and if said cases are true-billed, to engage in any acts necessary to prosecute Coleman."

Five and a half months later, the trial court granted Coleman's motion for continuance to allow a newly added defense attorney to become familiar with the case. Coleman requested and received another continuance because one of the attorneys had a personal matter, and the trial was set for January 2005. McEachern's term of office ended December 31, 2004; the newly elected district attorney, Wally Hatch, took office on January 1, 2005. Six days later, Coleman's counsel filed an objection to the special prosecutors and moved for their recusal, explaining that the conflict of interest that had required their appointment no longer existed. Because Hatch was no longer disqualified, Coleman reasoned, the trial court no longer had the authority to continue the appointment of the attorneys pro tem.

Do the attorneys pro tem stay or go?

stay _____ go _____

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4 A jury convicted Jose Angel Moreno of capital murder and sentenced him to death in 1987, two years before the United States Supreme Court decided *Penry v. Lynaugh* (*Penry I*). In his initial application for writ of habeas corpus, he argued that the jury charge did not empower the jury to give effect to his mitigation evidence, basing his argument on the United States Supreme Court decision in *Penry I*. The convicting court recommended that the Court of Criminal Appeals deny relief because the jury could adequately consider the mitigation evidence within the ambit of the future dangerousness special issue instructions the trial court gave them. In 2000, the Court of Criminal Appeals denied relief.

Moreno did not carry his *Penry* claim from the initial writ to the federal petition. The Fifth Circuit affirmed the denial of relief and the Supreme Court denied cert. in January 2007. In April 2007, the United States Supreme Court revisited *Penry I* and its progeny in two Texas cases, *Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman*. The Supreme Court held that Texas jury instructions in the wake of *Penry I* (or at least the ones used in those cases) did not give meaningful effect to the defendant's mitigation evidence. Moreover, the Supreme Court held that the Court of Criminal Appeals' denial of relief in those cases was contrary to and an unreasonable application of clearly established federal law.

Moreno, armed with these cases, filed a subsequent writ complaining about the jury instructions in his case. Equally divided as to how to dispose of Moreno's second application, the Court of Criminal Appeals entered an order announcing that it would take no action on the subsequent writ. The next day, Moreno filed a "suggestion" that the court reconsider the *Penry* claim from Moreno's *initial* writ on its own initiative pursuant to Rule 79.2 of the Texas Rules of Appellate procedure.

Can they do that?

yes _____ no _____

5 Police asked Mark Ramos to come downtown for questioning about a drive-by shooting. The officer placed Ramos in handcuffs before driving him to the station. When they got there, the officer removed Ramos's handcuffs and placed him in an interview room. The detective read Ramos his *Miranda* warnings, and Ramos indicated he understood them. The officer also told Ramos that he was not under arrest. Ramos agreed to talk to the police and initially denied involvement in the offense. After 45 minutes, the detective left the room to consult with his partner who indicated that Ramos's girlfriend had given Ramos up as the shooter. When the detective confronted Ramos with this tidbit of information, Ramos laughed and said his girlfriend would never say that. The detective then told Ramos that he could probably get a warrant based on the girlfriend's statement. Ramos became angry and said he didn't want to talk to the detective and he didn't want to talk about "it" anymore. The detective left the room for five minutes. He came back in the room with his partner who said that it would be better if Ramos told the police what really happened. Ramos orally confessed to the crime and gave a written statement after the detective read Ramos his *Miranda* rights a second time.

At the suppression hearing, Ramos's sister testified that the officer who transported Ramos downtown had *demanded* that Ramos go downtown for questioning instead of *asking* if he would do so. The trial court made the factual finding that Ramos was in custody during questioning.

Did Ramos unambiguously invoke his right to terminate the interview?

yes _____ no _____

6 Gerardo Flores got his girlfriend, Erica Basoria, pregnant. An ultrasound revealed that she was carrying twins. Basoria told her doctor that she was considering an abortion, but her doctor said that the pregnancy was at such a late stage that he could not perform the abortion safely. Basoria showed pictures of the ultrasound to one of her teachers and appeared very happy about having children. She delivered the twins prematurely at her home. They were stillborn and had been dead in utero for at least a day before they were delivered. An autopsy showed that they had been killed by some form of blunt force trauma. When Basoria went to the hospital the day after the delivery, the doctor noticed bruises on her upper arms, a small bruise on her face, and a line of purplish bruises across her abdomen. Basoria testified that Flores had reluc-

tantly agreed to help her terminate her pregnancy by stepping on her abdomen. Basoria also indicated that she took several steps to induce the deaths of the fetuses, namely by increasing her walking and jogging regiment and repeatedly hitting herself in the belly. Her expert testified that the bruises on her abdomen looked like they had been self-inflicted.

The State charged Flores, Basoria's boyfriend, with capital murder of two unborn children. Flores argued that the statute—which excused Basoria's conduct, but not his—violated the Equal Protection Clause of the United States Constitution. Did it?

yes _____ no _____

7 The State charged Bryan Keith Watkins with burglary of a habitation. During voir dire, the State used peremptory challenges on two African-American veniremembers, saying that it struck a juror No. 13 because she stated she would have trouble giving a life sentence and would need overwhelming evidence to reach that. The record did not reveal that the prospective juror said this, but it did reflect that a female juror on the first row needed to hear "the right facts" before she could assess a life sentence.

The State also struck another prospective juror who, before the defense rehabilitated her, indicated that she would hold the State to a burden of proof beyond a reasonable doubt to assess a life sentence. The State struck seven of the eight African-American jurors capable of being reached, with the eighth serving as an alternate. The State questioned nine jurors specifically about circumstantial evidence cases, four of whom were African-American. In this manner, the State singled out African-American jurors for questioning at twice the rate one would expect from random selection. However, when the State questioned the jurors regarding punishment, the State singled out 14 veniremembers, none of whom were African-American. While the State exercised peremptory strikes against juror No. 13 because the State believed she would have a difficult time considering a life sentence, the State also struck two non-African-American jurors for the same reason. The State did not strike the only other non-African American juror who expressed similar hesitation. During the *Batson* colloquy, the trial court actually found one of the State's peremptory challenges impermissible and seated the juror.

On appeal, Watkins asked the court of appeals to take judicial notice of a study commissioned by the *Dallas Morning News* newspaper that he contended showed a continuing pattern on Dallas County's part in exercising peremptory challenges in a racially discriminatory manner.

Were the State's race-neutral explanations for its peremptory challenges a pretext for race-based exclusion?

yes _____ no_____

8 A jury convicted Jimmy Lucero of murdering three members of a neighborhood family in the same criminal transaction. Jurors answered the special issues, and the trial court sentenced him to death. Lucero filed a motion for new trial alleging that the jury had engaged in misconduct when the foreman read Biblical scripture to the jury at the beginning of the punishment-phase deliberations. Though the motion failed to provide adequate citation, the passage in question addressed a Christian's duty to obey and consent to the laws of man. Lucero supported his claim that this Bible reading coerced two jurors into changing their votes on the special issues by attaching an affidavit from juror No. 7. Lucero claimed that this Bible reading amounted to an "outside influence" that jurors could testify about, and Lucero demanded a hearing on his motion for new trial. The State responded with affidavits from all 12 jurors indicating that the Bible passage had no effect upon their hours-long jury deliberations.

Was the reading of a section of the Bible an "outside influence" sufficient to require a motion for new trial hearing on jury misconduct?

yes _____
no _____
God only knows _____

9 In 1994, a jury convicted Jose Medellin of capital murder for his role in the brutal rape, murder, and robbery of 16-year-old Elizabeth Pena and 14-year-old Jennifer Ertman. He had given a full confession after having been arrested and *Mirandized*. Four years later, Medellin complained that he, as a Mexican national, had not been

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informed of his right to consular notification under the Vienna Convention after his arrest. (He had received consular assistance, but he hadn't been notified of his right to consular notification within the three days contemplated by the treaty.) The Court of Criminal Appeals denied Medellin's request for relief because he had not raised the issue at trial and, alternatively, because he, as a private individual, did not have the right to enforce the treaty.

Mexico brought suit against the U.S. for the enforcement of the treaty in the International Court of Justice on behalf of 51 Mexican nationals who claimed that their convictions violated the Vienna Convention; Medellin was one of them. The I.C.J. held in *Cases Concerning Avena and Other Mexican Nationals (Avena)* that these 51 individuals were entitled to reconsideration and review of their convictions regardless of whether the claims were procedurally barred.

President Bush sent a letter to the Attorney General indicating that the United States would discharge its obligations under the treaty by having the state courts give effect to the I.C.J.'s decision.

The Supreme Court then decided that the Vienna Convention did not preclude the application of state default rules in Sanchez-Llamas, a case involving the Vienna Convention and two individuals not named in the Mexican suit against the U.S.

Then, the Texas Court of Criminal Appeals dismissed Medellin's Vienna Convention writ as an abusive writ because Medellin had failed to timely raise his Vienna Convention claim under state law. So who wins?

President _____
Texas _____
I.C.J. _____

10 Eduardo "Waldo" Garcia Bazan committed the 3rd-degree felony, theft of a public servant. He was subsequently elected as Hidalgo County Constable. After the election, he was convicted and sentenced to seven years' probation with a $3,000 fine. The Local Government Code calls for the immediate removal of the county officer upon such a conviction. However, the Texas Supreme Court had previously interpreted §87.001 of the Local Government Code as prohibiting the removal of a county officer "for an act the officer committed before election to office." This section is regarded as the codification of the "forgiveness doctrine." Bazan filed a writ of mandamus in the Texas Supreme Court asking that the removal order be set aside based upon §87.001 and the Supreme Court's precedent in *Talamentez v. Strauss*.

So what should the Supreme Court do?

forgive him ____ forget it ____

Answers

1 $10,000. The Court of Criminal Appeals affirmed the trial court's order "running" the sentences concurrently, meaning that Crook must pay only the single highest total fine rather than the total of the fines. Under §3.03 of the Penal Code, sentences must run concurrently when a defendant is found guilty of more than one offense arising from the same criminal episode prosecuted in a single action. The court went on to explain that the fine is part of the sentence, so then multiple fines must "run" concurrently just like multiple terms of confinement also must run concurrently. The court also dispensed with the argument that the term "run" necessarily applied only to terms of confinement because terms of confinement involve the passage of time. According to the four-judge opinion, nothing in the legislative history of §3.03 indicated that the legislature ever took the position that §3.03 should *not* apply to fines. That 100 years of caselaw which require fines to "run" consecutively? Those cases were either decided before the legislature wrote §3.03 or they were based on cases that were decided before the legislature wrote §3.03.

Presiding Judge Keller concurred but did not explain why. Judges Holcomb, Johnson, and Cochran explained in a dissenting opinion that the previous version of 3.03 matched the current version in this area, and the court had interpreted the previous version as allowing trial courts to cumulate fines. Thus, by re-enacting the provision with the same language, the legislature implicitly approved of the judicial interpretation that allowed trial courts to cumulate fines. According to this dissent, the majority failed to apply common sense to the word "run" and relied upon the absence of a discussion in the legislative sessions to support its position.

Judge Cochran also wrote her own dissent, which can really be summarized in the first sentence: "Time runs; money is paid." She also expressed concern that this decision could apply to traffic tickets (remember *Crook* is a barratry case, not a traffic violation), but some have suggested that it may not apply to traffic tickets because each traffic offense generates a separate complaint. Regardless of whether it applies, this case could result in either higher fines or fewer consolidated cases.

The court has denied rehearing, so we'll see if the legislature wants to run with this interpretation, or if legislators want courts to run from it. *State v. Crook*, ____ S.W.3d _____; 2008 WL 313626 (Tex. Crim. App. February 6, 2008)(4:1:4).

2 No. Applying the concurrent-cause instruction to intoxication impermissibly authorized the jury to convict Otto if it believed she was intoxicated by a combination of alcohol and another substance. A jury charge improperly expands upon allegations in an indictment when it defines intoxication in terms of introduction of alcohol, drugs, or a combination of both despite language in the indictment that alleges intoxication as the introduction of alcohol alone. In contrast, if the charge says the combination of drugs and alcohol made the defendant more susceptible to alcohol, it does not improperly expand upon the allegations in the indictment.

The dissent argues that the inclusion of the "but for" language in the concurrent causation instruction meant the State still had to prove that the defendant would not have been intoxicated but for her ingestion of alcohol. The majority dismissed this argument by explaining that the instruction still included the language "operating alone or concurrently with another cause" which brought it in line with the "combination" instruction held impermissible under *Rodriguez*. The dissent also suggested that this holding essentially invalidates all concurrent causation instructions that have not been pled in the indictment even though the court had previously held that concurrent causation does not need to be alleged in the indictment. The majority had no answer for this. Perhaps at some point, the court will recognize that a way out of this "Dickensian hair-splitting" can be found in overruling the requirement that the State allege a specific type of intoxicant in the charging instrument. As it stands now, however, the State cannot apply concurrent causation to the type of intoxicant in a DWI case. *Otto v. State*, ____ S.W.3d ____; 2008 WL 313942 (Tex. Crim. App. February 6, 2008)(5:1:2).

3 Stay. The appointment of an attorney pro tem lasts until the purposes contemplated by that appointment are fulfilled, regardless of the duration of the district attorney's disqualification. The court had previously held that Article 2.07, which authorizes the appointment of an attorney pro tem, encompasses the performance of all "germane functions of the office contemplated by the appointment." Thus, the appointment lasts until the job is done, not until the disqualification is removed. Coleman argued that the plain language of Article 2.07 authorizes the appointment of counsel only "during" the district attorney's qualification. The court rejected this argument, noting the decision not to modify the appointment order was within the trial court's sound discretion, and Coleman did not demonstrate how his rights had been adversely effected by the continued appointment.

Presiding Judge Keller, along with Judges Keasler and Hervey, concurred in the decision but disagreed with the majority's conclusion that the trial court has discretion in this circumstance. Specifically, Keller questioned whether a trial court could continue the appointment of the attorneys even if doing so would run contrary to the wishes of the elected district attorney. But because the court did not need to resolve that issue to uphold the trial court's actions in this case, Judge Keller decided to concur and otherwise let the issue go. *Coleman v. State*, ____ S.W.3d _____; 2008 WL 313818 (Tex. Crim. App. February 6, 2008)(6:3:0).

4 Yes they can. Rule 79.2 of the Texas Rules of Appellate Procedure by its own terms and without temporal limitation authorizes the Court of Criminal Appeals to reconsider an order denying relief "on its own initiative." The court dispensed with the argument that this rule conflicted with the habeas corpus provisions found in Article 11.071 by stating that reconsideration on its own initiative does not establish a new or separate procedure for applications for writs of habeas corpus. Simply put, the court

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did not view this rule as a way of circumventing the restrictions on subsequent applications for writs of habeas corpus even though that's kind of what happened in this case. Moreover, the court explained that the denial of Moreno's federal habeas claim did not adversely impact the court's ability to reconsider its own opinion. Doctrines such as the abstention doctrine and the exhaustion doctrine, the court reasoned, were designed to advance interests of comity, efficiency, and expediency; they weren't intended to be jurisdictional. Allowing the court to reconsider an objectively unreasonable decision on its own doesn't interfere with those goals. Indeed, the court noted that the Supreme Court had begun to make clear that the court's application of *Penry I* was not only incorrect but also objectively unreasonable. *Abdul-Kabir* and *Brewer* squarely held that the court had misinterpreted *Penry I*. So, granting relief on reconsideration of the initial writ seems to make sense if you assume that the court believed Moreno would likely prevail on his subsequent federal writ based on *Abdul-Kabir* and *Brewer*.

Please note: The rather unconvincing nature of the mitigation evidence wasn't really the issue. The jury instructions were, because the Supreme Court had just struck down similar instructions for not giving full effect to that mitigation evidence. And because the instructions were bad, the court granted Moreno a new punishment hearing. The court also pinky-swore that it will be extremely hesitant to ever exercise this authority again, particularly in old cases. *Ex parte Moreno*, 245 S.W.3d 419 (Tex. Crim. App. February 6, 2008)(7:1:0).

5 Yes. Ramos unambiguously asserted his right to remain silent. The court twice noted that the question of whether Ramos was in custody at the time of the questioning was not before them. (Indeed, after the trial court found that Ramos was in custody, it would have been very difficult to challenge that issue on appeal.) The court of appeals had held that the invocation of the right to terminate the interview was ambiguous because, in context, the "it" that Ramos referred to could have meant both a specific discussion of Ramos's girlfriend and a general discussion of the interview itself. The Court of Criminal Appeals did not buy this claim because Ramos's first statement that he did not want to talk to the officer was an unambiguous, unequivocal, and unqualified assertion of his right to remain silent. According to the Court of Criminal Appeals, any ambiguity in the second statement was entirely irrelevant. Because the officers did not scrupulously honor the defendant's right to remain silent, Ramos's written statement was inadmissible at trial. *Ramos v. State*, 245 S.W.3d 410 (Tex. Crim. App. February 6, 2008)(8:1).

6 No—at least, not in this case. The trial court did not err in denying Flores's motion to quash the indictment because his "as applied" equal protection challenge had to rely on facts that were raised at trial and couldn't be decided prior to trial without those facts.

First, the court did away with the "due process" challenge that the statute violated *Roe v. Wade* by reaffirming the earlier case of *Lawrence v. State*, where the court upheld the capital murder statute and its criminalization of the murder of an unborn fetus against the mother's will. The court also did not consider Flores's attack on the statute as unconstitutionally overbroad because Flores did not raise the argument in his petition for discretionary review. The court rejected Flores's equal protection claim by noting that it was premised upon the theory that both Basoria and Flores consensually tried to terminate the pregnancy. According to the court, Flores overlooked significant evidence that Flores caused the death of the unborn twins without Basoria's consent. While Flores admitted to beating Basoria in the face without her consent, he asked the jury to believe that Basoria had agreed to the other injuries—unlikely, because the jury could rationally come to the simple conclusion that all of the bruises, and the death to the twin fetuses, occurred without Basoria's consent. Still, the court specifically indicated that it had no opinion as to the underlying merits of Flores's claim, and it held that the case could not be resolved on a pre-trial motion to quash because it needed the evidence adduced at trial to ultimately resolve the issue.

Judge Cochran in a concurring opinion expressed concern that the statute could make anyone who assists a woman or a physician in the lawful termination of a pregnancy subject to prosecution for capital murder. She noted that the ample evidence that Flores had acted without Basoria's consent kept the

case outside of this potentially unconstitutional interpretation. So, she, along with Judge Johnson, would have addressed the merits of Flores's "as applied" challenge to the statute (and apparently affirmed the statute's application in this case) rather than hold that Flores improperly raised the claim in a pre-trial motion to quash.

Bottom line, we have some indication from the court that this statute can be properly applied to a defendant who tries to abort a woman's pregnancy without her consent even though *she* cannot be prosecuted for it. But situations where both the man and the woman are complicit in trying to terminate the pregnancy may run afoul of the equal protection clause. *Flores v. State*, 245 S.W.3d 432 (Tex. Crim. App. February 13, 2008)(5:2:2:0).

7 No. The State's race-neutral reasons for exercising its peremptory challenges were not a pretext for racial exclusion. Even though some of the relevant *Miller-El* factors may have suggested that the State used peremptory challenges in a racially discriminatory manner, not all of them did. For example, while the race-neutral reason for striking one of the jurors was not well-supported in the record and thus suggested the possibility that the explanation could have been a pretext, the reason given for the other was well-supported. The State did appear to use a disproportionate number of strikes to exclude African-American veniremembers, but that alone didn't make the trial court's findings clearly erroneous. And the State did appear to direct questioning towards African-Americans disproportionately in one area of voir dire, but it did not do so in another area. Finally, the State kept a non-African-American on the jury panel even though that juror exhibited the same problems as the African-American jurors that the State chose to strike. However, the State did strike other non-African-American jurors for the same reason given for striking the two African-American veniremembers that Watkins singled out on appeal. The court chose not to consider the *Dallas Morning News* study because Watkins did not offer it at trial, and he did not demonstrate it was sufficiently "indisputable" for the appellate court to take judicial notice of it. Ultimately, the court did so because it viewed this entire issue as a fact issue that the trial court properly resolved. It remains to be seen whether the Supreme Court's recent decision of *Snyder v. Louisiana* (decided a month later) will call this case into question.

For now, however, the court held, in an exceedingly close case, that the prosecution's race-neutral reasons for its peremptory strikes were not pretextual and that the trial court properly denied Watkin's *Batson* claim. *Watkins v. State*, 245 S.W.3d 444 (Tex. Crim. App. February 13, 2008)(8:1:0).

8 If you threw up your hands and said, "God only knows," like Brian Wilson did, you'd be doing basically what the court did. The court held that a hearing on the motion for new trial was unnecessary because it failed to present any "reasonable grounds" that the Bible passage affected the jury. The court side-stepped whether the Bible passage amounted to an "outside influence" because all of the affidavits indicated that the scripture had no effect on the deliberations. The foreman read it early in the deliberations, and the passage exhorted only that the jury should follow the laws of man, which basically duplicated the court's charge. And none of the jurors said that they discussed whether Biblical principles (such as "eye for an eye") should be considered in assessing Lucero's punishment. Even juror No. 7 said in an affidavit to the State that Lucero's attorney had misunderstood him and that he did not mean to suggest in his affidavit that there was any connection between the scripture reading and any member's vote. Thus, the court left open the possibility that reading a different passage might lead to a different result. But in this case, the trial court did not abuse its discretion in denying a hearing on the motion for new trial because the record failed to present a reasonable grounds for relief. *Lucero v. State*, ____ S.W.3d ____; 2008 WL 375416 (Tex. Crim. App. February 13, 2008)(7:2:0).

9 Texas. Neither the I.C.J.'s decision nor the President's memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions. Writing for the majority, Chief Justice Roberts rejected Medellin's claim that the Supremacy clause of the United States Constitution made the Vienna Convention the law of the land and therefore binding on Texas. He acknowl-

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edged that the treaty created an international law obligation on the part of the U.S., but the treaty did not contain any stipulations that made it self-executing. Thus, the treaty required Congressional action to make it binding on the states.

Moreover, the majority noted that reading the treaty as self-executing and the I.C.J. opinion as "binding law" could lead to troublesome consequences, namely that the I.C.J. opinions would become unassailable and capable of overriding state and federal law even if the Supreme Court disagreed with the reasoning and the result of the I.C.J.'s opinion. (The Supreme Court already presented its disagreement with the reasoning and result in *Avena* in *Sanchez-Llamas*.)

The majority also disagreed with Medellin's argument that the President's Memorandum made *Avena* binding on state courts. After acknowledging the President's compelling interest in ensuring reciprocal observance of the Vienna Convention, the majority explained that he cannot exercise his executive authority unless he's been given that power by the Constitution or Congress. The majority explained that the Constitution gives the President authority to make a treaty, and if he wants it to be self-executing, he should make it self-executing. If he fails to do so, it's up to Congress to do so. Moreover, even if Congressional acquiescence to the President's actions could authorize him to make a non-self-executing treaty binding on the states, Congress certainly didn't acquiesce in this case.

Finally, the majority concluded that the President's memorandum did not constitute a valid exercise of his foreign affairs authority to settle claims disputes between foreign nations. The memorandum does not appear to stem from a longstanding practice of dealing with civil claims disputes, but rather it springs from conduct that even the United States Attorney General acknowledged was unprecedented.

Justice Stevens (yes, that Justice Stevens) concurred in the judgment and wrote an opinion that almost totally sided with the dissent's view that the treaty was, in fact, self-executing. However, Stevens saw some ambiguity in the terms of the treaty and the U.N. Charter creating the I.C.J. Given that ambiguity, Stevens felt the proper action was to defer to Congress, which was essentially what the majority did as well. Thus, Congress could ultimately, and properly, pass legislation to make the *Avena* decision binding on Texas. But as of right now, the Court of Criminal Appeals' decision that Medellin had procedurally defaulted on his claims stands athwart the treaty. *Medellin v. Texas*, _____ S.Ct._____, 2008 WL 762533 (March 25, 2008)(5:1:3).

10 Forget it. The Supreme Court denied mandamus relief and held that §87.001 only prohibits removal if the acts committed prior to election amounted to official misfeasance that could be subject to a removal suit, but not a cause for automatic disqualification. In reaching its decision, the court reconsidered its holding in *Talamantez*. The court explained that §87.001 is often referred to the "forgiveness doctrine" and is grounded in the idea that the public has the authority to forgive the elected official for prior bad conduct after a campaign in which all of the facts would have been revealed. *Talamantez*, however, was not grounded in the forgiveness doctrine but rather in a belief that §87.001 created a limitation on a court's authority to remove. This understanding failed to consider the nature of the prior acts or the nature of the removal proceedings.

Under subchapter B of Chapter 87, the Local Government Code lays out provisions for civil removal. Under subchapter C, the code links removal to criminal prosecution. Section 87.001 resides in subchapter A and appears to apply generally to both subchapters. However, the court noted that the legislature intended this section to apply only to civil removal proceedings, not removal proceedings tied to criminal prosecution. Originally, the language found in §87.001 appeared in the section dealing strictly with civil removal; it was moved to the general section in 1987. The legislature specifically indicated that this move was not intended as a substantive change. In contrast, the criminal removal provisions were kept separate because they got their power from Article XVI, §2 of the Texas Constitution. That constitutional provision deals specifically with removal from office for high crimes; it does not make allowance for high crimes that pre-date an officer's election.

Looking at all of these considerations, the court determined that §87.001 prevents civil removal only for pre-election conduct, not removal for

high crimes committed before an election. Justice Willett authored a concurring opinion where he expressly disagreed with the holding in *Talamantez* because it would seem to allow an elected official to commit a felony while in office, get re-elected, get convicted, and stay in office. *In re Bazan*, _____ S.W.3d _____; 2008 WL 820567 (Tex. March 28, 2008)(8:1). ✤

BACK TO BASICS

By Pamela Kemp Parker
Special Projects Attorney with the Office of General Counsel, Texas Department of Family and Protective Services, Austin

A few things you should know about CPS litigation

If you are new to CPS cases, the learning curve is steep. What follows is a roadmap for this important but often disorienting legal terrain.

A growing awareness of the unique legal, social, and psychological issues confronting abused and neglected children and their families in recent decades has produced an army of judges, lawyers, child advocates, and social workers better equipped than ever to handle the unique landscape of child protective services (CPS) litigation. For attorneys new to this area of practice, however, the field's increasing complexity makes getting up to speed a daunting task.


Pamela Parker

Any attorney who has been in the trenches knows why the learning curve is so steep: a maze of constantly changing federal and state laws, an alphabet soup of acronyms, a variable cast of parties in every lawsuit, and myriad special laws governing everything from paternity, to Native American children, to interstate and international placements. It isn't possible to produce an exhaustive compilation of what an attorney representing the Department of Family and Protective Services (DFPS) needs to know in a brief article, but what follows is intended as a roadmap for this important but often disorienting legal terrain, with citations and resources for further research. Although this is only a fraction of what a successful practitioner needs to know, I hope that a close look at the infrastructure underlying this field of practice will make it easier to build the necessary expertise.

The big picture

In 1997 Congress enacted a fundamental truism of child welfare litigation into

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law: Child safety is paramount in every decision at every juncture.[1] Although it almost seems unnecessary to say out loud, the reality of child welfare litigation—the frenetic pace, heavy caseloads, high stakes and limited resources—makes the mantra of child safety a useful touchstone for practitioners.

Another pillar of child welfare policy is the concept that every child needs the most permanent living arrangement possible, as quickly as possible. Ideally, permanency means services that prevent a child from being removed from her home or allow a child to be returned home as quickly as possible. When a child cannot be returned home, however, her need for permanency requires timely decisions to afford her a safe and stable placement. After too many years of children languishing in foster care, both the Texas Legislature and U.S. Congress enacted statutory mandates that compel timely progress and review of cases and, most importantly, impose strict time limits for reaching a final determination in a child welfare case.[2]

Another significant concept, reflected in both policy and law, is a renewed emphasis on the role of the extended family and friends in resolving abuse and neglect issues.[3] This philosophy takes many forms, but the Family Group Conferencing model is a prime example.[4] In this model the first effort to aid a family in crisis is to provide a forum for the family to craft its own solution. A facilitator convenes relatives, friends and other members of the community important to the family, but the focus is on encouraging the family to draw on its own strengths and create a uniquely appropriate plan to address child safety.

With the increased focus on families, greater emphasis is also placed on an aggressive search to find any and all possible relatives or family friends who are potential caretakers when it's determined that a child can no longer be safe in her home. To this end, DFPS provides a parent with a Child Placement Resources Form at the time of removal and must evaluate each person on the form and complete a home study of the most appropriate substitute caregiver before the adversary hearing.[5]

A hearing for every occasion

The rhythm and progress of a child protection lawsuit is dictated by federal and state laws that require a series of hearings that begin when a child is removed from a family's home. The following are broad descriptions of the purpose and timing of these standard hearings. For details about the statutory requirements, issues and procedural prerequisites, consult the resources cited below. In addition, the Office of General Counsel for DFPS anticipates releasing the *Practice Guide for DFPS Attorneys* in the fall of 2008. Attorneys who represent the agency also currently have access to HOTDOCS, a software program with standard pleadings for DFPS litigation.[6]

Emergency removal. If a child has been removed with no prior court order, the agency must appear in court no later than the next business day (usually this is an *ex parte* hearing/order) and provide sufficient evidence of "a continuing danger to the physical health or safety of the child if returned to the home or evidence that the child has been sexually abused and is at substantial risk of future sexual abuse."[7]

Alternatively, DFPS may seek an *ex parte* order prior to a removal and in that instance must provide sufficient evidence of "either an immediate danger to the physical health or safety of the child, or that the child has been a victim of neglect or sexual abuse."[8]

In addition, in either of these circumstances the agency must also provide sufficient evidence:

- that there is not sufficient time, consistent with the child's physical health or safety, to hold an adversary hearing;
- that it would be contrary to the child's welfare to remain in the home; and
- that reasonable efforts were made to prevent or eliminate the need for removal.[9]

Non-emergency hearing. If there is no urgent need for removal but the child's safety is at risk if left in the parent's care, DFPS can seek a court order authorizing removal following a noticed hearing. This type of order requires sufficient evidence to prove:

- that it would be contrary to the child's welfare to remain in the home; and
- that reasonable efforts were made to prevent or eliminate the need for removal.[10]

In every removal, the original petition in the Suit Affecting the Parent Child Relationship (SAPCR) is verified by the caseworker's supporting affidavit, which must detail specific facts about

household conditions, medical findings, allegations of sexual abuse or physical abuse, or other circumstances that make removal of a child necessary, as well as the efforts made to obviate the need for a removal.

Adversary hearing. Within 14 days after DFPS takes a child into custody in an ex parte proceeding, the court must revisit the issue of removal and either enter temporary orders or return the child to the family.[11] At this hearing, if the court appoints DFPS as the child's temporary managing conservator, the court must enter temporary orders and find:

- danger to the child's physical health or safety and that it is contrary to the child's welfare to remain in the home;
- the urgent need for protection required immediate removal; and
- that despite reasonable efforts to prevent or eliminate the need for removal and to return the child home, there is a substantial risk of continuing danger to the child in the home.[12]

At this juncture the agency attorney also typically seeks any necessary orders for visitation, child support, paternity testing, psychological testing, drug assessment or testing, physical examinations, discovery, or other orders needed to protect the child, facilitate the child's return, or find optimum placement for a child.

Status hearing. No later than 60 days after a temporary order is entered, a status hearing must be held.[13] Its focus is:

- the contents of the service plan;
- designation of the person authorized to give medical consent for the child;
- the status of diligent search efforts for any missing parents; and
- a warning to parents that unless the parent can offer the child a safe environment, termination of parental rights is an option.[14]

Permanency hearings. The first permanency hearing must be held no later than 180 days after DFPS is named as temporary conservator.[15] Notice is required and all parties must be given a copy of the permanency plan at least 10 days prior to the hearing.[16] At the hearing, the court must:

- thoroughly assess all facets of the case;
- return the child to the home if it is safe to do so;
- enter necessary orders to ensure progress toward permanency; and
- set a dismissal date.[17]

A subsequent permanency hearing must be held within 120 days of the last permanency hearing.[18]

Final hearing. The driving force that dictates timely resolution of a child welfare case is the requirement that no later than one year after DFPS is named conservator (or at most an additional 180 days later if the court finds that extraordinary circumstances necessitate an extension), the court must either enter a final order or dismiss the lawsuit.[19] DFPS may seek termination of parental rights and appointment of DFPS or another caretaker as permanent managing conservator. Although it is sometimes necessary, naming DFPS or another caretaker as a child's managing conservator without termination of the child's parental rights is only appropriate if no other, more permanent option is available. Without question, this stage of the litigation requires the most careful preparation, adherence to procedural requirements, and close coordination between DFPS staff and attorneys representing the agency. Evidence of DFPS' efforts to locate a missing parent, a parent's compliance with the service plan, and the child's adoptability may all be crucial at this juncture. If termination of parental rights is requested, there must be clear and convincing evidence of at least one statutory ground for termination of parental rights and that termination is in the child's best interests.[20]

Placement reviews

If the final order names DFPS as managing conservator, the court must review the child's placement at least every six months until the child ages out of foster care.[21] DFPS must submit a placement review report addressing all aspects of the child's status at least 10 days in advance, and the court must make findings as to the appropriateness of the placement, the efforts made to meet the child's needs, and any additional services the child needs.[22]

Who qualifies as a parent?

In child protection litigation, sometimes half the battle is figuring out who is a party to the action. If a child is born to a married woman, her husband is the presumed father and must be named in a suit seeking to restrict or terminate parental rights.[23] Similarly, if a man has lived continuously with a child during her first two years of life and has held himself out to be the child's father, he may also qualify as a presumed father.[24]

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A presumption of paternity can be rebutted only by an adjudication of paternity or a valid denial of paternity filed by a presumed father with a valid acknowledgement by another person.[25]

If the mother is not married when a child is born (and wasn't married within 301 days before birth) and no man has been adjudicated to be the father, the legal ramifications of alleged father status become important. Texas maintains a paternity registry, which allows an alleged father to protect his rights by registering; if he fails to do so, he allows a child to be legally freed for adoption without service of process.[26] The process of checking the registry and terminating parental rights of a man who fails to register is not difficult, but getting accurate information as to potential fathers, obtaining paternity testing where possible, and handling new information that may not surface until the eve of a final hearing can be tricky. The best strategy is to make every effort to resolve the paternity question as early in the litigation as possible to streamline the litigation and make the best use of limited resources.[27]

Search and serve

When parental rights are at stake, due process requires that a parent be served with the lawsuit or, at a minimum, the agency must exercise due diligence in an effort to locate a missing parent before a court can authorize substitute service, usually by publication. Generally, DFPS pleads for termination of parental rights *in the alternative* in the initial petition. This strategy avoids the necessity of serving parties again when and if the decision is made to pursue termination of parental rights. If a default judgment is taken, compliance with the Service-members Civil Relief Act requires proof that a parent is not an active member of the military.[28]

Acronyms and lingo

Being familiar with the language always makes navigating new terrain much easier. A few key terms include:

Adam Walsh: The federal Adam Walsh Child Protection and Safety Act of 2006, which requires (among other things) that child welfare agencies conduct fingerprint-based FBI checks on all prospective foster and adoptive homes and, for federally funded placements, imposes either a permanent or a five-year bar on placements if a caretaker has a conviction for specified crimes.[29]

ASFA: The federal Adoption & Safe Families Act of 1997 which amended Title IV-E of the Social Security Act.[30]

Baby Moses: The tag given to cases involving infants left at a designated facility, which are not treated as abandonment, to promote safe delivery of infants who might otherwise be left in trash bins or similar perilous circumstances. Special procedures regarding confidentiality, notice, and termination of parental rights apply in these cases.[31]

CAC: Child Advocacy Center, a multidisciplinary center designed to minimize the trauma on a child by limiting the number of interviews and to promote collaboration between medical, law enforcement, social work, legal, and other child welfare professionals.[32]

CAPTA: The federal Child Abuse Protection and Treatment Act, most recently reauthorized and amended by the Keeping Children and Families Safe Act of 2003.[33]

CASA: Court Appointed Special Advocates, volunteer guardians ad litem appointed to advocate for a child in court.[34]

CCEJ: Court of Continuing and Exclusive Jurisdiction. After the adversary hearing, if another court is the CCEJ as result of a custody case or another CPS suit, the court must transfer the suit to the CCEJ or, if mandatory transfer grounds exist, order the transfer of the suit *from* the CCEJ, or order the transfer of the case to the court having venue of the suit.[35]

FBSS: Family Based Safety Services. These are protective services provided to a family before a child is removed from the home. These services are designed to avoid a removal and reduce the likelihood that a child will be abused or neglected.[36]

IV-D: Title IV-D of the Social Security Act creates the state's child support enforcement program. Texas receives a substantial federal subsidy for this program. The Child Support Division of the Office of Attorney General (also known as the IV-D state agency) is responsible for the establishment and enforcement of child support.

IV-E: Title IV-E of the Social Security Act, the source of federal foster care and adoption assistance funding and the accompanying restrictions and requirements.[37]

Family Reunification Services: These are protective services provided after removal to support a family and the

child during the child's transition from living in substitute care to living back in the home.[38]

Kinship Care: Caretaking by relatives or "fictive kin," friends of the family that function like relatives.

Order to Participate in Services: A court order to compel a parent or caretaker to participate in services designed to avoid the need to remove a child.[39]

SWI: Statewide Intake, a centralized DFPS office located in Austin where members of the public or professionals can report child abuse via the telephone or the Internet.

Special circumstances

In some cases, laws applicable to special situations and populations require particularized knowledge to competently resolve a CPS case. If you find yourself in a case with one of these issues, you must get help before you proceed. For example, if a case involves:

- a child with Native American heritage: Any removal or termination of parental rights of an "Indian child" is subject to the Indian Child Welfare Act.[40]
- a foreign-born child: If a foreign-born child is in DFPS custody, DFPS must give notice to the foreign consul.[41]
- an undocumented child: If an undocumented child cannot reunify with her family, the child will probably be eligible for Special Immigrant Juvenile Status, which is an avenue for obtaining Permanent Resident status.[42]
- a child to be placed outside Texas: If a child will be placed outside of Texas, the Interstate Compact on the Placement of Children may require advance approval from the state where the child will be placed.[43]
- a child from another state: If Texas does not have "home state" jurisdictionxliv or there is a prior custody determination in another state, consult the Uniform Child Custody Jurisdiction and Enforcement Act to assess to what extent a Texas court can assert jurisdiction beyond temporary emergency jurisdiction.[45]

Where to get help

Fortunately, there are excellent resources, mentors, checklists and guides available to help the busy practitioner wade through the daunting blend of legal, medical, mental health, financial and educational issues that modern child welfare litigation presents. Using these tools, we can best follow the advice of an early child advocate, Sitting Bull, who urged, "Let us put our minds together and see what kind of life we can build for our children."[46]

Texas Department of Family and Protective Services for CPS policy, rules, resources and updates about new initiatives; www.DFPS.state.tx.us.

Administration for Children and Families for Children's Bureau, with federal law and child welfare policy handbook; www.acf.hhs.gov/programs/cb/.

Texas Lawyers Care for child welfare-related articles, practice guides, expert witness information, and legal research; www.texaslawyerscare.org.

American Bar Association Center on Children and the Law for articles, news, legislative updates and links to many other resources; www.aba.childlaw.org.

National Council of Juvenile & Family Court Judges for technical assistance, training, and research; www.ncjfcj.org.

National Association of Counsel for Children for training, publications, and advocacy; www.nacchildlaw.org. ✤

Editor's note: For more information, the author can be contacted at 512/929-6635 or pamela.parker@dfps.state.tx.us.

Endnotes

1 Adoption and Safe Families Act of 1997, P.L.105-89, §102.

2 42 U.S.C. §675 (5)(E) (state must file termination of parental rights for child in foster care for last 15 out of 22 months, or in case of aggravated circumstances, unless exception applies); Tex. Fam. Code §263.401 (dismissal of DFPS suit after one year unless extraordinary circumstances warrant extension of no more than 180 days).

3 42 U.S.C. §671(a)(19) (mandatory preference for adult relative that meets child protection standards over non-related caretaker); Tex. Fam. Code §262.114 (DFPS must evaluate relatives or other potential caregivers identified by parents and perform home study of most appropriate caregiver); Tex. Fam. Code §264.751 (relative and other designated caregiver support program).

4 Tex. Fam. Code §264.2015 (family group conferencing as strategy to promote family preservation and permanency).

5 DFPS Designated Caregiver Form 2625.

6 Contact Chrissy Sanders, Legal Assistant, Office of General Counsel, at 512/438-5606 or chrissy.sanders@dfps.state.tx.us, to request HOTDOCS.

7 Tex. Fam. Code §262.107; §262.104 (a)(5) and (b) (in

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addition to general danger to physical health or safety, removal authorized based on specific harm caused by a parent or caretaker's use of controlled substances or by allowing a child to remain on the premises where methamphetamines are manufactured).

8 Tex. Fam. Code §262.102.

9 Tex. Fam. Code §262.102 (a)(2)-(3); §262.107(a)(2)-(3); DFPS can claim federal funding for children who qualify for Title IV-E, but only if a court finds at the time of the removal that it was contrary to child's welfare to remain in the home and that reasonable efforts were made to prevent or eliminate the need for removal. 42 U.S.C. §671(a)(15)(B); §672(a)(2)(A)(ii).

10 Tex. Fam. Code §262.113.

11 Tex. Fam. Code §262.201(a).

12 Tex. Fam. Code §262.201(b).

13 Tex. Fam. Code §263.201.

14 Tex. Fam. Code §§263.006; 263.202; 266.007.

15 Tex. Fam. Code §263.304.

16 Tex. Fam. Code §263.301.

17 Tex. Fam. Code §263.306.

18 Tex. Fam. Code §263.305.

19 Tex. Fam. Code §263.401 (dismissal after one year; 180 day extension possible).

20 Tex. Fam. Code §161.001(2); *Holley v. Adams*, 544 S.W. 2d 367 (Tex. 1976) (list of best interest factors).

21 Tex. Fam. Code §263.501.

22 Tex. Fam. Code §263.502-.503.

23 Tex. Fam. Code §160.204(a) (possible permutations that warrant presumed father status include child born during marriage, or within 301 days of a terminated marriage, child born during attempted marriage, or marriage after child's birth with voluntary assertion of paternity if father takes specific actions)

24 Tex. Fam. Code §160.204(a)(5).

25 Tex. Fam. Code §160.204(b).

26 Tex. Fam. Code §160.402 (paternity registry); §160.404 (termination without notice to alleged father unless established parent-child relationship or man has filed paternity suit).

27 A variety of mechanisms exist for establishing paternity, Tex. Fam. Code Ch. 160, Subch. C. (establishing parent-child relationship); Subch. D. (acknowledgement of paternity) and Subch. G (adjudication of parentage).

28 Servicemembers Civil Relief Act, 50 U.S.C. App. §511 et seq.

29 P.L. 109-248; See also 42 U.S.C. §671(a)(20)(A).

30 P.L. 105-89.

31 Tex. Fam. Code Ch. 262, Subch. D; §263.1015 (no service plan required) and Tex. Fam. Code §161.001(1)(S) (termination ground for abandoned infants).

32 Tex. Fam. Code Chapter 264, Subchapter E.

33 P.L. 108-36.

34 Tex. Fam. Code Ch. 264, Subch. G.

35 Tex. Fam. Code §262.202-.203.

36 40 Tex. Admin. Code §700.702.

37 42 U.S.C. §670 et seq.

38 40 Tex. Admin. Code §700.703.

39 Tex. Fam. Code §264.203.

40 25 U.S.C. §1901 et seq.

41 Vienna Convention on Consular Relations, 21 U.S.T. 77, Article 37.

42 8 U.S.C. §1101(a)(27)(J).

43 Tex. Fam. Code Ch. 162, Subch.B.

44 Tex. Fam. Code §§152.102(7); 152.201(a)(1) ("home state" is state where child lived with a parent or person acting as a parent for at least six months prior to the filing of the SAPCR).

45 Tex. Fam. Code Ch. 152.

46 Sitting Bull, Hunkpapa Sioux, See The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children, B.J. Jones (American Bar Association, Family Law Section, 1995), p.1.

CRIMINAL LAW

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Mental health treatment and treatment providers

The second of two articles meant for prosecutors on mental health issues

In the last issue of this journal, a primer on basic terms and diagnoses regarding mental health issues was published. In this follow-up piece, we'll learn about treatment providers and options. By understanding the basics, prosecutors will be in a better position to communicate with mental health professionals when evaluating cases and making recommendations for community supervision.


Jennifer Varela

Treatment providers

Many types of mental health issues are successfully treated with a variety of providers. For instance, a woman who has been a victim of domestic violence and now suffers from depression and post-traumatic stress disorder may receive medication from a psychiatrist, counseling from a licensed clinical social worker, and support from a group lead by a person with a bachelor's degree in psychology. A man with an alcohol addiction who suffers from depression and anxiety and has relationship issues with his partner may receive medication from a psychiatrist, seek counseling with a licensed marriage and family therapist, and attend Alcoholics Anonymous meetings.

One cannot practice medicine or law without an education and a license, but one *can* practice some types of mental health treatment without one. Without training or a license, a person can charge money for words of wisdom and even call himself a psychotherapist or a life coach. Unlicensed individuals provide many good mental health services. They often have bachelor's degrees, experience, and training. However, these people cannot call themselves a counselor, psychologist, or a social worker because those are licensed professions.

Just because someone has a license doesn't mean he is qualified to treat every type of mental health problem, that he's a suitable fit for every client, or that he's any good at his job. Having a license protects the profession because people without proper credentials can't practice in licensed professions. A license also protects the public: It means that the professional has met the requirements (i.e., education, internship, supervision, and passing a test) for his profession and can be held accountable if he does something wrong. Insurance companies are more likely to pay for services provided by a licensed professional.

See the chart on page 48 for a list of treatment providers and what they are qualified to do.

Education and support

Education. Educational programs are designed to give information about a specific subject, are generally not regulated, and do not require special credentials for the instructor. The class may be held once or over several sessions. For instance, a person who commits his first DWI may be sent to a class to learn about substance abuse behaviors and symptoms; a person who commits criminal mischief might be sent to an anger management class. Educational programs are *not* treatment. For example a parenting class may teach participants strategies for dealing with children, child development issues, and coping skills. In treatment (i.e., professional counseling), parents meet with a therapist who uses

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Mental health provider*	Educational requirements?	Can she provide counseling?	Can she diagnose substance abuse?	Can she diagnose mental illness?	Can she evaluate and testify to competency and sanity?[1]	Can she prescribe medication?
Advocate, caseworker, life coach, psychotherapist, group leader**	Varies	Yes, but it is unregulated	No	No	No	No
Minister or chaplain**	Varies	Yes	No	No	No	No
Licensed Chemical Dependency Counselor (LCDC)[2]	Associate's degree plus supervision	Yes, but it is limited to issues related to substance abuse	Yes	No	No	No
Licensed Bachelor's Level Social Worker (LBSW)[3]	Bachelor's degree in social work	Yes, but cannot practice independently without special license	No	No	No	No
Licensed Master's Level Social Worker (LMSW)[3]	Master's degree in social work	Yes, but cannot practice independently without special license	No	No	No	No
Licensed Clinical Social Worker (LCSW),[3] Licensed Professional Counselor (LPC),[4] Licensed Marriage & Family Therapist (LMFT)[5]	Master's degree plus supervision	Yes; can practice independently	Yes	Yes	No	No
Psychologist[6]	Doctoral degree plus supervision	Yes	Yes	Yes	Yes; must be qualified	Not in Texas, but can in other states w/ add'l training
Licensed Psychological Associates (LPAs)[6]	Bachelor's degree	Yes, but must work under supervision of licensed psychologist	Yes, under supervision	Yes, under supervision	No	No
Registered Nurse (RN)[7]	Bachelor's degree	Yes, but it is limited to scope of the license	No	No	No	No
Advanced Practice Nurse (APN)[7]	Master's degree	Yes	Yes	Yes	No	Yes
Physician Assistant[8]	Completion of program approved by ARC-PA[9]	Yes	Yes	Yes	No	Yes
Physician[10] (including psychiatrist[11])	MD and advanced training	Yes	Yes	Yes	Yes (qualified psychiatrist only)	Yes

* All mental health providers listed can offer education. **Does not require license.

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clinical techniques to change the parents' thoughts, beliefs, and actions towards their children.

Peer support group. A peer support group is comprised of individuals with a similar issue who meet to provide each other with support and advice. An example is Alcoholics or Narcotics Anonymous or a domestic violence survivors group. An advantage of peer support is that it is usually free, but while it *enhances* treatment, it is *not* treatment.

Life skills training. Young adults, juveniles or people with cognitive issues (such as low IQ or neurological damage) can benefit from life skills training. A caseworker might teach people basic life skills, such as home management, grocery shopping, basic self-care, or basic financial skills.

Treatment

Substance abuse treatment.[12] Substance abuse intervention ranges from a DWI class to inpatient treatment, and many options in between. Some addictions, such as prescription drug abuse, might require medical management. Treatment programs should have an aftercare component, which is follow-up support for people who have completed the program. If someone is required to attend Alcoholics Anonymous, she could be required to secure a sponsor with several years of sobriety.

Counseling and therapy. Counseling or therapy should be provided by an appropriately licensed mental health professional—generally, a licensed clinical social worker (LCSW), psychologist, licensed professional counselor (LPC), or licensed marriage and family therapist (LMFT). This professional meets with clients over a period of time to resolve emotional or behavioral issues.

Someone may call herself a "psychotherapist," but there is no license associated with this term. Licensed chemical dependency counselors (LCDCs) may provide counseling relating only to substance abuse issues. Most psychiatrists don't provide therapy. They usually meet with the client long enough to prescribe and monitor medication.

Specialized programs. Community supervision departments have special caseloads and programs, some of which are regulated for purposes of community supervision. Examples are substance abuse programs, domestic violence programs (also called BIPPs [Batterer's Intervention and Prevention Program, discussed below]), and sex offender treatment.

Batterer's Invention and Prevention Program (BIPP). BIPP is intervention and education for domestic violence perpetrators. It is different from anger management in that it explores and challenges the basis of battering, which is one person exercising power and control over his partner. It is a standardized program agreed upon by domestic violence service providers, the Texas Department of Criminal Justice (TDCJ), and the Texas Council on Family Violence (TCFV). Specific guidelines can be found at the TCFV website (www.tcfv.org). The goal is to achieve victims' safety, offenders' accountability, and opportunities for batterers to change their beliefs and behaviors relating to their partners.

Effective September 1, 2009, as a condition of community supervision, judges can only send batterers to TDCJ-accredited BIPPs. More information can be found in the Texas Code of Criminal Procedure, Chapter 42. Currently, the accreditation process is underway. There is no requirement that the treatment provider have any type of professional mental health license (unlike sex offender treatment providers), only that they complete the required training.

Sex offender treatment.[13] The Texas Administrative Code specifically defines who can provide sex offender treatment and treatment guidelines (Title 22, Part 36, Chapter 810); treatment providers are limited to those licensed in Texas to practice as a physician, psychiatrist, licensed professional counselor, licensed marriage and family therapist, licensed clinical social worker, or advanced nurse practitioner [with additional requirements]. Licensed Sex Offender Treatment Providers (LSOTP) must also undergo hours of clinical supervision and training.

In-custody programs. Various programs are available for in-custody treatment. Here in Harris County, we have in-custody programs for substance abuse treatment and mental health. We might consider an in-custody program for a repeat offender who has a particularly difficult addiction problem. Some people with chronic mental health problems receive the most consistent mental health treatment when they are in jail.

Hospitalization. Hospitalization or partial hospitalization programs provide intensive treatment for people with

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active suicidal thoughts or plans or severe psychosis or those who need intensive medication management. Partial hospitalization is an alternative where the client may spend several hours or all day at a treatment center but go home at night. Such treatment might be used, for example, when someone has been recently suicidal but is now stable. The person might choose partial hospitalization for five days, then step down to twice-weekly counseling sessions, and ultimately end with weekly sessions until treatment is completed.

Involuntary commitment. A person can be involuntarily committed if he exhibits signs of a mental illness and poses a serious, imminent danger to himself or others. It isn't enough to merely be "out of one's mind" or actively psychotic (hearing voices, being paranoid, etc). A police officer is authorized to take someone into custody and to a mental health facility (or to a jail if one is not suitable) only if he believes that person is mentally ill and a serious danger.[14]

An adult (who doesn't have to be relative) can swear out a mental health warrant through the local probate court. When a person is picked up on a mental health warrant, he is held up to 72 hours. If there is cause to hold him longer, there is another legal procedure to follow. The longer a person is held involuntarily, the more stringent the law is for keeping him.[15]

There is a tension between individual rights, proper treatment, and cost. Under the old system, a person could be sent to a sanitarium and left for years, but on the other end of the spectrum, mentally ill people are released after a very short time, usually only having been stabilized on medication; after that, it is difficult to justify reasons to keep people hospitalized involuntarily. Once they are released, there is no way to ensure that they keep taking their medication, and long-term treatment can be very expensive. Middle ground surely exists, but our criminal justice system hasn't found it yet. Prosecutors might be tempted to dismiss charges against someone with a chronic mental illness; however, with our current system, there is no guarantee that that person will receive consistent and appropriate treatment. In some cases, the best way to ensure treatment is through the criminal justice system.[16]

Psychotropic medication

Many mental illnesses, such as schizophrenia or bi-polar disorder, require medication to control symptoms. It is often when people "go off their meds" that we see them in the criminal justice system, sometimes after committing "nuisance crimes" such as criminal trespass. If a person is placed on community supervision, he can be ordered to take medication as recommended by a physician.

Following is a description of common types of medication and their uses.[17] It is a short list as it is beyond the scope of this article to describe psychotropic medication in detail.[18] It should be noted that just because a person is taking a certain medication, it does not mean she has a certain diagnosis. For instance, sometimes anti-psychotic or anti-depressant medication is given to people with ADHD to control aggressive or impulsive behavior.

Anti-depressants and SSRIs (selective serotonin reuptake inhibitors). These medications relieve symptoms of depression and anxiety. Common brand names are Prozac, Wellbutrin, Zoloft, Paxil, Celexa, and Effexor. Strattera is an anti-depressant prescribed for ADHD.

Hypnotics and anti-anxiety medications. Some of the most common anti-anxiety medications are benzodiazepines, which include Valium, Klonopin, and Xanax. Some non-benzodiazepine hypnotics induce sleep; Ambien and Benadryl are two common ones. Note that these medications have high potential for abuse.

Anti-psychotics. The primary function of these medications is to eliminate or reduce psychotic symptoms (i.e., delusions and hallucinations). A second-line application is the reduction of aggression. Examples are Seroquel, Risperdal, Zyprexa, and Abilify.

Mood stabilizers and anti-manics. Medications such as lithium, Tegretol, or Depakote stabilize mood and control mania associated with bi-polar disorder.

Psycho-stimulants. These are medications given for ADHD. It is believed they work on dopamine to increase attention. Examples are methylphenidate (Ritalin or Concerta) or amphetamines (Adderall or Dexedrine).

Helpful programs

Community supervision departments establish relationships with treatment

providers. However, some prosecutors may want (or have) to take a more active role in finding programs. Following are some thoughts to consider in ascertaining the effectiveness and quality of treatment:

- A good place to start is with the local United Way or MHMR (Mental Health and Mental Retardation Authority). Other good places are a local Mental Health Association (www .nmha.org) or through the National Alliance for Mental Illness (www .nami.org).
- Establish relationships with local mental health providers through local professional associations, such as the National Association of Social Workers (www.naswtx.org).
- Find out if there are licensed mental health experts at your local Community Supervision Department. They can assist in determining appropriate conditions of community supervision.
- Larger offices can hire a licensed mental health professional on your staff. Not only will she will be able to help evaluate programs, she can also assist prosecutors with reading and interpreting mental health reports and evaluating other types of mental health issues.
- For smaller offices, contract with a mental health professional when necessary and develop relationships with mental health professionals at public agencies who can answer general questions.
- Ask the provider what types of programs (education, assessment, therapy) they have.
- Who is providing the services? Do they have a license? What type? Are they operating within the scope of their license?
- How long have they been in business?
- Do they keep stats on how many of their clients complete their programs?
- Do they keep stats on how they measure the efficacy of their programs?
- Does research support the effectiveness of their program?
- Do they have a written curriculum? If so, ask to see it, and ask questions about it.
- Do the number of treatment programs suit the number of staff members? ✤

Endnotes

1 Tex. Code Crim. Proc., Chapter 46.

2 Texas Administrative Code. Title 25, Part 1, Chapter 450.

3 Texas Department of State Health Services. Texas Occupations Code Ch. 505.

4 Licensed Professional Counselor Act, Texas Administrative Code, Title 22, Part 30, Ch. 681, subchapter B; Occupations Code, Ch. 503.

5 Texas Administrative Code, Title 22, Part 35, Ch. 801, subchapter F.

6 Texas Occupations Code, Subtitle I, Ch. 501.

7 Texas Administrative Code, Title 22, Part 11, Ch. 217.

8 Texas Occupations Code Ch. 204.

9 Accreditation Review Commission on Education for the Physician Assistant.

10 Texas Occupations Code, Subtitle B, Ch. 151, Subchapter A.

11 Psychiatrists are physicians who specialize in psychiatric disorders. While neurologists specialize in brain disorders, they generally refer to psychiatrists for psychiatric illnesses, such as bipolar disorder. Many general practice physicians or pediatricians also prescribe psychotropic medication.

12 Texas Administrative Code, Title 25, Health Services, Chapter 453, Offender Education Programs; Texas Code of Criminal Procedure. Chapter 42.12.

13 Texas Administrative Code. Title 22. Part 36. Chapter 810. Subchapter A.

14 See Texas Mental Health Code, §573.001.

15 See Texas Health and Safety Code Ch. 574.

16 For a real-life account, I recommend *Crazy: A Father's Search Through Mental Health Madness* by Pete Earley. It is a heart-breaking but informative book about a young man who is ultimately diagnosed with bi-polar disorder, his involvement with the criminal justice and mental health systems, and his family's struggle to help him.

17 Information from National Institute of Mental Health.

18 For a downloadable cheat sheet on psychotropic medication, go to www .psychceu.com/Preston/quick-reference.doc.html.

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