THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 40, Number 3 • May–June 2010

"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

A Champion for Justice

On April 22, the Texas District and County Attorneys Foundation honored Carol Vance, former Harris County District Attorney, at a festive reception in Houston for his longtime public service. Almost 200 friends and family attended. Here are some photos from the evening.

See more photos and a list of donors on pages 16 and 17.
Even more photos are on our website, www.tdcaf.org.

Check out the 2009 Annual Report available online

We are honored to show you our very first Texas District and County Attorneys Foundation Annual Report. It summarizes what we've accomplished in the last year, lists all donors, and explains plans for the next year and beyond. Please review it at www.tdcaf.org.

2010 Annual Campaign needs your support!

We hope by now you have received the 2010 Annual Campaign letter, brochure, and your invitation to be a part of the Texas District and County Attorneys Foundation. The foundation is committed to continuing and improving the excellence TDCAA provides in educating and training Texas prosecutors, law enforcement, and key personnel.

By Jennifer Vitera
TDCAF Development Director in Austin

This year, we have two fundraising goals for our membership groups, one for elected prosecutors and one for investigators, key personnel, and victim assistants.

Elected Prosecutor campaign challenge. This year we are asking all elected prosecutors to raise $500 for the annual campaign. If all 332 prosecutors donate at this level, the foundation will receive $166,000 in unrestricted funds.

Campaign challenge for investigators, key personnel, and VACs. Three membership groups (investigators, key personnel, and victim assistance coordinators) have challenged each other in their fundraising. We will track the results based on dollars raised compared to percentage of membership in each of these groups and feature a regular update on who's leading the way on our website and in *The Texas Prosecutor.*

Looking back at the year

With your help and the generosity of our fellow Texans, the foundation has accomplished the following in 2009:

- hired a senior appellate attorney, John Stride, and victim services director, Suzanne McDaniel, whose salaries are funded by the foundation;
- defrayed expenses for Train the Trainer seminars and the Advanced Trial and Appellate Advocacy Courses, which frees up grant funds to increase reimbursement to prosecutors and staff for hotel expenses;
- published and distributed the *Offense Report Manual* to all prosecutor offices; and
- honored former Harris County District Attorney Carol Vance at the third Champions for Justice event.

Funding from members, foundations, corporations, and the community at large greatly increases the quality of service we can offer you, our members. I am asking you to please consider supporting the foundation by making a contribution of any size; you may send your gift using the return envelope in the Annual Campaign letter you will soon receive, or go directly to www.tdcaf.org. We appreciate your support and consideration!

In other news

Two major events are coming up. One is **Guarding Texas Roadways: 2010 DWI Summit** on November 12 (presented by TDCAA, the Texas Department of Transportation, the Anheuser-Busch Companies, Inc., and TDCAF). The other is the second **Annual Foundation Golf Tournament**, which will take place Wednesday, September 22 (the week of the Annual Criminal and Civil Law Update) on South Padre Island.

For both the DWI Summit and the golf tournament, we ask for help identifying corporations and individuals who might be interested in supporting these events. Please e-mail me at vitera@tdcaa.com if there is someone in your area to whom we can send more information. Sponsorship levels are: Platinum: $10,000; Gold: $5,000; Sterling: $2,500; and Bronze: $1,000. Money raised from sponsorships and attendees will benefit TDCAF, a 501(c)(3) non-profit.❇

See page 9 for a list of recent gifts.

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TDCAA seminar reimbursements to increase, thanks to the foundation!

By Rob Kepple
TDCAA Executive Director in Austin

Much of the grant support that TDCAA receives from the Court of Criminal Appeals goes directly to reimburse you, the staff of prosecutor offices, for some of the costs to attend the training that you need. With over 5,000 members to serve, we can't pay the full expense, but we do our best to stretch the funds that we have. Currently, you are reimbursed up to $85 a room night for the Annual and Elected Conferences and up to $40 a night for all others. We figure that $40 could cover most of the hotel expense if you room with another attendee.

Since October, when Texas effectively adopted the federally-set government rates for hotel rooms, hotels are now upping their room prices way beyond the old $85 Texas "state rate." It is very rare these days to see a hotel room rate under $100. To top it off, our service group continues to grow by about 100 people a year, and our grant funding has not increased in 10 years.

Enter the Texas District and County Attorneys Foundation. Three years ago TDCAA's leadership demonstrated the vision to find additional resources to serve you. As a result of the work of the foundation and your generous contributions, we can defray these increased training costs. Effective with the 2010 Civil Law Seminar, we will reimburse attendees up to $60 a night for hotel room expenses. We are still capped at $85 a night for the Annual and the Elected Conferences, but the $60 maximum should be enough to cover your full hotel expense for most conferences if you share the room with someone.

Once again, thanks to all who have supported the foundation. It is another way we can be sure that TDCAA brings you the best training and support possible.

Fighting for the State's right to a jury trial

As you know, the State of Texas has a right to a jury trial in both felony and misdemeanor cases, and a waiver of that right is required from the prosecutor before a court may accept a plea of guilty from a defendant. [*State ex rel. Turner v. McDonald*, 676 S.W.2d 371 (Tex. Crim. App. 1984); *State ex rel. Curry v. Carr*, 847 S.W.2d 561 (Tex. Crim. App. 1993); Art. 1.13, Texas Code of Criminal Procedure.] I cited these cases because this right is something prosecutors have had to fight for from time to time.

And why is that important for the quality of justice in Texas? Just ask anyone who practiced in misdemeanor courts in the 1980s, before the State had the right to a jury. Common scenario: You'd show up Monday morning ready to try any number of DWIs, only to see a visiting judge on the bench, often pulled from the ranks of defense attorneys in your jurisdiction. Suddenly, every defense attorney set for trial would change his election to a bench trial. It was a frustrating situation changed by the Legislature in 1991, and now we are comfortable with the notion that citizens and crime victims in Texas also have the right for a jury to decide a criminal case.

Every now and then, we must still fight for this right. **Judge John Roach**, Criminal District Attorney in Collin County, and his assistant prosecutor **John Rolater**, most recently stood up for this valuable right. A defendant charged with a number of offenses, including assault on a police officer, was set for a jury trial before a visiting judge. The defense made a run at waiving a jury, but the State refused and held fast while the judge proceeded in the plea without the State's participation.

The Fifth Court of Appeals made short work of the visiting judge's unlawful plea by conditionally granting the State's mandamus. *In re John Roach*, Slip Op. No. 05-09-01451-CV, 2010 Tex. App. LEXIS 1082 (Tex. App.—Dallas, Feb. 17, 2010) (orig. proceeding). The court found that a defendant clearly has the right to a jury trial but reaffirmed that there is no such thing as a constitutional right to *waive* a jury trial.

We all know that most of our cases are disposed of by plea. But

there are cases that deserve, and indeed call for, the participation of the public. So thanks to Judge Roach and John Rolater for protecting this valuable right of the citizens of Texas. It will come in handy in the future, I'm sure.

Welcome to our newest TDCAA Meeting Planner

At the next TDCAA seminar, please welcome our newest TDCAA Meeting Planner, **Michael Lindsay Bomar**. Michael, a native of Wichita Falls, is fresh from the University of Texas and is beginning her career as a meeting and events planner. She will be learning the ropes from Training Director **Erik Nielsen**, lead Meeting Planner **Manda Helmick**, and Registrar **Dayatra Rogers**, so the training team is at full strength and firing on all cylinders!


Michael Bomar

The TDCAA family grows

We are very excited to welcome **Caroline Foster Myers**, born to **Ashlee Myers**, former TDCAA meeting planner, on March 15. We are very happy for Ashlee and her husband Darren, who are just now getting acquainted with that sleep-deprivation thing.

Thanks to Carlos Valdez

I want to take a moment to thank **Carlos Valdez**, who retired as the Nueces County District Attorney in March after 18 years of service. Carlos enjoyed a fine reputation during his tenure, and I am sure he will enjoy much success as the newly appointed city attorney for Corpus Christi. Thanks, Carlos, for your service to TDCAA and the citizens of Texas.

And some new faces

Welcome our newest district attorney, **Anna Jimenez**, a Nueces County Assistant DA who was appointed by the governor to fill Carlos Valdez's shoes. Also, welcome to **Rob Henneke**, who has been appointed to serve as the new Kerr County Attorney. Finally, the Southern District of Texas has a new acting United States Attorney, **Angel Moreno**, a Laredo-based Assistant United States Attorney, who takes the place of **Tim Johnson**.

Hand puppets in court

Anyone who's been to one of our Prosecutor Trial Skills Courses might have heard a story from **Jack Choate**, the first assistant in Walker County who is often a faculty advisor at the seminar. Years ago, he was trying a case where two co-defendants blamed each other for the crime. At closing, Jack stooped in front of the jury box, only his hands poking above the bar, and proceeded to mimic—via hand puppets—the defendants arguing with each other. (His boss, Criminal District Attorney **David Weeks**, was watching from the gallery and says he couldn't believe his eyes.) But David was a believer once the jury delivered a guilty verdict in almost record time, and Jack has told the tale about the time he used hand puppets in court to bewildered and amused throngs ever since.

Well, we couldn't help but wonder if there might be a new puppet in town once word got out that a judge in the Valley—one running for DA, no less—was "talking" to defendants and staff via a sock puppet on his hand. I emailed Jack to find out his thoughts on sock puppets, whether they might have any benefits over hand puppets, and if socks were indeed the future of courtroom drama. His reply, staunchly pro-hand puppet, was priceless enough that I reprint most of it verbatim:

"I'm told that sock puppets could be construed by jurors of certain faiths to be very offensive," Jack wrote. "There is nothing like a freshly adorned sock puppet to have a jury loudly cry foul. The 'masking effect' from a sock puppet will almost surely cause a prosecutor to seem less sincere and therefore have less credibility.

"The hand puppet is a much more effective advocacy tool. With a little work, the hand puppet is able to capture and express so many emotions to the jury. A slight turn of the wrist lets the jury believe they are basking in the wisdom of a toothless, old man. A quick clinched fist causes the skin between the thumb and index finger to pucker up, sending a compelling message to the jury about opposing counsel.

"The hand puppet also lends itself to being more than just two hand puppets. When reinforcements are necessary, 10 finger puppets stand ready to count the number of ways the defendant is guilty. In a solemn moment, the finger puppets may choose to bow down so that the silent but deafening voice of the middle finger screams out for justice.

"I would strongly encourage

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TDCAA as an organization to take a stand against sock puppets at its next board meeting. I would be glad to write a resolution banning the use of sock puppets by all prosecutors in Texas, with the sole exception of **Mike Fouts** [the DA in Haskell County] who will be [required to cover] his one hand with the dirty mouth (another whole story of a hand-puppet gone wrong)."

Apparently Jack has a sense about these things because the sock-puppet judge lost to the incumbent DA in the primary! ❇

THE PRESIDENT'S COLUMN

'I Just Can't Say Goodbye': Options when evicting an elected official is really awkward

Get out. I'm tellin' you now.
Do you catch my drift?
What could be plainer than this?
Nothin' more to be said.
Write me a letter instead.
I don't mean to be cruel,
But I'm finished with you.
—Tubes, *Talk to Ya Later* (1981)

Some people just can't take a hint that they've worn out their welcome. If it's a visiting family member, you fold up the sleeper sofa and put away the linens while they're making a long distance call on your phone. You padlock the pantry and the refrigerator. You fill their car up with gas and start it for them. If it's an elected official gone rogue, you have deputies or Texas Rangers hover around their office with listening devices and cameras, but they still won't leave. Does this sound familiar? Whether it's families or counties, at least one dysfunction is common to the group dynamic: the black sheep who cannot or will not recognize it's time to hit the road.

By C. Scott Brumley
County Attorney
in Potter County

With that in mind, what happens when your county's own little Teapot Dome Scandal unfolds? Whether it involves large-scale kickbacks or bribes (as in some of the more spectacular cases), the recurrent scenario of road and bridge resources being used for private benefit, or some other mischief, the first misconception to dispel is that it's unique to any particular locale. Unfortunately, the concept of official wrongdoing is familiar enough to find itself addressed in the Texas Constitution. In particular, it provides:

> County judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefore being set forth in writing and the finding of its truth by a jury.[1]

So, habitually drunken elected officials should beware. Beyond that, the picture painted in the Constitution is abstract. It is true that article 15, §7 of the Constitution requires the legislature to "provide by law for the trial and removal from office of all officers of this State …." While this provision by its own terms applies to state officials, its scope has been judicially interpreted to include county and municipal officers too.[2] And it isn't just misconduct while in office that concerned the Constitution's framers. Run-ins with the law before taking office also

bear upon the ability to occupy elected office. Specifically, the Constitution prompts the legislature to address the issue by stating:

> Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes.[3]

What "high crimes" are within this provision has not been addressed by our two high courts in any unified sense. On the one hand, the Court of Criminal Appeals has opined that "high crimes" are limited to criminal conduct which demonstrates the same type of moral corruption and dishonesty inherent in the offenses that are explicitly named in its language.[4] On the other, the Supreme Court has indicated that any felony conviction triggers the constitutional bar to officeholding.[5] At a minimum, then, the caricature of the duplicitous politician with a hand in the cookie jar to the tune of $1,500 or more suggests a removable "high crime."[6]

Conviction of a "high crime," whatever that may ultimately mean, isn't the only way to wind up in the ejection seat. There's also civil removal for official misconduct, incompetency, intoxication from drinking an alcoholic beverage,[7] or failure to satisfy an official bond requirement.[8] All told, the missteps that can get folks kicked out of office are many. In fact, I've written some fairly hefty papers on the subject that I'll be glad to send to you if you're nervous about the addictive potential of prescription sleep aids. Meanwhile, it's no safe assumption that your office will never be cast into the fray. Stuff happens, and your office may land in the quagmire because only county and district attorneys are authorized under Texas law to litigate a removal action.[9] Moreover, your office is joined by the Attorney General as the lone litigators of quo warranto actions to oust unqualified or usurping occupants of public office.[10]

Disqualification or recusal

Given that status, sooner or later you're likely to hear scandalous tales about other county officers. This is acutely possible because your office generally will qualify as an "appropriate law enforcement authority" under the Whistleblower Act.[11] At the same time, the discomfort you're likely to feel when treated to these reports will be more than just the product of a "lowest and best bid" county HVAC system cobbled together in MacGyver fashion. As you chew on an antacid and ponder the relative merits of personal injury law or landscaping work, several issues are likely to present themselves to you. Of course, the primary consideration is whether the facts make out a substantial case for some sort of ouster suit. Even if they do, there is no escaping the intensely political and polemic pressures that will be brought to bear. They may or may not be alliterative, but they will give you serious and creative thought as to whether your office and, more importantly, you can foist the case on someone else. Let's consider that, shall we?

Neither the removal provisions nor the quo warranto statutes provide much guidance in resolving disqualification or recusal issues.[12] Nonetheless, it was long ago observed that, in the context of official duties, the State—like nature—"abhors a vacuum."[13] Where the "vacuum" develops in a quo warranto case, the void may be filled by the attorney general's office.[14] Further, it may be argued, based on older Supreme Court authority, that the district attorney may step in for the county attorney, and vice versa, where one faces a potential conflict.[15] Failing that option, it is worthy of note that a prosecutor is responsible for removal suits because of his status as an attorney for the State.[16] Indeed, the State may not be represented "in district or inferior courts by any person other than the county or district attorney, unless such officer joins them."[17] For that reason, it is instructional, at least initially, to consider basic principles applicable when a criminal prosecutor is confronted with disqualification or recusal issues.

When a prosecutor is disqualified because of absence, recusal, or other inability to perform the duties of office in a case, a court may appoint "any competent attorney" (called an "attorney pro tem") to perform them.[18] An attorney pro tem "is not subject to the direction of the district [or county] attorney as is a subordinate, but, for that case, he *is* the district [or county] attorney."[19] An attorney pro tem is required to take the constitutional oath of office and may perform the office's germane functions for purposes contemplated by the appointment.[20] The Waco Court of Appeals recently assumed, *arguendo*, that the Code of Criminal Procedure's attorney pro tem provisions might not apply to a civil removal suit but found that the trial court could appoint an attorney pro tem under its inherent authority to

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fill a prosecutorial void.[21] This authority may be a helpful patch if your office is currently prosecuting the elected official or faced with a similarly vexing situation that seems to favor recusal.[22]

Sticking it out

That an escape hatch exists doesn't answer whether you should use it. At the risk of oversimplification, discomfort does not equal disqualification. You will still need to articulate a reason for recusal or disqualification. The judge will probably want to know, and the news media will definitely ask about it. In any event, and I speak from experience, the temptation to abandon ship when removal or quo warranto becomes a possibility can be strong. Whatever the case may be, there are several folks within the association, including me, who can provide you with procedural help and guidelines on removal and quo warranto suits in general and recusal and disqualification in those suits in particular. But you still will have to determine whether the facts present a valid reason to pawn the case off on someone else. When you consider these prospects, remember two things. First, when evidence of official misbehavior becomes known, someone has to address it. Second, if you figure out a way to ensure that the "someone" isn't you, bear in mind that what comes around goes around. Handing off an ouster case to a neighbor invariably creates the risk that your neighbor will call in the favor somewhere down the road.

Conversely, it may be that your office doesn't have a real reason to bow out but needs help from an experienced hand in litigating the matter. Where that situation arises, consider bringing in a special prosecutor. As you probably know, a "special prosecutor" is an attorney, not a part of the prosecutor's staff, who is enlisted to assist the prosecutor in a particular case.[23] She is permitted by the elected district or county attorney to participate in a particular case to the extent allowed by the prosecuting attorney, without being required to take the constitutional oath of office.[24] The district or county attorney need not be absent, disqualified, recused, or otherwise unable to perform, and approval by the trial court of the special prosecutor is not required.[25] Use of an adjunct assistant in the nature of a "special prosecutor" now appears to be sanctioned in removal suits.[26]

With all of that said, I hope you never have use for any of these principles. Ideally, when the folks in your county join hands to sing, let it be "Kumbaya," not "Thank God and Greyhound You're Gone." If official misconduct *does* rear its ugly head in your jurisdiction, however, remember that someone has to show the unwelcome one to the door. If you are convinced that you're not the one to do it, remember also the aphorism generally attributed to P.T. Barnum: "There's a sucker born every minute." Just recall, as well, that they generally don't work in prosecution. ❇

Endnotes

1 Tex. Const. art. V, § 24.

2 See *Meyer v. Tunks*, 360 S.W.2d 518, 520 (Tex. 1962) (provision applies to county officers, specifically including sheriffs); *State ex rel. White v. Bradley*, 956 S.W.2d 725, 736 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 990 S.W.2d 245 (Tex. 1999) (provision applies to officers of general-law municipality).

3 Tex. Const. art. XVI, §2.

4 *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (holding that felony driving while intoxicated conviction was not "high crime" so as to disqualify juror).

5 *In re Bazan*, 251 S.W.3d 39, 41-42 (Tex. 2008) (art. XVI, §2 forbids eligibility for public office of those convicted of "other high crimes," which are those offenses of same degree or grade as enumerated offenses, namely felonies) (citing Op. Tex. Att'y Gen. No. H-20 (1973)); *cf. id.* at 45 n. 1 (Willett, J., concurring) (opining that Supreme Court should distinguishing Court of Criminal Appeals' *Perez* interpretation or adopt it outright).

6 See Tex. Pen. Code Ann. §39.02(a)(2), (b)(4)-(7) (Vernon Supp. 2009); see also *Talamantez v. State*, 829 S.W.2d 174, 180-82 (Tex. Crim. App. 1992) (concluding that predecessor to current Abuse of Official Capacity statute constituted official misconduct supporting removal).

7 There is a defense to removal based on intoxication if a licensed Texas physician prescribed the alcoholic beverage. See Tex. Loc. Gov't Code Ann. §87.013(b) (Vernon 2008). Who would've thought one might need a doctor's note to go honky tonkin'?

8 See Tex. Loc. Gov't Code Ann. §§87.013(a), 87.014(1), (2) (Vernon 2008).

9 See *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191, 194-95, 197 (1956) (explaining that constitutional conferral of power upon state officials is generally exclusive, and such powers cannot be enlarged or restricted; thus, Tex. Const. art. V, §21 restricts representation of state in removal suit to county or district attorney and excludes attorney general).

10 See Tex. Civ. Prac. & Rem. Code Ann. §66.002(a), (c) (Vernon 2008) (granting attorney general, as well as district and county attorneys, authority to petition court for quo warranto relief); accord Op. Tex. Att'y Gen. No. JC-0514 (2002), at 4-5 (noting authority of attorney general, county or district attorney to initiate quo warranto proceedings).

11 See Tex. Gov't Code Ann. §554.002(b)(2) (Vernon 2004) (authority is "appropriate law enforcement authority" if reporting employee in good faith believes authority is authorized to investigate or prosecute violation of criminal law); see also *Town of Flower Mound v. Teague*, 111 S.W.3d 742, 755 n. 9 (Tex. App.—Fort Worth 2003, pet. denied) ("… district attorneys are appropriate law enforcement authorities because they are authorized to investigate or prosecute violations of criminal law.") (internal citations omitted).

12 Chapter 87 does provide that, where the defendant is the county attorney, the district attorney will represent the State. Tex. Loc. Gov't Code Ann. §87.018(e) (Vernon 2008). Further, where the attorney who ordinarily would represent the State in a removal suit is also a subject of a pending removal suit, the county attorney from an adjoining county, as selected by the commissioners court of the county in which the removal suit is pending, will represent the State. *Id*. at (f). Beyond that, however, conflict of interest and designation of appropriate substitute counsel are not addressed.

13 *McGhee v. Dickey*, 4 Tex. Civ. App. 104, 23 S.W. 404, 404 (1893).

14 See Op. Tex. Att'y Gen. No. JC-0514 (2002), at 3 ("The attorney general or the district attorney may petition the district court for leave to file an information in the nature of quo warranto proceeding if the county attorney is precluded from doing so because of a conflict of interest.").

15 See *Garcia*, 285 S.W.2d 191. The district court is empowered to resolve any conflict between the district attorney and the county attorney, should such differences develop over a removal suit. Id. at 197.

16 See n. 10, *supra*.

17 *State Bd. of Dental Exam'rs v. Bickham*, 203 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1947, no writ).

18 *Mai v. State*, 189 S.W.2d 316, 319 (Tex. App.—Fort Worth 2006, pet. ref'd); cf. Tex. Code Crim. Proc. Ann. art. 2.07(a) (Vernon 2005).

19 *State v. Ford,* 158 S.W.3d 574, 577 (Tex. App.—San Antonio 2005, pet. dism'd) (quoting *State v. Rosenbaum*, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993)) (emphasis by the court).

20 *Id.*

21 See *In re Murray*, 268 S.W.3d 279, 286-87 (Tex. App.—Waco 2008, orig. proceeding [mand. denied]).

22 In *Murray*, the district attorney's office had successfully sought recusal based on its pending prosecution of a drug charge against the defendant. 268 S.W.3d at 281. Thus, the Criminal Justice Division of the Attorney General's Office was appointed in its stead. *Id.*

23 *Mai*, 189 S.W.3d at 319.

24 *Ford*, 158 S.W.3d at 577.

25 *Mai*, 189 S.W.3d at 319.

26 See *Teal v. State*, 230 S.W.3d 427, 432 (Tex. App.—San Antonio 2007, pet. denied) (approving outside counsel's assistance to county attorney where record indicated county attorney appeared at trial and outside counsel did not usurp county attorney's duties).

TDCAF News

Recent gifts to TDCAF (Feb. 1 to March 15, 2010)

Larry W. Allison*
Richard H. Anderson, *In Honor of Carol Vance*
Joan J. Berry, *In Honor of Carol Vance*
Gus Blackshear, *In Honor of Carol Vance*
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T.D. Howe III, *In Honor of Carol Vance*
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Brent Johnson, *In Honor of Carol Vance*
Jane L. Joplin, *In Honor of Carol Vance*
Jay Karahan, *In Honor of Carol Vance*
Judge Oliver S. Kitzman, *In Honor of Carol Vance*
Judge Janice M. Krocker, *In Honor of Carol Vance*
Don Lambright, *In Honor of Carol Vance*
Judge William C. McCulloch, *In Honor of Carol Vance*
Suzanne McDaniel, *In Honor of Carol Vance*
John Patrick McKenna, *In Honor of Carol Vance*
Mike McSpadden, *In Honor of Carol Vance*
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Sam Robertson, *In Honor of Carol Vance*
Charles A. Rosenthal Jr., *In Honor of Carol Vance*
Thomas L. Royce Jr., *In Honor of Carol Vance*
James Brett Smith
Peggy S. Supak, *In Honor of Carol Vance*
Johnny Keane Sutton, *In Honor of Carol Vance*
Charles B. Thomsen, *In Honor of Carol Vance*
Martha Warren Warner, *In Honor of Carol Vance*
Milton H. West III, *In Honor of Carol Vance*
Sue Whitfield, *In Honor of Carol Vance*
Brian W. Wice, *In Honor of Carol Vance*

* denotes restricted gift

A jolt into the electronic age

By John Stride
TDCAA Senior
Appellate Attorney

We are rapidly becoming a paperless age—especially in the world of banking—and the legal system is adapting too, albeit in a dysfunctional sort of way. Courts across the nation are transitioning from paper documents and paper filings to electronic transmissions and electronic filing of documents. The size and diversity of Texas' complicated court system—very likely, as the Office of Court Administration's materials demonstrate, the most complicated in the world—is leading to the adoption of these new practices in a piecemeal, even haphazard, fashion. Possibly, though, the most unified approach in the state is occurring at the appellate level. This article will examine the appellate courts' adoption of procedures for the electronic transfer and electronic filing of documents as they affect practitioners of Texas criminal law.

Distinguish electronic transfers from electronic filings

In starting out, it is important to distinguish between an appellate court's requirements that copies of documents be *transferred* electronically and its requirements that documents be *filed* electronically. While a document may be transmitted electronically—for example, by e-mail or CD-Rom—only in rare cases will an electronic transfer constitute a filing of the document. Usually, paper documents must still be physically tendered, in person or by regular mail, to the court to satisfy the requirement of filing them. Some courts, however, do permit filing documents by fax, but this method, of course, is not submitting a document to the court in electronic format—the document arrives on paper. To date, no Texas appellate court accepts an e-mail attachment or submission of a CD-Rom alone as a substitute for paper filings. Any e-mail and CD-Rom submissions are in addition to the required paper filings. (See the chart on the opposite page for a quick reference.)

Electronic transfers

Electronic transfers of documents can be optional, in the courts' terms recognized as a "courtesy," or mandatory. Most courts have adopted a progressive approach, allowing parties to familiarize themselves with electronic transfers on a voluntary basis as they continue to tender paper documents. After a period to acclimatize everyone, the courts then require electronic copies of documents in addition to paper copies. Electronic copies may be required in the form of an e-mail attachment or in the form of CD-Rom. So far, no court officially recognizes flash drives or other vehicles as a legitimate means to transmit documents. Also, no court has adopted fax as a mandatory method of electronic communication and, with the advances in e-mail, it seems unlikely that any would do so. For purposes of convenience, expense, and precaution, I would suggest using the e-mail method of transfer—unless that method is not accepted. It is very easy to attach a document to an e-mail, no CD-Roms need be purchased, and the document is sent to the court by an alternative means than the copies transmitted by the regular mail or by hand. No court has taken the giant leap of relying on electronic copies alone.

Electronic filing

Electronic filing can also be optional or mandatory. At the time of writing this, the only court requiring electronic filing is the Fifth Circuit. As with electronic transfers, the court began by offering parties electronic filing as a choice. Starting March of this year, however, electronic filing is mandatory. Like electronic transfers, no court has transitioned to accepting electronic filing, other than faxes, in lieu of filing paper copies. But surely that is the way things are going.

Rules for electronic transfers and filings

The Texas Rules of Appellate Procedure are currently devoid of provisions governing electronic transfers or electronic filing—although they do address electronic records. So long as the rules do not address these matters, the individual courts are left to establish their own procedures

Appellate court	Is transmitting e-docs required?	Is transmitting e-docs accepted?	In what format(s)?
Supreme Court of the United States	yes	yes	searchable PDFs with the latest version of Adobe Acrobat; specific labeling req'd
Fifth Circuit	yes	yes	pre-registration, completed learning modules, and certification of accomplishment req'd for e-filing; PDFs only; docs must be <10MB each and <50MB total
Court of Criminal Appeals	no	only in DP cases and "other extraordinary matters"	e-mail attachments <5MB with notification and confirmation via telephone
Texas Supreme Court	yes	yes	e-mail attachments >10MB must be divided into smaller files; PDFs pref'd, and specific labeling and certificate of compliance req'd
1st court of appeals	no	no	N/A
2nd court of appeals	no	yes	e-mail or CD; files >20MB must be divided into smaller files; PDFs pref'd; Word, Word Perfect, and faxes <10 pages accepted
3rd court of appeals	no	yes	CD or DVD (no e-mail); basic labeling of disks and searchable PDFs req'd
4th court of appeals	no	yes	e-mail or CD; labeling and compliance cert req'd; searchable PDFs pref'd, but Word, Word Perfect, and faxes <10 pages accepted
5th court of appeals	yes	yes	e-mail, CD, or fax; PDF pref'd but Word, Word Perfect, and faxes accepted; certificate of compliance is req'd
6th court of appeals	no	no	N/A
7th court of appeals	no	no	N/A
8th court of appeals	no	yes	fax only
9th court of appeals	no	no	N/A
10th court of appeals	no	yes	e-mail or CD,; searchable PDF pref'd; labeling req'd; faxes accepted for some docs
11th court of appeals	no	no	N/A
12th court of appeals	no	no	N/A
13th court of appeals	no	no	N/A
14th court of appeals	no	yes	standard floppy (3½-inch) disk or CD; Word, Word Perfect, Rich Text Format, PDF (Adobe Acrobat 5.0 or higher), or ASCII formats accepted; no e-mailed docs accepted

under their local rules and guidelines. The Fifth Circuit and the Texas Supreme Court are the only courts with extensive procedures for electronic transfers and filings. The remaining courts are still in the evolutionary phase of determining how best to implement their needs into requirements, but some courts have gone into greater detail than others. To the extent the courts have rules or guidelines, they are posted in their local rules and/or on their official websites. Readers should always check the current requirements and, if in doubt about them, call the clerk of the pertinent court.

Some courts have limited the size of e-mail attachments for security reasons to 5MB. According to the Texas Supreme Court website, this is 60–70 pages of a PDF file. If using a scanner, the court recommends setting it at 200 dpi or the next lowest resolution to prevent oversized files. Using PDF files is the better practice because the documents cannot be altered, unlike Word Perfect and Word files.

The most common requirement is inevitable given all the malicious interference on the internet—files in electronic format should be free of viruses and other files that could be disruptive to the courts' networks. In addition, parties should be careful to ensure only the materials permitted in the e-mail or on the disk are included—and nothing extra.

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The courts' positions

Court of Criminal Appeals

The Court of Criminal Appeals does not yet address the electronic transfer or filing of documents except in the very limited realm of death penalty litigation or "other extraordinary matters" where emergency e-mail filings are permitted. The term "other extraordinary matters" is not defined, but reference to the court's usage of that term elsewhere provides guidance. Although the e-mail procedure benefits the defense in capital cases and, presumably, in any criminal case for writs of habeas corpus, both the defense and the State can invoke it in any criminal case when seeking the other familiar writs of mandamus and prohibition. Anyway, the court must be notified in advance by telephone during business hours and paper copies must also be submitted by 9:30 a.m. the next business day. Pleadings cannot exceed 5MB and the sender must obtain telephone confirmation of the e-mailed pleading's receipt. Pleadings must also be in standard paper format and e-mailed to other parties.

Texas Supreme Court

Effective February 15, 2010, the Texas Supreme Court requires that electronic copies of all petitions, responses, replies, briefs on the merits, amicus briefs, post-submission briefs, motions for rehearing, and emergency motions be mailed or e-mailed the same day as the paper copies. The rule applies to pleadings in cases on direct review as well as those in original proceedings. Previously, the court had merely requested electronic copies of briefs on the merits, amicus briefs, and post-submission briefs. Emailing the documents does not constitute filing them. Electronic copies must be in PDF with the latest version of Adobe Acrobat. The briefs are posted on the court's website—although redaction or removal can be requested. Any file larger than 10MB (under the prior voluntary scheme, the file size was limited to 5MB) must be divided into smaller files. Specific labeling and a certificate of compliance and required. Oddly, the rules do not expressly require service of the electronic copies on other parties.

Second Court of Appeals

In the Second Court of Appeals, "as a courtesy to the court," parties may submit electronic briefs by e-mail or on CD-Rom. When submitted these "ebriefs" are not considered a filing. Paper copies of briefs must be filed prior to the ebrief's submission. Any ebrief larger than 20MB must divided into different files and the files e-mailed separately. PDF files are preferred, although updated Word Perfect and Word are accepted. Specific labeling and certificates of compliance are expected.

The court also accepts fax filings for any document under 10 pages. If received after business hours, the documents will be filed next business day. Other parties must be similarly expeditiously served, and the sender must retain the original document faxed with the original signature affixed.

Third Court of Appeals

The Third Court of Appeals is "now accepting electronic courtesy copies of filings in addition to the paper copies." Filing by e-mail is not accepted and, apparently, the use of e-mail is not permitted for transmitting documents. Electronic files should be on a CD or DVD. Basic labeling of the disks is required. Files must in searchable PDF format in letter-page setup. Hyperlinks to appendices are permitted.

Fourth Court of Appeals

In the Fourth Court of Appeals, "[p]arties may now submit as a courtesy to the court an electronic brief." The court prefers to receive electronic copies. A party may submit an ebrief by e-mail or by CD, but the submission of an ebrief is not considered a filing. Labeling and a certificate of compliance are required. A searchable PDF file is preferred, otherwise the latest version of Word Perfect and Word will be accepted.

Filing by fax is permitted for documents of ten pages or less both during and after business hours. If filing by fax, the court "encourages" service on the other parties by the same method.

Fifth Court of Appeals

Effective October 1, 2009, the Fifth Court of Appeals has instructed that "electronic copies of briefs are required." Electronic copies of briefs can be transmitted by e-mail or CD, but e-mail is not an effective method of filing a brief.

Filing documents by fax permitted. The original paper copy of the faxed document must be received by the court within seven days of the fax. PDFs are preferred, but Word and Word Perfect documents are accepted, and a certificate of compliance is required.

Tenth Court of Appeals
The Tenth Court of Appeals "requests that written briefs on the merits filed before submission also be submitted electronically on a CD-Rom or as an email attachment." Searchable PDF is preferred and labeling required. The court directs practitioners to the Texas Supreme Court's website for additional details on electronic briefing. Electronic filings of briefs are not considered.

Filing by fax is available for motions to extend time to file a notice of appeal; motions to extend time to file a brief; notices changing the designation of lead counsel; motions to extend time to file a motion for rehearing; and, upon the clerk's prior approval, any other document. The original paper copy of the fax must be forwarded to the court on the same day as the fax. If the original is not received within five days of the fax, the document will be stricken. The date the fax is successfully transmitted during business hours is the day the document is filed or, if transmitted after business hours, the next day the court is open to the public for timeliness purposes.

Fourteenth Court of Appeals
The Fourteenth Court of Appeals home webpage bluntly states: "No briefs, motions, or other documents will be accepted for filing by email." But behind that dire warning, the court's local rules are less hostile. While original paper copies of documents must be filed with the court, in lieu of the multiple copy requirements, a party may file with the original document just one copy of the document on a standard floppy (3½-inch, 1.44MB) or compact disk (700MB). (Is someone really still using floppy disks?) This rule does not apply to petitions for discretionary review. Text files must be searchable and can be in Word, Word Perfect, Rich Text Format, Adobe Acrobat 5.0 or higher PDF, or ASCII.

First, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Thirteenth Court of Appeals
So far, with the single exception of the Eighth Court of Appeals which permits the transmission and filing of documents by fax, these eight intermediate courts do not address electronic document transfers or electronic filing. In the Eighth Court of Appeals, if a document is faxed, the party must retain the original paper copy with the original signature affixed.

Court of Appeals for the Fifth Circuit
Effective March 15, 2010, the Fifth Circuit requires mandatory electronic filing. Since December 10, 2009, the court has offered "electronic filing to attorneys on a voluntary basis." Pre-registration for electronic filing is required—allow at least four days to complete this preliminary step. Also learning modules must be completed and certification of accomplishment provided. Registration is performed through the PACER Service Center. An untimely registration is not an acceptable reason for an extension of time.

The court already requires electronic copies of documents in addition to paper copies. All documents submitted must be in PDF, and documents are limited to 10MB per file for uploading and 50MB total. Some hyperlinks are permitted. Documents filed electronically must be retained for three years after the mandate issues or the case is closed by order. The Fifth Circuit has the most developed and detailed set of rules of any of the courts. If in doubt, check out the website.

Supreme Court of the United States
The Supreme Court of the United States (the court does not want to be addressed as the United States Supreme Court) requires that electronic versions of briefs be filed with the court and opposing counsel in addition to, and at the same time as, the booklet-format briefs. The electronic briefs must be in text-searchable PDF with the latest version of adobe Acrobat. They should be specifically labeled and are to be e-mailed to the court. The court emphasizes that "e-mailing a brief does not obviate the requirement that a hard copy be timely filed."

Conclusion and a suggestion

The courts have already required e-transmission of some of you, provided a choice to others, and still others do not yet acknowledge it procedurally. In time, though, everyone will be subject to the requirements to transmit and file documents electronically. It is happening in the appellate courts, some prosecutor's offices have already committed to becoming paper-free, and trial courts are accepting e-mail communications. It is likely only a short time before all courts will require the filing of all legal documents in elec-

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tronic format, even if they do not totally dispense with paper.

Although those who practice before several appellate courts might desire that a single set of rules for electronic transmission and filing govern in all courts, perhaps the two high courts are awaiting to learn what they can from the procedures of the intermediate courts before establishing a unified set of hard-and-fast rules for incorporation in the rules of appellate procedure. Nevertheless, when cases wind their way up through the courts, unification of the rules would benefit the bench as much as the bar, especially when cases are transferred between the intermediate courts. And before the appellate courts' procedures become any more diverse, the time is ripe for consolidating the procedures into a single, streamlined set of rules applicable in all appellate courts. Given their pioneering efforts and comprehensive approach, maybe the Fifth Circuit's rules can serve as a loose model from which we can build our specific state appellate rules governing the electronic transmission and filing of legal documents. We need to construct some and switch to them soon. ❇

Endnotes

1 The variety of trial courts in Texas is probably without compare anywhere else in the world. The OCA lists the panoply of trial courts' subject-matter jurisdiction at www.courts.state.tx.us/pubs/AR2008/jud_branch/2a-subject-matter-jurisdiction-of-courts.pdf.

2 Tex. R. App. Proc. 38.5.

3 See Court of Criminal Appeals Emergency E-mail Filing Seeking Relief in Death Penalty Execution Cases or Other Extraordinary Emergency Matters, available at cca.courts.state.tx.us/rules/ememail.htm.

4 Extraordinary matters include writs of: habeas corpus, mandamus, prohibition, procedendo, and certiorari. See Tex. R. App. P. 72.1; see also *Ex parte Jones*, 97 S.W.3d 586, 588 (Tex. Crim. App. 2003).

5 Order Requiring Electronic Documents in the Supreme Court, Misc. Docket No. 09-9193, signed December 15, 2009, available at www.supreme.courts.state.tx.us.miscdocket/09/099919300.pdf.

6 At the time of writing this article in early February, the Texas Supreme Court's website displays both the new mandatory rules and the previous voluntary requests. It may be that after the rules become mandatory, the website information will change.

7 2nd Tex. App. (Fort Worth) Loc. R. 1(K).

8 *Id.* Loc. R. 7(B).

9 Information available at www.3rdcoa.courts.state.tx.us/rules/efiling.asp.

10 Information available at www.4thcoa.courts.state.tx.us/ebriefs/ebriefs.asp.

11 4th Tex. App. (San Antonio) Loc. R. 3.2.

12 5th Tex. App. (Dallas) Proposed Loc. R. 10, available at courtstuff.net/5th/eBrief/Rule%2010%20amended%20change.pdf.

13 5th Tex. App. (Dallas) Loc. R. 3.

14 10th Tex. App. (Waco) Loc. R. 12(g).

15 *Id.* Loc. R. 8.

16 14th Tex. App. (Houston [14th Dist.]) Loc. R. 2.3.

17 8th Tex. App. (El Paso) Loc. R. 9.1(b).

18 The Fifth Circuit's standards for Electronic Case Filing (ECF) are available at www.ca5.uscourts.gov/cmec/ECFf%20Filing%Standards.pdf.

19 Application for a PACER account is available at pacer.psc.uscourts.gov/psco/cgi-bin/register.pl.

20 The Fifth Circuit Rules, incorporated in the Federal Rules of Appellate Procedure, are available at ca5.uscourts.gov/clerk/docs/frap2007.pdf.

21 www.ca5.uscourts.gov/.

22 Supreme Court R. 25.9 (revised effective February 16, 2010). The guidelines are available at www.supremecourtus.gov/oral_arguments/2008ElectronicMertisBriefsSubmissionGuidelines.pdf.

A few notes on victim assistance

New Victim Services Board coming up

With lots of hard work from the TDCAA Board of Directors, Victim Assistance Committee, and TDCAA staff, the long-range planning goal of transitioning the committee to the TDCAA Victim Services Board is becoming a reality. On Sept. 23, at this year's Annual Criminal & Civil Law Update in South Padre Island, all eligible victim services personnel will elect representatives from each of the eight regions. We are asking for your help in identifying and recruiting candidates to run for the board. To be eligible, each candidate must have permission from the elected prosecutor, attend the elections at the annual conference, and be a paid member prior to the meeting. The proposed bylaws for the board and a map of the regions is below.

By Suzanne McDaniel
TDCAA Victim Services Director in Austin

Like those on the existing Key Personnel and Investigator Boards, the new Victim Services Board members will assist in preparing and developing operational procedures, standards, training, and educational programs and serve as a point of contact for their region. For more information, please contact Suzanne McDaniel at mcdaniel@tdcaa.com.

Victim assistance grants

Victim assistance services have long been an underfunded—if not unfunded—mandate in prosecutors offices. Local, state, and federal budget cuts make it essential to be aware of funding opportunities.

The Office of Justice Programs (OJP), a division of the U.S. Department of Justice, has a new website to provide basic information about state and federal funding opportunities and the steps involved in applying for grants: www.ojp.gov/ grants101. It is a good overview for anyone thinking of applying or reapplying for a state or federal grant.

Over the past 10 years, OJP has provided 52,000 funding awards to the criminal justice community totaling more than $26 billion. In fiscal year 2009, OJP awarded 4,900 grants totaling more than $2.5 billion and 3,883 Recovery Act grants totaling more than $2.74 billion to state and local and tribal law enforcement and community organizations.

Texas Crime Victim Rights Week, April 18–24

Texas observed National Crime Victims Rights Week this year from April 18–24. The theme was "Crime Victims' Rights: Fairness. Dignity. Respect." Communities across the state increased awareness of crime victims' rights by coming together and hosting educational activities, hotlines, conferences, and other events. This week marked an important time not only to honor victims but also to recognize those organizations and agencies that we depend on daily for cooperation in providing assistance. TDCAA was involved with planning the statewide observance in Austin on April 22.

We'd love to include pictures with captions of the events in your community in the next edition of the *Prosecutor*. Please e-mail stories and photos of your community's activities to us at mcdaniel@tdcaa.com so that we can share ideas with the entire membership.

Also, it isn't too early to start planning for next year. Bookmark the Office for Victims of Crime website for more reference and information at www.ojp.gov/ovc/welcome.html.❇

Photos from our Champions for Justice reception honoring Carol Vance

During the ceremony in his honor, Carol Vance announced the release of his new book, Boomtown D.A.*, the story of his experiences as an assistant district attorney and district attorney in Harris County for 22 years. Mr. Vance gave every attendee a signed copy, and we have a few left in the foundation office. If you would like one, please contact Jennifer Vitera at vitera@tdcaa.com or 512/474-2436. Also, you can go to our website, www.tdcaf.org, to view even more photos. If you would like a copy, e-mail the editor at wolf@tdcaa.com and identify which photo(s) you want by their number, and we will e-mail a high-resolution version.* ❇

Thank you to the Champions for Justice donors

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From the other side of the criminal justice system

When those who work in prosecutors' offices are themselves victims of crime, it can change the way they handle cases and victims down the road. Here are two prosecutors' stories.

Taly Haffar
Assistant U.S. Attorney in Dallas

> "The only thing necessary for the triumph of evil is for good men to do nothing." —Edmund Burke

A bead of sweat falls down my chest. I am staring out a glass sliding door in a small town in Mexico, when I see Kelly, a man I had met earlier that day, put a gun to his head and pull the trigger. My body is immediately flushed with heat, and I frantically look for my shoes. I have to get help. Just as I open the door and look down at the now pooling blood, I wake up. It was only a dream.

Three weeks earlier, one of the closest people in my life, my uncle Murphy, was murdered by his older brother, Nabil.

I've been a prosecutor for seven years now. I started my career at the Dallas County District Attorney's Office and loved every day of it. After spending a year as a felony chief, I joined the United States Attorney's Office. Like all prosecutors, I have been driven by the good work we do: making the community a little safer, offering victims some closure, and holding people accountable for violent crimes. But as much as we can sympathize and try to understand what victims' families go through, you never really know what it's like until you are part of a victim's family.

Getting the news

I was working at my desk in the 283rd Judicial District Court on June 6, 2006, when my aunt called. She said my uncle Murphy had gone to see his brother the night before and never returned. She asked if I had heard from him. I said no, but I would call around and find him for her. After trying several family members with no luck, my phone rang. An Addison detective was on the line, and she asked me to come to the Addison police station immediately. I heard my mom in the background crying and screaming for answers. I raced to my car and called a Dallas homicide detective, asking him to find out more information for me, though I had a horrible feeling that I already knew what had happened. The detective called me back as I drove and told me two male bodies were found shot to death in my uncle's apartment.

When I arrived at the station, my mom and aunt were crumpled on the ground sobbing. They didn't know the details, but they knew something was seriously wrong. The previous night, my eldest uncle asked his three siblings to come over. He had become a recluse during the past few years, making little effort to see family or find a job. My mom and aunt couldn't go, but Murphy, who always put others before himself, went.

It was surreal. My family had never been through anything like this. More family members arrived, and as the detective spoke, everyone was paralyzed. My eyes went from face to face, seeing their eyes glazed over, full of tears and confusion. Strangely, I was experiencing these emotions, but simultaneously, I was thinking about the murder cases I prosecuted. I wondered if every family went through this. Is this how police tell people that a loved one has been killed? I wanted information; I wanted to see pictures of the crime scene; I wanted answers. I was not getting any of it. The shock and sadness turned into anger and frustration, and I was taking it out on the police officers in front of my family. Being a prosecutor, I knew there was more information that they weren't telling us. The detective then pulled me aside and told me the limited details they knew.

My mom had gone to Nabil's apartment to check on him and

Murphy. She knocked on the door, but no one answered. She found a maintenance man and explained her concerns. He opened the door and immediately told her to wait outside. He could smell the blood. He walked to a back bedroom and found the two bodies. The door had been locked from the inside; no sign of forced entry. The police determined that Murphy went into the apartment and at some time that night, his brother shot him three times and then turned the gun on himself. I was overwhelmed with emotions and questions. I realized that families who suffer from a random act of violence will forever have unanswered questions about what happened and why.

Two days after the murder, the apartment complex manager contacted me. He was sending a biohazard company to clean and destroy anything left in the apartment; if we wanted anything from inside, we needed to go there immediately. Although I was hurting, the prosecutor in me needed more information. I was convinced I could understand the reason for the crime. With two of my closest childhood friends, Amier and Luke, and with friend and fellow prosecutor Erin Hendricks, I went to the crime scene.

My heart was racing as I unlocked the door. The metallic stench of blood immediately hit us. We opened windows and slowly looked around. I went into the room where the shooting occurred. There was blood on the wall and ceiling. Again, I was looking through the eyes of a sad family member and of a prosecutor. We all stood in the room and tried to piece it together. Did Murphy and Nabil talk for a while, or was it quick? How did Nabil get Murphy to the back bedroom? Why did he shoot him three times?

In the end, we left with more questions than answers: Why did he do it? Would he have killed his other siblings, including my mom, if they had accepted his invitation? These questions haunt me to this day. Murphy was a second father to me, and because of his huge heart, he was the family favorite.

How I've changed

Before this crime happened, I would talk to murder victims' families and tell them my theory of the case. I explained options, such as plea bargains and what could happen if we went to trial. I would tell them how truly sorry I was for their loss and to call me anytime. But then they would leave my office and I would have to get back to work. I would make calls, look at new cases, and prepare for upcoming trials. I didn't really understand the profound impact violent crime has on those left behind.

As prosecutors, we learn about our cases in a sterile environment—we don't see or smell the blood. We don't hear the firsthand accounts of what may have happened. We don't really know the people involved. Instead, we walk into work and, all too often, find the next violent case sitting on our desk, arranged in a file of a few pieces of paper. Some say a prosecutor should not get too involved in his cases, that it can cloud your judgment. I disagree.

After we lost Murphy, my perspective changed. Often, when meeting with families for the first time, I now share my loss with them. I know what they are going through. I don't simply explain trial and plea bargaining options like it is just another decision that needs to be made. The violence my family has experienced allowed me to realize who I need to be as a prosecutor for the families of murder victims. When meeting with the victim's family, I now appreciate it is one of the most important days of their lives. They look to us for answers, for closure, and to hold the guilty accountable. I now know the true importance of going to the crime scene, meeting with witnesses and officers at length, and understanding as much of the crime as possible. Prosecutors can offer insights that are so important to a victim's family. These days, I make it a point to know the case backward and forward before meeting with a victim's family. I talk to them, see pictures of their loved one, and hear their stories. The next time you meet with a victim's family, offer to go to their house, turn off your cell phone, spend as much time with them as they need, and answer all their questions. They will always remember how you treated them in their time of need.

As both a prosecutor and the nephew of a murder victim, I am keenly aware of the important role prosecutors play in the community. Be mindful of the significance of your job the next time you open a new case file. You have the ability to give people some peace and the duty to ensure justice is served.

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Karen Anders
Assistant Criminal District Attorney in Denton County

I had just returned from court around 10 a.m. when my husband called to tell me that our house had been burglarized. Actually, ours was one of many homes in our neighborhood that had been broken into. Burglars had kicked in our back door and ransacked the house, taking the TV, gaming systems, cameras, jewelry, guns, and other items including one of my badges. A few weeks later, an informant came forward with information regarding our burglary, and the suspects were arrested. As a prosecutor in Denton County, I knew generally what would happen from that point—or so I thought. What followed was a year and a half of the frustration and waiting that all crime victims feel.

The detective on my case told me of other burglary cases with the same suspects from other police departments. He notified those departments of jewelry in pawn shops matching their burglaries but got no responses, so only my case and two others were indicted out of a possible 20 cases linked to these suspects. I thought about how many times I have spoken with victims complaining about why we were "doing nothing" when these defendants had committed numerous crimes. In the past, I had told those victims that we couldn't prosecute cases that weren't filed and that they were more than welcome to contact the police to see if the other cases will be sent up. Sometimes the victims understood, but they were always angry. I was usually perturbed at these phone calls from victims, always thinking in my head, "What do they want me to do about unfiled cases? Don't they realize I have thousands of *filed* cases to deal with and no time to call police departments and track down *unfiled* cases?" Now I was on the receiving end of that advice, and I realized that the detective in my case had passed the buck on unfiled cases—as I had done in my professional life as an assistant DA. The prosecutor in me understood, but the victim part of me was angry.

Because I live in the county neighboring the one where I prosecute, my case ended up at that district attorney's office. Like many victims, I was in unfamiliar territory and at the mercy of judges and prosecutors I did not know. I was frustrated at not being able to control the system that was so familiar to me. Luckily, I at least knew who to call and what questions to ask when I did call, but that made me realize how many victims struggle to communicate with the right people in the criminal justice system.

The county where my case ended up is a large and heavily populated one, so I knew my case was one of thousands. I also knew my case was a property crime, not a violent one, putting it lower on the scale of importance on a heavily stacked docket. As a prosecutor, I had always categorized property crimes as less urgent, thinking that people have insurance to reimburse them for repairs and that property can always be replaced. They were pretty easy cases to move and not worry about because a person was not physically harmed or injured. As a result, I was guilty of simply moving cases and had forgotten my role as a victim advocate.

Caught on the flipside of this scale of (un)importance as a victim myself, I thought my case should be ranked up there with any other serious felony and given the same attention. I now understand that not all property can be replaced, and time spent, say, rebuilding your back door isn't taken into consideration. Neither are the feelings of being violated and the sleepless nights filled with worry or anger.

As my case rode the docket for almost a year and half, I tried not to lose patience and kept myself from making numerous phone calls requesting updates on my case. After all, how many times had I told a crime victim that I would let them know if their case was going to plead or go to trial? And that until it was set for one of those two options, nothing was going on and there was no use calling me weekly?

Because I am a prosecutor, the folks in the other DA's office who were handling my case gave me insight about the judge, docketing system, and defense attorney that otherwise would not have been afforded a typical victim. However, when it came to the plea bargain, I was helpless as to the negotiations. The offer on my case went from eight years to five to three. As frustrating as it was, I knew that the prosecutor was faced with unfriendly juries and a young defendant with no felonies on his record. It made me wonder how many phone calls I had made to victims explaining that I tried for pen time in a plea but gave

in and lowered the number of years because of the factors I faced. At the end of the day I could still say to my victim we had gotten pen time, and the number always sounded large if you didn't have to explain parole implications.

One of the co-defendants in my case is now set to plea, and I as a victim will have my day in court with my victim impact statement. As I read my rough draft to my husband, he asked if I was going to tell the defendant that I had been affected to the point that all my future offers would be pen time. I told him no, but then started to realize how this crime affected the way I treat all my cases and how I deal with victims.

I now take the time to patiently listen to these victims and go the extra mile by calling the agency to check on unfiled cases because I know what a difference it would have made in the plea offer in my burglary. I also have more patience with victims and their families who call for updates on their case and do my best to answer their questions.

When cases are on my desk to be reviewed for a plea offer, I take into consideration the victim's feelings and keep in mind the emotional aspects of the crime, not just what I read in a police report. When defense attorneys come to me to negotiate a lesser sentence, I reiterate those unspoken feelings as I defend the offer I made. I try harder to hold the line and not give in to the defense attorney's incessant pleadings.

I certainly don't wish for anyone to be a victim of a crime, but as a prosecutor and now a victim, I have changed for the better. As a result my victims receive greater advocacy from me, from beginning to end. ❇

PCI and Oscar Sherell Award nominations due July 1

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

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

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

Addition to the last issue

A valuable member of the McLennan County District Attorney's Office was inadvertantly left out of the cover story on the last issue ("The Murdering Minister," March-April 2010). Tracy Viladevall, the victim services assistant, spent a great deal of time with the Dulin family and others who needed her, always in her kind and professional way. The authors regret omitting her from the list of those who helped investigate and prosecute such a complex case. ❇

News Worthy

Mike Fouts named TSCRA Prosecutor of the Year

Mike Fouts, the district attorney in Haskell County, was named the Prosecutor of the Year by the Texas and Southwestern Cattle Raisers Association (TSCRA) at the group's March convention in Fort Worth. Pictured below are TSCRA Special Ranger Scott Williamson; Larry Horwood, award presenter and chairman of the TSCRA Brand and Inspection Committee; Fouts; TSCRA President Dave Scott; and Larry Gray, TSCRA executive director of law enforcement.

In introducing Fouts, Larry Horwood noted that in the previous 12 months, Fouts had been involved in the recovery or restitution of nearly a half million dollars worth of assets and 68 years of incarceration or probated sentences in cattle theft cases. "He understands that ag producers are the core of West Texas," Horwood said, "and he takes his responsibility to protect those people seriously."

Congratulations, Mike! ❇

An appellate dictionary for non-appellate attorneys

A primer on what trial attorneys should know about appellate jargon, documents, and deadlines

By Melinda Fletcher
Appellate Attorney for the Special Prosecution Unit in Amarillo

Pop quiz: You, a trial attorney, return from lunch and see a mandate from the local court of appeals sitting on your desk. It looks very official. You:

(a) shuffle it under a large pile of papers, hoping it will magically go away;

(b) break out into a cold sweat and start to hyperventilate; or

(c) do the happy dance.

The answer is probably "c." If you thought "c" had to be the only wrong answer, then this article is for you.

Many offices have appellate attorneys that take over a case once prosecutors are finished with a trial or sometimes even a plea. Though you may never see the case again, there is often a lot of work going on for the next several months or even years. This article is not legal advice: it is just a Wikipedia-style dictionary for those who aren't sure what appellate jargon means. It discusses criminal appeals only and primarily discusses appeals by the defendant. I hope it will help you know when to celebrate, when to sit back and wait, and when you need to start working to save your case.

Motions for New Trial are usually filed by the defense after a trial.[1] They are generally very brief and say something like, "The verdict is against the great weight and preponderance of the evidence." If this is the case, you are probably safe to ignore it: The defense attorney is just buying some time before the appeal starts. If the motion has more meat to it, you probably need to review it and be ready to tell your judge in a hearing why the motion should not be granted. If your judge ignores the motion also, it will be overruled by operation of law in 75 days.

Notices of Appeal are the documents necessary to perfect an appeal.[2] You do not need to respond to them in any way, except maybe to give it to the office's appellate attorney. Fear not! Many more documents are coming your way.

Docketing Statements are required by the courts of appeals and must be prepared by the party who gave the notice of appeal.[3] If the defense filed this statement, you can nearly always file it and ignore it. If it is a slow day, you might read it over and possibly learn something. Spotting and correcting a problem now may save you or your appellate attorney more work later.

A flurry of correspondence will follow in the next few months. Letters may come from the defense attorney, clerk, court reporter, and appellate court. Read these, but most likely you will not need to respond to any of them. However, if the court of appeals directs you to respond, do it! Ask for help if necessary, but do not ignore an order or request from the appellate court.

The **Brief for Appellant** will eventually land on your desk.[4] Now it is your time to work. The **Brief for the State** is probably due within 30 days. You will soon receive a letter or postcard from the appellate court telling you exactly when the brief is due.

Either side may file a **Motion for Extension of Time** to file its brief.[5] It is proper to call opposing counsel and ask whether he agrees to or opposes the motion. My personal practice is to always agree. For one reason, the defendants in my cases are nearly always incarcerated pending appeal so I do not care how long it takes. For another reason, I sometimes find myself needing more time, and it is much easier to ask for a returned favor from defense counsel down the road. If there is some reason that you do oppose the defense taking more time, say so, but be aware that those remarks may end up quoted and filed with the appellate court.

Each appellate court has its own customs regarding motions for extensions of time. Some grant them all, and some grant very few. Most fall in between somewhere. Do your homework and know what to expect in the court where your appeal has been filed.

After the State's brief is filed, start playing the waiting game. You may occasionally receive a **Reply Brief**. This is the appellate equivalent to rebuttal arguments. Read over it, just in case the defense points out that you really did screw up and you need to fix it to save credibility with the court of appeals. If it is just a difference of opinion or a repetition of the original argument, you can file this away and continue waiting.

Sometime down the road, you will receive an **Opinion** from the court of appeals. Definitely read it. Not only will it tell you whether the case was affirmed, but you may also learn something to help with another case in the future. If your case was affirmed, continue waiting, only now a little more joyously.[6]

The party who considers the opinion a loss may file a **Motion for Rehearing**.[7] It is an opportunity to convince the appellate court that it was wrong and should change its mind. It is nearly always futile. Appellate justices, like the rest of us, are rarely convinced that they made a mistake. However, like the motion for new trial, it is a way to buy some time even when you know you have precious little chance of success on that particular motion.

A **Petition for Discretionary Review (PDR)** is the document that asks the Court of Criminal Appeals to review a case.[8] The Court of Criminal Appeals is the highest court in Texas to hear criminal cases; for civil cases, the Supreme Court is its counterpart. Both courts hear only the cases they choose to hear, and they choose not to hear most cases. In rare instances, you may choose to respond to the PDR and let the court know up front why they should not grant it, but many appellate attorneys feel that filing a response highlights your fears and makes the court pay a little more attention to the PDR. Most often, unless and until you get a letter that PDR has been granted, there is nothing for you to do but, you guessed it, wait some more.

If the opinion was against the State and you wish to file a PDR, pay particular attention to the guidelines, requirements, and deadlines. *The State's Appellate Manual*, available from TDCAA, is full of great tips and reminders; I recommend reviewing it each time you receive an opinion that you don't like. If you do not use the manual, seek advice, do some research, and do some soul searching—there are many traps for the unwary.

The court will send a letter to counsel for both sides informing you whether PDR is granted. If it is, the cycle described above for the initial appeal repeats: The movant files a brief, opposing counsel files a brief, there may be a reply brief filed, the court contemplates your case, and it eventually renders an opinion. The unhappy party may now file another **Motion for Rehearing**, which stands about as much a chance of success as the earlier one.

Eventually, all of the courts and parties will have their say and the avenues are exhausted. At this point, the original court of appeals will render a **Mandate**. This document makes your judgment final. (Hence, the happy dance!) The court will also send a copy directly to the district clerk to put in the original case file. You may do with the mandate whatever you wish: file it, frame it, or burn it. Your copy is just another piece of paper.

Perhaps the most important thing for a trial attorney to know about mandates is that they are the document that makes an appealed judgment final. If you are trying a case and need a prior conviction to prove up either a punishment enhancement or an element of the original charge, you may get caught short if you do not have a mandate. If you present a judgment or pen pack as evidence, all the defendant has to do is say that the case was appealed and the ball is back in your court to prove that the judgment is final. Do so with a mandate. If you prepare ahead, a certified copy of a mandate is easy to get from the district clerk. You may also be able to get a certified copy from either the appellate clerk or TDCJ, but you probably will not get one if you do not ask. Depending on where these documents are filed, it can take a few minutes or a few weeks—plan ahead!

If your case was anything but "affirmed," carefully review Rule 51.2 of the Rules of Appellate Procedure and make sure you know what needs to happen next. It may be necessary to retry your case or even just follow up with county or district officials and make sure they have done their jobs.

Now that you know all that you

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need to know about appeals (unless you are responsible for one), let us take up one more subject: the **State's Right to Appeal**. The State has a very limited right to appeal, and appellate courts are divided over just how we are supposed to appeal. Article 44.01 of the Code of Criminal Procedure sets out the circumstances under which the State may initiate an appeal. If you feel frustrated, cheated, or abused or are just flat angry, review the code. I also suggest you cool off for a day or two, then discuss it with other attorneys. The timelines and requirements for a State's appeal are different than those for an appeal by the defense, so be sure to thoroughly read and comply with the code.

My last bit of advice? Talk to your appellate attorney. If you do not have an appellate attorney, find one in another office and make friends with him. (You can also e-mail TDCAA's senior appellate attorney, John Stride, at stride @tdcaa.com.) Ask dumb questions. Ask them again if necessary. If possible, ask them early. We are all striving for the same goal, and the easier we can make the journey for one another, the happier we will all be. ❇

Endnotes

1 Motions for New Trial are codified in Rule 21 of the Rules of Appellate Procedure.

2 Rule 25.2 of the Rules of Appellate Procedure explain how to perfect an appeal of a criminal case.

3 Rule 32.3 of the Rules of Appellate Procedure explain docketing statements for criminal cases.

4 Rule 38 of the Rules of Appellate Procedure explain the requisites of briefs.

5 Rule 10.5 of the Rules of Appellate Procedure outlines the procedures for requesting additional time.

6 The great majority of cases are affirmed on appeal. For this fact and others that might interest you, see the Annual Reports for the Judiciary available online at www.courts.state.tx.us/pubs/AR2009/toc.htm#appellate.

7 See Rule 49.1 of the Rules of Appellate Procedure.

8 Rule 68 of the Rules of Appellate Procedure outlines the procedure for PDR.

Extending protection

How one county attorney's office extends protective orders when the respondents are in jail and notifies crime victims and their families about offenders' statuses in prison

A note from Suzanne McDaniel, TDCAA Victim Services Director: Welcome to the new Victim Services Section of The Texas Prosecutor journal, which features your articles on victim assistance as well as updates on resources and referrals. We envision the section as a central place to share innovations and solutions. Please contact me at mcdaniel@tdcaa.com with your ideas and suggestions for future articles.

Cooperation and collaboration are key in providing victim assistance, especially in domestic violence cases where victims are particularly vulnerable upon the defendant's release. In this issue we are presenting a team effort from the Travis County Attorney's Office, the nonprofit Texas Advocacy Project, and the Victim Services Division of the Texas Department of Criminal Justice. These three entities worked closely to develop a solution to the issue of victim vulnerability upon the release of the offender that all counties may find useful.

In 1999, the Texas Legislature amended §85.025 of the Texas Family Code to expand the remedies available to victims of domestic violence. The amendment extended the length of protective orders from one to two years and provided an additional automatic extension in cases where the respondent (defendant or offender) is incarcerated on the order's expiration date. This article will explain the procedures employed by the Travis County Attorney's Office for extending a protective order when a respondent is incarcerated and will highlight the importance of collaborating with the Texas Department of Criminal Justice (TDCJ), your local legal aid offices, and other non-profit organizations who provide assistance to victims of domestic violence, and to provide a framework for prosecutors' offices across the state to expand their services to domestic violence victims.

By Erin Martinson
Assistant County Attorney in Travis County

Section 85.025(c) does not leave the decision to extend within the judge's discretion. Rather, it mandates that a protective order be extended for one year after the respondent is released from incarceration if the respondent was incarcerated on the original date of expiration. The Texas Legislature should be applauded for responding to the needs of DV victims (as our elected County Attorney David Escamilla says, "This statute is critical in protecting victims in what would otherwise be a very dangerous transitional period"); however, §85.025(c) leaves most attorneys in the dark as to how to proceed. The statute simply provides for the extension; it does not set forth any guidance as to how the order should be extended and issued to law enforcement. My fear is that many attorneys and prosecutor's offices across the state are not extending protective orders simply because there are no specific procedures to follow. Our office has adopted procedures and forms for the extension of protective orders under these circumstances but has only been able to do so with the help of TDCJ.

Because §85.025 is not discretionary, the process for extending the protective order is an easy, uncontested matter. The statute does not require that either party be notified before an order can be extended. However, we have found that informing applicants and respondents of this extension in the language of the final protective order decreases confusion and violations after the respondent is released from jail. All of the final protective orders we draft expressly state the expiration date followed by a statement about the automatic extension. We also spend time in court explaining the provision to our applicants and respondents to further minimize

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confusion and put the respondent on notice that the order could be in place for longer than two years. We rely on applicants to inform our office if they know the respondent is incarcerated when the protective order expires so we can begin the process of extending the protective order.

When an applicant notifies our office that the respondent was or will be incarcerated on the date the order expires, we send a request for information to TDCJ Classification and Records querying the date of incarceration and the projected release date. TDCJ has been extremely responsive to our requests and usually faxes the information to us within a couple of days. We have also created a Motion and Order Extending the Protective Order to present to the court once the respondent's incarceration and release information is verified.

The importance of obtaining a written order extending the protective order from the court lies in enforcement. Without an extension order, law enforcement is forced to rely upon the expiration date written in the final order. Once the court has signed the extending order, the order needs to be issued in the same manner as a final protective order so that local law enforcement can then enter the new expiration date into the national database. Then law enforcement across the nation will have access to that information should the applicant travel or relocate.

Failure to enforce protective orders sends the respondent the message that we are not taking the orders seriously and places the victim in further harm. I encourage and invite each prosecutors' office to tailor our forms (which are available for download at www.tdcaa.com) and adopt policies and procedures that address protective order extensions pursuant to §85.025(c). In jurisdictions where this is not possible, TDCJ, in conjunction with the Texas Advocacy Project, has created its own system for notification and a set of pro se forms for victims who must proceed by representing themselves.

Notification

TDCJ's Victim Services Division utilizes our Victim Notification System (VNS), which is a confidential system that allows registrants to receive written information regarding an offender (also called a respondent).

Registrants include crime victims, surviving family members, witnesses, or concerned citizens. Registrants are added to the VNS by either their completed Victim Impact Statement (VIS) that was included in the offender's penitentiary packet or by calling, writing, or e-mailing TDCJ directly. Individuals can be added to this system only for offenders who have been received by TDCJ Correctional Institutions Division (CID) or state jail.

The VNS provides more than 65 points of possible written notification regarding several phases of an offender's incarceration, including his discharge or release on parole or mandatory supervision. These notifications have typically been distributed via letters, though TDCJ is adding an option for registrants to receive them via e-mail.

Because TDCJ could not identify each registrant (possible applicant) who has a protective order, our notification staff identified notification letters and e-mails that were related to an offender's direct discharge or release on parole/mandatory supervision. We then incorporated language regarding the extension of protective orders in those letters/emails along with referral information to the Texas Advocacy Project. (We will address the importance of the referral later in this article).

It is important to realize that information regarding the extension of a protective order is included in all of our VNS notification letters and e-mails dealing with an offender's direct discharge or release on parole/mandatory supervision. This includes notifying registrants who may not have a protective order against the offender. We also include information on Texas Family Code §85.025(c) on our website and in our brochure, "Your Rights, Your Voice, Your Participation." Once a registrant is added to the VNS, she receives a letter with this brochure.

Furthermore, all offenders are notified of the amendment extending the length of protective orders. A notice is attached to an offender's release certificate or discharge paperwork.

In addition to our written notification system, victims, surviving family members, witnesses, concerned citizens, criminal justice professionals, and victim advocates can contact Victim Services Division staff by calling 800/848-4284 or 512/406-5900 (in Austin). This service is available Monday through Friday from 7:30 a.m. to 5:30 p.m.

Our phone staff received train-

ing on the protective order process and the amendment extending the length of protective orders. When necessary, our staff will discuss the protective order process and extension of protective orders with victims and provide appropriate referrals.

Referrals are also a key component in the VSD's role. We might provide all the accurate information a victim needs to get an extended order entered, but if a victim is not referred to an organization that can assist her through the process, the information may be useless. The VSD refers appropriate victims to D'An Anders at Texas Advocacy Project in all of our written notifications and, as needed, also makes verbal referrals. (Anyone needing assistance with extending a protective order may contact Ms. Anders at 888/325-7233.) Based on statistics from VSD's phone staff, 456 victims were given information on protective orders and a referral during fiscal year 2008 and 612 in fiscal year 2009. ❇

Editor's note: This article was written with contributions from the Texas Advocacy Project and the Texas Department of Criminal Justice's Victim Services Division. Please also note that Travis County's sample forms are available on our website; just look in this issue's articles in the Newsletter Archive.

Paw and order

The Harris County DA's Office had a "crazy" idea: having dogs visit the offices to comfort and calm crime victims and their families. It's been a huge, tail-wagging hit.

My job as a social worker with the Family Criminal Law Division of the Harris County District Attorney's Office is dynamic and interesting—just when I think I've seen or heard it all, something new surprises me.

By Jennifer Varela, LCSW
Director of Family Violence Services in the District Attorney's Office in Harris County

Belinda Smith, chief of our Animal Cruelty Section and chair of the Houston Bar Association's Animal Law Section, proposed that we meet with some folks from a local animal volunteer group. They bring their own animals to visit people in hospitals and nursing homes. I had heard of "animal therapy" and its positive effects on people who have experienced trauma. I thought it sounded interesting, but I had some reservations. Like most public agencies, we're already stretched beyond capacity and I didn't want to dilute our services. I don't like to stray too far afield of our primary mission, which is increasing victim safety via proper handling of domestic violence cases and filing protective orders.

Belinda and South Texas College of Law Professor Fran Ortiz made the formal presentation to District Attorney Patricia Lykos. During the entire presentation, one of the volunteer dogs was in the judge's lap, and she was petting it, so we hoped that she would approve the program.

It was decided that we'd propose the idea to the divisions in our office that have a lot of contact with victims: Crimes Against Children, Victim Rights, and Family Criminal Law, where I am assigned. Of these three departments, it seems like we have the most in-person complainant contact. Our staff serves about 7,500 people in person, each year, and we can pretty much guarantee a waiting room full of people on any given morning. Because many of these people bring kids, we always stock toys, books, movies, and video games to entertain them while we meet with their parents. We thought that the dogs could interact with the kids while we met with their moms or dads.

Planning

We met with members of the animal volunteer group, and we brainstormed about how the animal visits would work. We decided that the

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dogs should be medium-sized (around 40 pounds or smaller) and that six human volunteers would visit on the first and third Tuesdays of each month for a one-hour visit each time. We also had to arrange for parking, a meeting place, building security, and a place for the dogs to "do their business." (To that end, we designated some strips of grass around the courthouse, and the owners carry plastic bags to clean up after their dogs.)

The Houston Bar Association got a sponsor to purchase some colorful bandanas for the children who participated in the program. One of our clever legal interns, Joseph Herbster, was kind enough to draft some policies for the program, which included details about when and where visits would occur, confidentiality, and volunteer and facility requirements. Everyone agreed that volunteers would have to pass a background check, so we came up with an application, and one of our investigators performed the checks. The dogs go through their own background testing to ensure the animals are calm and will not act aggressively.

The human volunteers were used to working in medical settings, so they already understood the idea of confidentiality; we asked them to sign a confidentially agreement, which they did without hesitation.

Most everyone was interested in the program, but we did get some negative response. One defense attorney suggested that we might be influencing witnesses too much, but in my thinking, having canine visitors was no different than showing a movie in our waiting room or providing magazines for people to read while they wait. It is just a way to lessen the stress of a difficult situation. Besides, most of people who would be visiting with the dogs would likely never testify.

Marron Bradley (daughter of assistant DA Denise Bradley), Nick (the now-deceased dog of assistant DA Donna Hawkins), and District Attorney Patricia Lykos pose for a press photo.Though he is not part of the program (because the animal group doesn't allow its dogs to be publicized in the media), Nick happily posed for this photo modeling one of the custom-made bandanas.

And … action!

We had already arranged with our building security that the volunteers and dogs would be allowed to come in a back, secured entrance. The first couple of visits were met with a lot of fanfare: Lots of people from around the office came to see the dogs too.

One of the visiting dogs looks and acts very much like Benji from the movies of the 1970s. His owner gets him to do lots of tricks, which thrills the kids—and the adults. Even children who are afraid of dogs love petting a sweet little long-haired chihuahua that visits. Both he and his owner are exceptionally cam.

Not only did the dogs meet and cheer up kids, but they met and cheered up adult victims too. We also found that they helped us: We have been called "the ER of social work" because we deal with crisis and trauma all day, so spending 10 or 15 minutes petting and loving on the dogs will drop our blood pressure and reduce stress like almost nothing else.

Another very positive outgrowth of this program is that the Chief of our Crimes Against Children Division, Denise Oncken, has been collaborating with our local Children's

Assessment Center (CAC) to have the dogs come there. Because we discovered that six dogs is a lot for our small area, we decided to split up the group. Three volunteers and dogs will come to the DA's Office and three will go to the CAC. They'll switch sites so their volunteers get to visit different places.

We have tried to design the program in such a way that it doesn't take away from our main purpose. We have found that hasn't happened. Because we took the time to plan and evaluate the program in the beginning, we have found that it is a real benefit. It makes our complainants feel a little less stressed and it does the same for us too. ❇

News Worthy

Free ethics training

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

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

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

Collateral damage: guilty pleas, deportation, and *Padilla v. Kentucky*

By David C. Newell
Assistant District Attorney in Harris County

Physicists have recently proven the existence of parallel universes.[1] I bring this up only because after the recent Supreme Court decision *Padilla v. Kentucky*, a plea might become involuntary if a defense attorney fails to advise his client how that guilty plea might be affected by alternate realities.

OK, that's clearly an exaggeration. I've been watching too much *Lost*. However, *Padilla* does seem to represent a break with our previously accepted plea-bargain reality. Texas courts had typically required that a defendant only be informed of the direct consequences of his plea.[2] After *Padilla* a defense attorney can render ineffective assistance for failing to properly advise his client about deportation consequences of his guilty plea, a consequence that Texas courts had previously regarded as "collateral." The impact of this decision on Texas law should be muted in the context of deportation consequences, but an examination of *Padilla* could help discover if the opinion has opened any wormholes to collateral attacks on the voluntariness of guilty pleas.

The perfect imperfect plea

"Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War." That's the way *Padilla* begins. With a cold open like that, you know where this show is headed, particularly when it's written by Justice Stevens.

Padilla pleaded guilty to transportating a large amount of marijuana in his tractor-trailer, but his attorney told him that he did not have to worry about his immigration status because he had been in the country so long. In reality, pleading guilty made deportation virtually mandatory. The Supreme Court of Kentucky held that trial counsel's performance was not deficient because he had no duty to properly advise his client about a "collateral" consequence of his plea, namely the possibility of deportation.

The United States Supreme Court seemed to reject this distinction and held that the failure to advise a client of the deportation consequences of a plea falls below prevailing professional norms, regardless of whether deportation is a direct or collateral consequence of the plea.[3] Justice Stevens, writing for

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a five-judge majority, first set out the change in immigration law over the last 90 years. He noted that there used to be a narrow class of deportable offenses, and judges once wielded broad discretionary authority to prevent deportation. Now, the "drastic measure" of deportation or removal is "virtually inevitable" for a vast number of noncitizens convicted of crimes. According to the majority, the importance of accurate legal advice for noncitizens accused of crimes has never been more important because these changes in the law have raised the stakes of a noncitizen's criminal conviction.

The majority then went on explain that the court has never applied a distinction between direct and collateral consequences when considering "reasonable professional assistance" under *Strickland v. Washington*. Given this position, it seems odd that they would then affirmatively duck the issue of whether such a distinction is even appropriate, but that's just what they did. Leaving that open question aside, the majority instead explained that deportation has such a close connection to the criminal process that it is uniquely difficult to classify it as either a direct or a collateral consequence. Concerning "the specific risk of deportation" the collateral versus direct distinction is ill-suited to evaluating an ineffective assistance claim.

Instead, the majority set up a system where courts will now have to analyze whether the immigration consequences of a plea are clear and explicit by holding that trial counsel must accurately inform a client whether his guilty plea carries a risk of deportation. The majority noted that numerous bar association guidelines already stress the importance of advising clients of the risk of deportation. Additionally, the majority noted the apparent ease with which Padilla's attorney could have uncovered how a guilty plea would have affected his client's immigration status. According to the majority, the terms of the relevant immigration statute were succinct, clear, and explicit in setting out that deportation would be automatic upon Padilla's guilty plea. In contrast, the majority notes that when deportation consequences are unclear or uncertain, a practitioner need only advise that pending criminal charges may carry a risk of adverse immigration consequences.

Applying the traditional *Strickland* analysis to Padilla's case, the majority held that trial counsel's total failure to advise his client that a guilty plea would result in deportation fell below prevailing professional norms. Thus, an attorney who tells his client he doesn't have to worry about deportation when the law clearly says that he does will render deficient representation. But if there's any ambiguity in the statutes authorizing deportation, an attorney who merely conveyed that a guilty plea carries a risk of possible deportation will have rendered constitutionally sufficient representation. The court then remanded the case to the lower court to determine if trial counsel's deficient performance prejudiced Padilla.

Concurrence

Justice Alito, along with Chief Justice Roberts, concurred in the judgment because Padilla's attorney had not just failed to advise his client, but he had also affirmatively misrepresented the deportation consequences of his client's plea. Indeed, the concurrence did not agree with the majority's position that an attorney renders constitutionally deficient performance by failing to affirmatively explain the immigration consequences of a guilty plea to his client. The concurring opinion would have simply required defense counsel to refrain from unreasonably providing incorrect advice and referring clients to immigration attorneys for specific advice.

Justice Alito also criticized the majority for abandoning the longstanding and unanimous position that defense counsel generally need advise a client about only direct consequences of a criminal conviction. There are a wide variety of collateral consequences beyond removal, such as civil commitment, civil forfeiture, disenfranchisement, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and the lost of business or professional licenses. The Sixth Amendment, according to the concurrence, had never before required a criminal defense attorney to advise clients about such matters, and it shouldn't now.

Finally, the concurrence argued that discovering whether a guilty plea will render an alien removable will often be quite complex, and keying the test for deficient performance on whether the law on removal is succinct and straightforward is more problematic than the majority acknowledged. First, attorneys who are not well versed in immigration

law will have a difficult time being sure a statutory provision properly applies in a particular case. Second, an attorney who advises his client about only one possible consequence, such as removal, could actually mislead his client by failing to explain additional, serious consequences. Third, the majority's rigid constitutional rule could head off legislative action that could be more narrowly tailored to address concerns about informed plea-bargaining. Fourth, the holding casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

What about Article 26.13(a)(4)?

While *Padilla* is really an ineffective assistance case rather than an involuntary plea case, the required statutory admonishments so helpful in ensuring a voluntary plea should also make it difficult for a defendant to show prejudice from his attorney's lack of advice. In Texas, the trial court is required to admonish a defendant that "a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law."[4] If the trial court does not admonish a defendant about these possible consequences before the defendant pleads guilty, that plea is subject to reversal. This was so even before *Padilla*.[5] After *Padilla*, both the trial court *and* the defense attorney have a duty to advise a pleading defendant. Now, a defense attorney *must* advise his client that a plea *will* result in deportation if it's clear and unambiguous that such deportation is automatic upon the plea of guilty. However, if the law is not clear or explicit, defense counsel merely has to inform his client that he *may* be subject to removal. The admonishments in article 26.13(a)(4) should cover circumstances where the likelihood of deportation is unclear and make it very difficult to show that an attorney's failure to advise his client resulted in prejudice in situations where immigration statutes don't clearly and explicitly require removal.

Of course, trying to figure out whether a court will ultimately determine that an immigration law clearly applies to a particular situation may be a little like trying to hit a bullet with a smaller bullet while wearing a blindfold riding a horse.[6] If Justice Alito's concurrence is any guide, conflicting authorities about whether a state offense rises to the level of an "aggravated felony" or "crime involving moral turpitude" should demonstrate sufficient ambiguity for the trial court's admonishment to adequately inform a defendant of the collateral consequences of his guilty plea. Similarly, a defendant whose citizenship is "derivative" or who was placed on deferred may not be an alien subject to removal for a "conviction," and courts should be willing to forgive less detailed advice from attorneys in such circumstances. Hopefully this will be the case in most circumstances given that every justice on the Supreme Court acknowledges that immigration law is so complex that it is a legal specialty of its own.

But some misdemeanors could open up a defendant to removal, and article 26.13(a)(4) applies only to felonies, leaving trial courts with no constitutional or statutory duty to admonish defendants that their guilty plea may result in deportation.[7] For example, a conviction for a Class A misdemeanor such domestic violence assault can subject a defendant to deportation.[8] While the Court of Criminal Appeals notes that it is "better practice" for trial courts to admonish misdemeanor defendants about the immigration consequences of their plea, they currently are not required to do so. In those circumstances, it's all on the defense attorney. If the trial court chooses not to give such admonishments, it may be easier for a misdemeanor defendant to demonstrate prejudice from his attorney's lack of deportation advice. Consequently, prosecutors would be well advised to either urge trial courts to admonish a misdemeanor defendant on deportation consequences or get some indication from defense counsel (on the record if possible) that he has advised his client of the possibility that his guilty plea could result in deportation.

And beyond whether the trial court informs a defendant that he *may* be deported, *Padilla* imposes a duty on trial counsel to tell a defendant that his guilty plea *will* result in deportation when it is clear and easily ascertainable that it will. While this requirement seems obvious and simple enough, it raises the question of whether the trial court's admonishments that a guilty plea *may* result in deportation is a strong enough admonishment to overcome any

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deficiencies in the advice given (or not given) by trial counsel when deportation is certain. Arguably the trial court's admonishment that a defendant may be deported as a result of his guilty plea in the absence of affirmative advice to the contrary from his attorney would be enough to render a defendant's plea knowing and voluntary, but that issue will have to be litigated before practitioners can be sure.

Fortunately, *Padilla* may provide some guidance in this regard. The majority noted that Padilla's trial counsel could have determined that his plea made him eligible for deportation "simply by reading the text of the statute." It seems that getting some recitation on the record that trial counsel has read 8 U.S.C.A. §1227 to determine whether a guilty plea will result in deportation is a very quick way to make *Padilla* factually distinguishable. Of course the question of whether simply reading the statute and advising a client according to that statute amounts to a bare minimum of competent representation will have to be litigated in the future. Still, it's a place to start.[9]

What about sex offender registration?

Interestingly enough, *Padilla* may not represent a significant break from our current sex offender admonishment realities. Trial courts are currently required to advise defendants that they will be required to register as a sex offender when they plead guilty to certain crimes.[10] Additionally, in *Mitschke v. State*, the Court of Criminal Appeals has already held that sex offender registration is a direct consequence, rather than a collateral one, of a guilty plea, so prosecutors could not have argued that distinction even if *Padilla* had recognized the distinction as valid.[11] Moreover, the court has held that the trial court's failure to advise a defendant about the possibility of registering as a sex offender does not render a plea involuntary, absent a showing of harm, because sex offender registration is not a "penalty" due to its remedial and civil nature.[12] In contrast to *Mitschke*, the Supreme Court in *Padilla* regarded deportation as a "penalty" even though it is not criminal in the strictest sense. Nothing in *Padilla* seems to undermine the Court of Criminal Appeals' current take on sex offender registration, namely that the trial court's failure to admonish won't render a plea involuntary unless there's some showing that a substantial right is affected.[13]

Where will it stop?

Both Justice Alito's concurrence and Justice Scalia's dissent noted that the majority appeared to abandon the distinction between a plea's direct and collateral consequences. As mentioned above, Justice Alito lists a variety of consequences to a guilty plea that could be regarded as collateral. Justice Scalia notes that the only thing limiting that list is judicial caprice and that practitioners can expect years of elaboration upon these new issues in the lower courts. Prosecutors, defense attorneys, and trial courts can hardly be criticized for wondering where this will end.

Unfortunately, the majority opinion sends some mixed messages in this regard. On the one hand, Justice Stevens broadly proclaims that the court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." That may be true, but pretty much every other court has. Indeed, the Court of Criminal Appeals has held that the ignorance of a collateral consequence does not render a plea involuntary.[14] Courts of appeals have held that trial counsel does not render ineffective assistance of counsel for failing to advise his client of the deportation consequences of his plea because deportation is a collateral consequence.[15] Obviously cases that base their holdings upon the premise that deportation is not a collateral consequence must be re-examined in light of *Padilla* to see if they are still good law.

But even after this sweeping declaration that there is no distinction between direct and collateral consequences, the majority indicates that it is not deciding whether the distinction between direct and collateral consequences is even appropriate. Deportation consequences can't be categorized as either direct or collateral consequences because of their close connection to the criminal process.[16] While this opinion certainly invites creative litigation in the future to determine just which consequences are so "closely connected to the criminal process" that a defense attorney must advise his client about them, it also highlights the attempts by the majority to render a holding limited to the issue of deportation consequences. Prosecu-

tors can credibly argue against a reading that expands the case's holding beyond the context of attorney advice about mandatory removal due to a guilty plea.

As for what makes something "closely connected," the majority provides little guidance other than an earnest desire that non-citizen defendants be informed that they might be deported. The court did note the severity and the automatic nature of the penalty as well as a long history of deportation consequences being enmeshed with criminal convictions. But are these factors in a test? What makes a result "automatic?" What makes an otherwise collateral consequence "enmeshed" with a criminal conviction? For example, a conviction for abandoning or endangering a child is a ground for termination of parental rights, but the ground must still be proven by clear and convincing evidence,[17] and there must also be a finding that termination is in the child's best interest.[18] It may be a severe penalty from the perspective of the parent-defendant, but what about from the child's point of view? And does the procedure-heavy nature of termination proceedings mean that the result isn't "automatic" in the same way that deportation is? Does the history of family law suggest that termination of parental rights proceedings are "enmeshed" with the criminal conviction? Such questions could be asked of any consequence beyond those relating to the sentence itself.[19] That is, of course, if courts interpret *Padilla* as broadly announcing a new test to replace the traditional direct/collateral consequences distinction rather than about mere deportation. Prosecutors have a credible argument that *Padilla* is limited to advice regarding deportation consequences. Unfortunately, time and litigation are necessary to vindicate that position.

Conclusion

Padilla v. Kentucky has imposed upon defense attorneys a massive duty to properly advise their clients of the possible deportation consequences attendant to a guilty plea. While trial court admonishments may help ease that burden and make a showing of prejudice harder, many unanswered questions remain about exactly how much advice a defense attorney must give regarding deportation. Making sure that defense counsel has at least looked at the list of deportable offenses under 8 U.S.C.A. §1227 provides a good starting point that quickly makes *Padilla* distinguishable, but time will tell if it is sufficient to ensure a plea is knowing and voluntary. One thing is for sure, defense attorneys don't have to advise their clients about alternative realities. At least not yet. ❇

Endnotes

1 www.foxnews.com/scitech/2010/04/05/freaky-physics-proves-parallel-universes/

2 *Mitschke v. State*, 129 S.W.3d 130 (Tex. Crim. App. 2004)/

3 *Padilla v. Kentucky*, ___ S.Ct. ___, 2010 WL 1222274 (March 31, 2010)/

4 Tex. Code Crim. Proc. Ann., art. 26.13(a)(4) (Vernon 2003)/

5 *Vannortrick v. State*, 227 S.W.3d 706 (Tex. Crim. App. 2007)/

6 *Star Trek* (Paramount 2009).

7 *State v. Jimenez*, 987 S.W.2d 886 (Tex. Crim. App. 1999). While the Court of Criminal Appeals did note that there is no constitutional requirement for judicial admonishment in misdemeanor cases, the Court also expressed its opinion that admonishing felony and misdemeanor defendants on the immigration consequences of a guilty plea is clearly the better practice. See also *Meraz v. State*, 950 S.W.2d 739 (Tex. App.—El Paso 1997, no pet.) (noting that "most judges follow the commendable practice of admonishing defendants in misdemeanor cases.").

8 8 U.S.C.A. §1227(a)(2)(E)(i) (West 2008). Of course, I'm not an immigration lawyer, I'm just reading the statute, so take what I say with a grain of salt.

9 As I write this article I am shivering because my office is so cold. This has nothing to do with the article. I just wanted to let you know.

10 Tex. Code Crim. Proc. Ann., art. 26.13 (a)(5) (Vernon 2003).

11 *Anderson v. State*,182 S.W.3d 914, 918 (Tex. Crim. App. 2006); *Mitschke v. State*, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004).

12 *Mitschke v. State*, 129 S.W.3d 130, 136 (Tex. Crim. App. 2004). The Court of Criminal Appeals based this holding upon a United States Supreme Court case that held sex offender registration is remedial or civil in nature. *Smith v. Doe*, 538 U.S. 84, 96, 123 S.Ct. 1140, 1149 (2003). Note Justice Kennedy wrote the majority opinion.

13 The Court of Criminal Appeals has held, albeit in an unpublished opinion, that misadvising a client about possible termination of sex offender registration amounted to ineffective assistance of counsel. *Ex parte Covey*, 2010 WL 1253224 (Tex. Crim. App. March 31, 2010). However, this holding deals with affirmatively wrong advice and is otherwise consistent with *Padilla*. Thus, *Padilla* would not have changed the way we already evaluate the issues in *Covey*.

14 *Jimenez*, 987 S.W.2d at 888; *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (listing different collateral consequences of a guilty plea).

15 See e.g. *Perez v. State*, 31 S.W.3d 365, 367 (Tex. App.—San Antonio 2000, no pet.); *Hernandez v. State*, 986 S.W.2d 817, 821 (Tex. App.—Austin 1999, pet. ref'd).

16 One could argue that the difference between a "close connection" and a "direct consequence" is a largely semantic one. Labeling deportation consequences as "closely connected" has the same practical effect as labeling it a "direct consequence."

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17 Tex. Fam. Code Ann. §161.001 (Vernon 2003).

18 *Id.*

19 In case you were wondering, the Fourteenth Court of Appeals has previously addressed whether a trial attorney renders ineffective assistance of counsel when he fails to advise of possible termination of parental rights. *Talbott v. State*, 93 S.W.3d 521 (Tex. App.—Houston [14th Dist.] 2002, no pet.). As you'd expect, the court of appeals held that trial counsel was not ineffective because he has no duty to advise his client of collateral consequences of his plea.

News Worthy

Free website now available for TDCJ inmate searches

Those who read our User Forum (http://tdcaa.infopop.net/2/ OpenTopic) know that the *Texas Tribune* (www.texastribune.org) has created a data application containing records of every TDCJ facility and the inmates inside them, including names, crimes, sentences, and more (current as of February 12, 2010). The searchable application contains charts and graphs that break down inmates by ethnicity, gender, age, and other variables.

Users can see visualizations of the average sentence lengths statewide and in specific prisons, along with dedicated pages for each prison that contain maps, satellite photos, and details about the inmate population. You can also drill down into inmates' personal pages to learn about their convictions, sentences, hometowns—even their height, weight, and gender. (Some of this information is available on TDCJ's official website (http://168.51.178.33/webapp/TDCJ/index2.htm), but that system is slow and sometimes unreliable).

Feedback to the folks at the *Texas Tribune* can be sent by means of a comment page connected to the application. For more, start at www.texastribune.org/stories/2010/apr/29/texas-prison-inmate-locator/. ❊

DWI Corner

Keeping children safe from intoxicated drivers

As prosecutors and prosecutor support staff, we are quick to respond to a child in need, from prosecuting child abuse and assault, to trying family violence cases, to spending extra time to get kids ready to take the stand. With all we do, it can be easy to miss opportunities to keep children from harm. That is where the Child Protective Services Division (CPS) of the Department of Family and Protective Services (DFPS) comes in. With just a little information and notice, authorities there will look into situations of neglect and harm in cases of DWI with a child passenger.[1]

By Seth Howards
TDCAA Research Attorney in Austin

There seems to be a mix of standards and methods across the state for how we are handling this weapon in our arsenal. When there is a car wreck or injury, CPS is generally notified, but during a traffic stop for DWI where a child is a passenger, reports to CPS are sporadic. After speaking with several law enforcement agencies, their DWI task forces, prosecutors across the state, and CPS officials, I have found that the overwhelming majority agree that this is a crime of which CPS should be notified.

Yet just as overwhelmingly, no one could say that was actually happening. While some offices may be doing a better job of it, let's take a look at how we can improve and get on the same page.

Best practice

First and foremost, the best thing to do is report the situation to CPS. CPS would prefer that prosecutors report it if we are unsure if peace officers reported it. It is better to have duplicates than to miss an opportunity. In fact, CPS takes the stance that prosecutors are *obligated* to report this crime under the Family Code,[2] which requires that professionals who believe that abuse or neglect has occurred *shall* immediately make a report. Prosecutors know how a DWI can turn into intoxication manslaughter with ease, so it is not a stretch to see that driving while intoxicated with a child in the car is a form of neglect.[3] And though some might argue that this statute does not apply to prosecutors as we rarely have direct contact with child passengers, it is clear that CPS would prefer that we report it. In fact, that same section of the Family Code makes it clear that attorney privilege does not shelter attorneys, prosecutors or defense, from the duty to report abuse or neglect to CPS.

When we asked various offices if they reported these crimes to CPS, the most common reply was that they did not because they expected

that office X was. Office X usually responded with, "We thought office Y was reporting them." Work with your local agencies to design a structure so that these cases will be reported. Currently it is possible for law enforcement agencies to make sure certain reports (mostly commonly sexual assaults) are flagged for follow-up; including a simple code on the form triggers that follow up. Adding a step at intake to flag these reports would help ensure that a call to CPS is made. (See the sidebar for what information CPS needs when reporting this crime.) If all the information is not available, CPS will take a partial report and continue from there. Reports can be made online at www.txabusehotline.org or by phone at 800/877-5300. (This number is designated for law enforcement and will move the call to the front of the queue.)

Reporting these crimes does not mean that every DWI with a child passenger is going to result in CPS swooping in and removing children from homes. What is does mean is that taking these steps will allow CPS to fulfill its role in ensuring children's safety. Not surprisingly, many of our DWI with a child passenger offenders may have open files at CPS, and it is frightening to realize these files might not get this necessary addition. Additionally, a DWI arrest may point out causative issues of alcohol and drug use that may contribute to existing child abuse or endangerment. Often the child may be subjected to dangerous and neglectful situations long before we can address them in sentencing, and CPS can bridge this gap. Once this line of communication is opened, we can also expect the information we might get from CPS to be helpful with our own sentencing hearings, presentence investigations, and plea bargaining.

With a few simple steps, we can ensure that children are getting one more chance for help before a plain ol' DWI leads to an intoxication assault or manslaughter. ❇

Info for CPS reports of abuse or neglect

1. About the child(ren) at risk:
   - name, age, and/or DOB
   - address or some other locating information (directions to the home if the address is rural or a P.O. Box)
   - school/daycare name and address
   - siblings' names, ages, etc.
2. About the parents and other household members:
   - names and ages
   - telephone numbers and address or some other locating information (directions to the home, if the address is rural or a P.O. Box)
   - place of employment and telephone number
   - relationship to child(ren)
   - involvement in the abuse/neglect
3. Nature of harm or risk:
   - description of child's condition and/or injury.
   - how the harm occurred or why the child appears to be at risk.
   - what explanation was provided by child or parent? Describe his/her behaviors and attitudes (does parent seem nervous? Angry? Is child fearful?).
   - when and where the incident occurred.
4. Collateral contacts who may have additional information:
   - names
   - contact/locating information

Endnotes

1 Tex. Penal Code §49.045.

2 §261.101.

3 "Neglect" includes:

(A) the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child, and the demonstration of an intent not to return by a parent, guardian, or managing or possessory conservator of the child;

(B) the following acts or omissions by a person:

(i) placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child … (Tex. Fam. Code §261.101).

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NEWSWORTHY

Prosecutors' input needed for two online studies

Jury selection decision making study

Researchers at John Jay College of Criminal Justice are conducting an online study on jury selection funded by the National Science Foundation. The study takes approximately 20 minutes to complete and pays $35. We are recruiting attorney participants from all over the country.

This study is supervised by Dr. Margaret Bull Kovera, and results will be disseminated in peer-reviewed psycholegal journals, such as Law and Human Behavior, and results will be published as aggregate data; attorneys' names will never be linked to their data.

Attorneys who participate in the study will be asked to read a short trial summary and a potential juror profile, then asked to answer some brief questions about the potential juror. To participate, attorneys must have conducted at least one voir dire. Interested attorneys can contact the researcher for this study, Julia Kennard, at juryselection@gmail.com.

For more information on Dr. Kovera, you can visit her website at: http://web.jjay.cuny.edu/~mkovera.

Plea bargaining research study

Researchers at the John Jay College of Criminal Justice are conducting a study investigating the factors that influence attorneys' plea bargaining decisions. The study is conducted online and takes approximately 20 minutes to complete. Participants will receive $30 for their participation, payable by check or PayPal.

Participants will be asked to assume the role of an attorney in a robbery case, will receive case information (police reports and witness statements), and will be asked questions about how they would proceed with plea negotiations. The results of this study will be disseminated in academic journals and in presentations at academic conferences.

If you are interested in participating, please contact Caroline Crocker at psychlaw.research@gmail.com to receive a link to the online study and a personal identification number. This study is funded by a grant from the National Science Foundation and is supervised by Dr. Steven Penrod (http://web.jjay.cuny.edu/~spenrod/). If you have questions about the research, you may reach Caroline Crocker by phone at 212/484-1351. ❇