THE TEXAS PROSECUTOR

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

Coming to a courtroom near you: sexually violent predators

Until recently, the Special Prosecution Unit in Huntsville tried all civil commitment proceedings for sexually violent predators—but not anymore. A new law sends these trials to the county where the predator was most recently convicted of a sexually violent offense. Here's how to try one of these tricky civil cases.

By Erin K. Faseler
Civil Chief of the Special Prosecution Unit in Walker County

Imagine that it's 8 o'clock Monday morning. Sitting on your desk is a stack of about a hundred documents with a cover letter that reads, "Pursuant to Texas Health & Safety Code §841.023(b), the Texas Department of Criminal Justice has determined that James Rubio[1] suffers from a behavioral abnormality that predisposes him to commit a sexually violent offense." The letter also says that if you wish to proceed with the case, a petition must be filed within 90 days from the day you received it.

In silent response, you either head into the first stage of grief (denial) by shoving the papers to the side of your desk so you can prepare for that day's docket, or you panic at the prospect of trying a civil case with (gasp!) full civil discovery on a subject you know very little about but that has heavy consequences for your community.

Now imagine this scenario is reality—because it is. If you haven't already received such a packet on your desk, you just might see one soon. That's because on June 17, 2015, Governor Greg Abbott signed into law Senate Bill 746, which significantly altered the way sexually violent predator (SVP) civil commitment proceedings are initiated and pursued in Texas. Most directly impactful for Texas prosecutors is the new definition of "attorney representing the State" in an SVP civil commitment proceeding, which is now defined as "a district attorney, criminal district attorney, or county attorney with felony jurisdiction."[2] Under this new law, when the Texas Department of Criminal Justice (TDCJ) refers these cases for civil commitment consideration, it will send them directly to "the attorney representing the state for the county in which the person was most recently convicted of a sexually violent offense,"[3] rather than exclusively to the Special Prosecution Unit (SPU)—though there is a provision that allows a local prosecutor to request legal, financial, and technical assistance for a civil commitment proceeding from the SPU.[4]

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Schultz v. The State Bar

By Rob Keppke
TDCAA Executive Director in Austin

In the last edition of *The Texas Prosecutor* journal, you read Melissa Hervey's cover story entitled, "Just disclose it." In it, Melissa, an assistant district attorney in Harris County, does a great job of walking us through the *Schultz v. Commission for Lawyer Discipline of the State Bar of Texas* opinion, a must-read for every Texas prosecutor.

In this edition of the journal, we offer additional thoughts on the implications of the *Schultz* opinion for Texas prosecutors (see The President's Column on page 7 and the Q&A on page 40) and hope that you find the insights helpful.

I am reminded of something one of our most experienced district attorneys, **Jaime Esparza**, the district attorney in El Paso County, once said when he described the job of a prosecutor: "Our job is as simple as right and wrong—and also that complicated." We go into prosecution with good intentions and a dedication to justice, but it can get complicated. In the big picture, our profession continues to demonstrate dedication to ethical conduct and the search for the truth, and with that spirit we will continue to learn and move forward.

I do have one question for Texas prosecutors as we go from here. Would it help if Texas had reciprocal discovery, like virtually every other state and the feds? If the defense bar complains of the non-disclosure of those facts particular to a defense they will raise, such as alibi, would it help prosecutors in discharging our duties under *Brady*, the Michael Morton Act, and Rule 3.09 of the Texas Professional Rules of Disciplinary Conduct to have notice of that defense? Email me with your thoughts at Robert.Kepple@tdcaa.com.

Never give up!

This lesson in tenacity and Criminal Procedure 101 comes to us from Walker County Assistant Criminal District Attorneys **Shanice Newton** and **Christina Lee**, who recently tried a defendant for terroristic threat. The defendant had made a serious threat with a firearm (apparently against some drunk cousins, and it involved pornography on a cell phone … yeah, sounds like a juicy story). When all was said and done the jury foreman announced the verdict: not guilty.

After the verdict was read, the judge asked the prosecutors if they would like to poll the jury. That's not very common, but Newton said yes. When asked if that was the verdict of the individual jurors, Juror No. 6 shocked everyone in the courtroom when he announced, "No!" The judge sent the jury back to continue deliberations, and when jurors sent out a note a couple of hours later, asking for a clean verdict sheet, people were stunned. Yes, the jury had flipped the verdict to guilty!

The moral of the story? When that verdict comes in, don't fear asking the jurors just how stuck they are on "not guilty!"

First civil commitment case outside of MoCo

On September 1, 2015, the duty to seek the civil commitment of sexually violent predators (SVPs) shifted from the Special Prosecution Unit (the SPU, based in Huntsville) and a particular district court in Montgomery County, to local felony prosecutors in the jurisdiction where the predator's most recent conviction for a sexually violent offense occurred. These cases represent a short-term training and staffing challenge for prosecutor offices as we learn how to handle them, as well as a long-term resource problem as we look for funds to pay for the attorneys and expert witnesses.

From what we can tell, offices have been doing a good job of preparing for this new type of civil case, and the Special Prosecution Unit, guided by Executive Director **Jack Choate** (formerly TDCAA's training director) has pulled out all the stops to offer assistance and guidance as the baton is handed off. (In fact, **Erin Faseler**, the Civil Division Chief for the Special Prosecution Unit and an expert in these civil commitment cases, wrote a primer on how to try them in this issue—check it out on the front cover.)

We've also gotten news of the first such commitment case tried locally (at least the first we've heard of): Congratulations go to the **Tarrant County Criminal District Attorney's Office**, which successfully sought the civil commitment of a sexually violent predator who was set to return to Tarrant County on parole without the treatment and supervision the commitment pro-

gram offers. Tarrant County Assistant Criminal District Attorney **Bill Vassar** joined with SPU prosecutor **Marc Gault** to prove that the SVP suffered from a behavioral abnormality that justified his civil commitment. Under the terms of his commitment, this person will go to a treatment facility in Littlefield to begin the program. Congratulations, Bill and Mark, for showing how this hand-off to local prosecutors will work.

Tarrant County's Annual Report

Many of you may have already seen the 2015 Annual Report issued by the Tarrant County Criminal District Attorney's Office (pictured below). If not, you can view it at http://access.tarrantcounty.com/content/main/en/criminal-district-attorney/about-us/newsletters.html. Publishing such a report is really a terrific way to educate the public about what an office does and what the staff accomplished the year before. I particularly like the section that highlights the high-profile prosecutions from 2015, as well as the simple and elegant mission statement on the back cover: "The mission of the Office of the Tarrant County Criminal District Attorney is to enhance public safety through vigorous enforcement of criminal and civil laws in an ethical, honest, and just manner." **Judge Sharen Wilson**, the elected CDA, tells us the report was produced by **Samantha Jordan**, the office's public information officer—a job well done!

Crime and Consequences blog

In the last *Texas Prosecutor*, I wrote about our criminal justice system and even showed some graphics to support my argument that the system is not "broken." Finding those types of resources can be catch-as-catch-can, but there are a couple places we can find them on a regular basis. The first is TDCAA's twitter feed (@TDCAA, run by our Director of Governmental Relations **Shannon Edmonds**). If you do not follow his feed, now is a good time to hop on board.

Another good blog to read is Crime and Consequences at www.crimeandconsequences.com/crimblog. As with most blogs, there is some random stuff that might not interest everybody, but overall it appears to be a consistent source of articles, studies, and information that balances out some of the "end mass incarceration" viewpoints in the general media and advocacy blogs. For instance, something you may not have heard much about yet: the California assistant prosecutors' association view that Prop 47, that state's penalty "realignment" (read: decriminalization) from a couple years, ago, has spurred a huge increase in crime. Take a look here: www.crimeandconsequences.com/crimblog/2016/03/prop-47-a-reckless-experiment .html.

"Well, don't use the camera for *that*."

Many of our police departments are grappling with policies regarding the technology and use of body cameras, and prosecutor offices are dealing with all of the video those cameras produce. It has been interesting to watch various public advocacy and civil rights groups urge the adoption of the technology to document bad police behavior and at the same time argue among themselves about how the cameras will necessarily infringe on citizens' privacy interests.

And now another twist in the saga: Peace officers have come to appreciate the protection cameras can afford when they are accused of misconduct. Does it come as any surprise to a defense attorney, who is trying to question a cop in the hallway of his local courthouse, that the officer's body camera is recording the whole incident? That is just what happened in Florida recently, and you can read all about the screams and howls of the defense bar here: www.star-telegram.com/news/nationworld/national/article68531277.html. But in my view, if you give a cop a camera, he's gonna use it.

TDCAA staff panics

When you read my column on TDCAF News on page 9, you will learn about our ground-breaking initiative to create the Texas Prosecutor Management Institute. This new training curriculum is under development thanks to funding from the Foundation and with the help of **Bob Newhouse**, a Houston-based management specialist who's also a lawyer who once worked in the oilfield industry.

One of the insights I took away from our inaugural management training in early March is that every-

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one brings a different set of skills to an office. If everyone is encouraged to bring his or her own strengths to the table, just about every problem can be solved and every job done right. The manager's duty is to recognize people's strengths, honor them, and let your folks use those strengths for the benefit of the team.

So how can you get to know your team's strengths? Well, we here at TDCAA discovered a bunch of them at the Austin Panic Room. (There's a photo of everyone below.) Billed as "the original escape game experience," the panic room entails being locked in a room with a series of puzzles inside. Solving the puzzles requires the communication and help of your teammates, and the goal is to escape the room within an hour. Our staff is big enough that we split into two teams; one was locked in a "jail" and the other in an "abandoned schoolhouse."

Both groups went through lots of trying and failing—but that was OK. Indeed, each person brought critical skills and work as we moved through the clues. It was tougher than I expected, and I must report failure: Both teams got to the final puzzle but couldn't complete it within the 60-minute limit. (Our guide, Doug, who stayed in touch via closed-circuit cameras and a walkie-talkie, told us that only 30 percent of groups escape in the allotted hour.) But I call it a success for two reasons. First, everyone got to know each other a lot better and learned to rely on each other. Second, as the leader, I realized that I need more management training—if I were a better manager, both teams would have escaped! Well, maybe not, but the exercise did help me appreciate why it is so important that managers put together a team that's empowered to use each individual's strengths for the benefit of the whole.

Diary of a killer

You are a superhero. Did you know that? You take the skills that God gave you and the powers granted you by the Texas Constitution and the laws of our great state, and you use them to protect your friends, family, and community. And make no mistake: Whether you are a civil practitioner, victim assistant, misdemeanor prosecutor, receptionist, felony chief, or investigator, using your powers to protect people is an absolute good. It is just that simple.

And it's also just that necessary, because evil does indeed lurk out there, and sometimes we even get a rare glimpse inside of its mind. Take this chilling diary entry, published in the Austin news and written by a woman who stabbed another woman in a brutal and completely random knife attack:

"So, OK, I'll start with the exciting bit. I stabbed an innocent woman to death earlier today (well yesterday since it's 1 a.m.). … It was absolutely fantastic. Murder gives me a high unlike any other, it feels like this crisp unreality, flashing and sparkling, adrenaline and shock. Fight or flight mode. How do I even go about describing it. The whole thing was unreal. I'm so proud of myself. I stabbed her like 20 times. Maybe more. … She screamed and grabbed at me, saying 'What the [expletive]?! Help! Leave!' For now I should explain why. Other than the fact that I'm a homicidal psychopath. I have a deep hatred towards people right now … yesterday I lost my other gold ring I've worn all my life on a chain around my neck as it was ripped off by a girl I was murdering. Fate is weird."

Reading about this horrific attack chilled my blood. Let's forget

for a moment all the people who might find fault with prosecutors for one thing or another. Prosecutors do a hard job for all the right reasons, and when you meet a person who is capable of committing such atrocities and then writing about them in her diary with such callousness, you must be at your best. We at TDCAA want to do our part to make sure you

News Worthy

Application forms for Investigator awards and scholarship

Updated applications for 2016's PCI certificates, Chuck Dennis Award, Oscar Sherrell Award, and the Investigator Section scholarship are now posted online. Changes have been made to all the applications so please use the new forms (on our website in this issue of the journal), and do not use any old forms you might have. Applications must be postmarked by the deadline date or they will not be accepted. ❇

The President's Column

Schultz eliminates all shades of gray

By Bernard Ammerman
County and District Attorney in Willacy County

The people's representatives in the United States's system of justice should be held to the standards that underscore our beliefs in fairness and equity under the law. As prosecuting attorneys, we work under a mandate that justice be carried out fairly and impartially. This mandate has an inherent two-directional compass—it includes both the accused and the accuser. Thus, as much as counsels, both defense and prosecuting, might tend to lean one way or the other, prosecutors have the higher duty of ensuring an environment of impartiality toward and for all involved. U.S. law, although an adversary system, places a high degree of value on the rights of the accused. The accused is not guilty until proven otherwise. Therefore, all evidence and information relative to a case must be disclosed to opposing parties—without prior analysis of such and without regard for how that potentially exculpatory evidence might negate or otherwise ameliorate our adversary's guilt.

The Board of Disciplinary Appeals' opinion in *Schultz* is that Rule 3.09(d) goes above and beyond *Brady* in that no materiality or intent is required to establish a violation of withholding evidence from opposing parties. Rule 3.09(d) requires a prosecutor in a criminal case to:

- make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and
- in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by the tribunal's protective order.

The gist of the BODA's opinion in the *Schultz* case is that a failure to disclose—for whatever reason—is a failure to comply with Rule 3.04(a); it's also an unlawful obstruction of another party's access to evidence under that rule. Rule 3.04(a) requires that a lawyer shall not:

- unlawfully obstruct another party's access to evidence;
- in anticipation of a dispute unlawfully alter, destroy, or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or
- counsel or assist another person to do any such act.

All of that is good. And fair. And

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Upcoming TDCAA seminars

Evidence Seminar, June 15–17, 2016, at the Intercontinental Dallas, 15201 Dallas Pkwy., in Addison.
Prosecutor Trial Skills Course, July 10–15, 2016, at the Radisson Town Lake, 111 E. Cesar Chavez, in Austin.
Advanced Trial Advocacy Course, August 8–12, 2016, at Baylor School of Law in Waco.
Advanced Criminal & Civil Law Update, September 21–23, 2016, at the Galveston Island Convention Center in Galveston. The host hotel, the San Luis Resort & Spa, is sold out, but TDCAA has contracted with others:
Hotel Galvez & Spa, a Wyndham Grand hotel, 2024 Seawall Blvd. The rate is $99 plus tax for run-of-house rooms. Call 409/765-7721 and identify yourself with TX District & County Attorneys or TDCAA by August 19 to get this rate.
Hilton Galveston Island Resort (next to Convention Center), 5400 Seawall Blvd. Rates are $99 for a single and $149 for a double (plus tax). Call 409/744-5000 and identify yourself with TX District & County Attorneys or TDCAA to get these rates by August 20.
Tremont House, a Wyndham Grand hotel, 2300 Ship's Mechanic Row. Rates are $99 for a single, $129 for a double, and $139 for a triple (plus tax). Call 409/765-7721 and identify yourself with TDCAA by August 26 to get these rates.
Harbor House, 221st Street. Rates are $99 for a single, $129 for a double, and $139 for a triple (plus tax). Call 409/765-7721 and identify yourself with TDCAA by August 26 to get these rates.
The Holiday Inn Resort on the Beach, 5002 Seawall Blvd. Rates are $99 for single and $149 for double occupancy (plus tax). Call 877/410-6667 and identify yourself with TX District & County Attorneys or TDCAA to get these rates by August 20. ❇

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ethical. And in accord with our beliefs and our *modus operandi*. But there is a "but" here: What happens when a trusted co-counsel, investigator, or someone in the office does not live up to our ethical expectations? One cannot always impose moral rectitude on others for whom we are held responsible. The argument is that a person in charge (in this case, the lead prosecutor) should know what is going on at all times. He should be omniscient, in other words—but that is not a human trait. The limitations that make us human can carry serious consequences and equally serious ramifications for lead prosecutors because a failure—of anyone on the State's side—to disclose potentially exculpatory information to the opposing team is a failure on the lead prosecutor's part. It puts your bar license on the line.

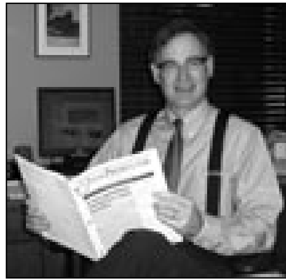
Let's examine the realities of daily routines. Not a day goes by when preparing for trial that a subtle difference does not come up from the victim's account, especially with child sex crimes, from that which is detailed in a police report or child advocacy center's video. What is a prosecutor to do when there is a slight nuance? *Schultz* argues that it seems an "unworkable burden" on a prosecutor to distinguish between what is to be divulged and what is irrelevant to a case; therefore, the burden on the individual prosecutor does seem unreasonable and beyond human capabilities.

But wait. Let's examine Rule 3.09(d) again. As it is, this Rule actually relieves the burden that could otherwise weigh on a prosecutor's mind. Is this or that bit of information of any consequence to the defense—should it be on the "must disclose" list? Is it black, white, or any of those hundreds of gray shades in between? Rule 3.09(d) answers all those questions. It takes out all the gray areas—on all potentially exculpatory factors—having to do with a case. In fact, it does even more: Black and white areas are also erased. The model for all prosecutors is that there should be no thought processes, no questions, no analyses, and no personal opinions on the matter. The law is simplicity itself, in its most extreme form: Disclose. End of discussion.

But is it also the end of conversation? The opinion on the *Schultz* case might have settled the issue of failure to disclose—it is "unlawful." But an equally important question for prosecutors remains unresolved: How are we to deal with the "unworkable burden" of delving into the unconscious minds of team members to ensure 100-percent compliance with the law? ("Omniscience" again comes to mind.) Unfortunately that characteristic doesn't exist among mere mortals. ❇

In memory of Dan Boulware, a chal-

I hope that you will all take the time to read **Tom Krampitz**'s tribute to an Association and Foundation great, **Dan Boulware**. (It's on page 10.) I met Dan when I came to TDCAA and was thrown into my first Legislative Session in 1991. There were big issues in play and many perils for prosecutors that year, but I was confident that we would come out OK because Dan, TDCAA's president that year, had taken the lead for prosecutors at the Capitol. He was The Guy that session, and to this day we as a profession benefit from his leadership all that time ago. And when it came time to create the Foundation, Dan stepped up, took the lead, and got us started.

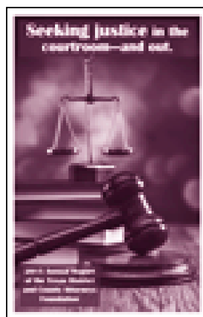


By Rob Kepple
TDCAA Executive Director in Austin

Dan was instrumental in the creation of the Texas Prosecutors Society. Having been a past Chair of the Texas Bar Foundation, he understood what Tom talks about: planting trees for the sake of the shade which you will not enjoy. In that spirit, Tom Krampitz has donated $250 to the Texas Prosecutors Society endowment fund in memory of Dan, and he challenges all who wish to honor Dan with a matching donation to reach $2,500. I'm already in, and I hope you will be too.

Annual Report available

The Foundation's Annual Report for 2015 was sent to donors a few weeks ago. (If you'd like one, email the editor at sarah.wolf @tdcaa.com to request a copy, or go online at www.tdcaa.com/publications, and look for this issue of the journal to find a PDF version of the report.) It explains how the Foundation has been supporting TDCAA's training efforts over the past year, thanks our donors and corporate sponsors, and goes into detail about what to expect in the year ahead.



Management training in the development phase

In March, TDCAA completed its first management retreat in Fredericksburg. This retreat, a three-day event which included presentations, discussions, and planning exercises, was facilitated by **Bob Newhouse**, a management consultant in Houston who understands and appreciates the challenges prosecutor offices face in guiding attorneys into the world of solid leadership and management. Bob is a lawyer, but he cut his teeth in management in the oil field business, where he experienced challenges in management similar to what prosecutors face—after all, moving an oilfield engineer into a supervisory position can be a lot like promoting a good trial lawyer into that same spot. (Just because you excel at the former doesn't mean you know how to do the latter.)

In the next few months, the first phase of implementing our management institute will be completed. At the end of this phase, we will have interviewed and surveyed prosecutors from all around the state to identify the core training that will serve as the foundation for this curriculum. In the next phase (during the summer), we will design the curriculum and identify how best to deliver sustained training to prosecutors all over Texas. By the end of the year we intend to launch some pilot training for testing and feedback purposes. Thanks to **Devon Anderson**, District Attorney in Harris County, for allowing us to use her office as a pilot program and for giving us access to her staff for development and feedback. The current plan has us on schedule to launch a training course in 2017.

This is great stuff. I want to thank the Foundation Board for its vision and support, without which this effort would not be possible. If you want more details or want to get involved, just give me a call at 512/474-2436. I would love to talk with you about it. ❇

TDCAF News

Recent gifts to the Foundation*

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* gifts received between February 6 and April 8, 2016 ❇

Newsworthy

In memory of Dan Mahanay Boulware: 1945–2016

By Tom Krampitz
Former Executive Director of TDCAA

"A society grows great when men plant trees whose shade they know they shall never sit in."

Sitting in the sanctuary waiting for the services to begin, I was reminded of that Greek proverb. I've always been drawn to the imagery of that saying and have thought of times when I've enjoyed the shade provided by the stewardship of those who have come before me. Few young Texas prosecutors may recognize the name Dan Boulware, but have no doubt: They, along with the rest of us, are sitting in the shade of some of Dan's selfless husbandry.

Dan Boulware

And so it was on a Saturday in mid-March, past an overflow crowd of family and friends gathered at the First United Methodist Church in Cleburne to celebrate the life and many accomplishments of Dan Boulware. Dan's service to his community and his profession was as tireless as it was without the need for acknowledgment or personal credit. No finer example of "servant leader" will you ever find.

Dan began his prosecutor career as Johnson County Attorney, serving from 1976 to 1984. He was then elected District Attorney for the 18th Judicial District, covering Johnson and Somervell Counties, where he served two terms.

Dan's quiet brand of leadership was on display during his tenure as President of the Texas District and County Attorneys Association in 1991. His professional excellence was recognized when he was selected the State Bar Prosecutor of the Year in 1992. He was a stalwart in his church community and served for many years on the board of trustees of his beloved alma mater, Texas Wesleyan University.

Perhaps Dan's greatest skill was on display as a negotiator. He was always able to see and appreciate all sides of an issue, and his lack of personal hubris bestowed great credibility. I was able to see his magic at work on countless occasions during often-tense legislative negotiations, and time and again Dan found a way to achieve common ground.

In the prosecution community, the hardiest tree of Dan's planting will no doubt be through his founding efforts on behalf of the Texas District and County Attorneys Foundation. Countless generations of prosecutors to come will benefit from his work.

Thanks, Dan. You will be missed, but as we enjoy this shade you've supplied, you'll always be remembered. ❇

Revisiting the perils of closing a courtroom to the public

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

In recent years, both the Court of Criminal Appeals and the Supreme Court of the United States have reminded us that as a rule, courtrooms should remain open to the public. Only a very compelling reason and exploration of all the alternatives will support closing it. But in a recent opinion on rehearing in *Cameron v. State*,[1] the Court of Criminal Appeals has shown a glimmer of hope by clarifying the burden of proof in such cases.

The legal background

In 2010, the Supreme Court reasserted years of caselaw and reminded parties that courtrooms were intended to be open to the public. In *Presley v. Georgia*,[2] the trial court excluded the defendant's uncle during voir dire, noting that the courtroom did not have space for the public to sit separately during voir dire and the judge did not want the public sitting intermixed with the jury panel. The Supreme Court reaffirmed that the right to an open trial includes voir dire and found that the trial court must show that alternatives were considered so that closing the courtroom was the only option. Trial courts must take "every reasonable alternative" to closing the courtroom.

Then in back-to-back months in 2012, the Court of Criminal Appeals issued two opinions reminding parties that courtrooms must be open to the public unless compelling reasons are presented on the record for the closure. In *Steadman v. State*,[3] the trial court refused to allow four members of the defendant's family to sit in the jury box during voir dire, citing "security concerns" and saying that it would be an "emotionally charged" trial. It also noted that there was a central jury room available, but it would be inconvenient to use for voir dire and also presented security concerns. The CCA held that the reasons provided were too vague and the trial court did not adequately consider reasonable alternatives.

A month later, in *Lilly v. State*,[4] the defendant was an inmate and was tried on a new charge at a courtroom inside the prison. He complained that restrictive security measures for entering the prison amounted to a *de facto* closure of the courtroom. Even though Lilly could not show that any member of the public was actually dissuaded from attending, the CCA found that the test is instead whether the judge took every reasonable effort to accommodate public attendance. Because the security measures were so restrictive, it did not meet this burden.

The original *Cameron* opinion

Vanessa Cameron was on trial for murder. During voir dire, the bailiff ushered out Cameron's friends and family so the panel could be seated. When Cameron complained, the judge noted that every single seat in the courtroom was full from the jury panel and the lawyers and asked where Cameron suggested they be seated. The judge suggested having the visitors stand in the hallway, but the record did not show whether they actually did so. The judge explained on the record the crowded conditions of the courtroom, noted that it was a murder trial, that there were "security concerns," and that he did not want family members seated right next to jurors out of concern it would affect their honesty during voir dire.

In October 2014, the Court found that the trial was improperly closed.[5] The right to a public trial helps hold judges, prosecutors, and jurors accountable to the public. Violation of this right is structural error and requires reversal even without a showing of harm. Before a judge may exclude the public from a trial, it must make specific findings showing an overriding interest that closure is essential to preserve higher values *and* the closure is narrowly tailored to protect that value. Mere crowded conditions are not enough—moving to a larger space or splitting the panel

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should be tried first. Other than crowded conditions, the judge listed only two factors: "security concerns" and worry that the defendant's relatives might affect the jurors' truthfulness. But "security concerns" alone is too vague to support closure, and the latter is the very purpose of a public trial. Because the public was excluded without sufficient findings, the case was reversed and remanded.

Opinion on rehearing

In March 2016, the CCA took up the case again and issued a new opinion on rehearing. The Court did not revisit the trial judge's rationale for closing the courtroom. Instead, it considered the question of whose burden it was to prove the courtroom was improperly closed. The Court found that the burden of showing that the courtroom was actually closed belongs to the defendant. When considering a closed courtroom complaint, therefore, courts must first consider whether the defendant proved that the courtroom was actually closed. Only after that is satisfied does the court consider whether the trial court provided adequate reasons to justify the closure.

The next question the CCA addressed was what level of deference the court should show. Ultimately, it concluded that the question of whether a courtroom was closed is a mixed question of fact and law. It is more than a pure legal question that receives *de novo* review with no deference at all to the trial court. But it does not involve a question of credibility, which would demand almost total deference. Thus, the appellate court must give deference to the trial court's fact-findings regarding the closure of the courtroom, unless those findings are unreasonable in light of the record.

What was the resolution? The CCA did not actually determine whether Cameron satisfied her burden in this case. Instead, it remanded the case to the lower court of appeals to consider the issue. In this case, the question of whether the courtroom was actually closed depends on some vague wording in the record. The trial court asked the bailiff to escort Cameron's family members out while the jury was seated, but as Presiding Judge Keller noted in her dissent on the original opinion, the record does not show that they were not allowed back in after the panel was seated. Also, the trial court repeatedly suggested alternatives, such as allowing family members to stand in the hallway, and asked the defense attorney whether they would be acceptable, but the defense attorney only asked for a ruling instead of responding. The court of appeals may decide that the record implicitly shows the closure of the courtroom, or it may find that the defendant did not provide clear proof that the courtroom was closed. But only *after* that determination is made does the appellate court go on to consider whether the trial court considered reasonable alternatives.

What does this mean?

Ultimately, courtrooms are meant to be open to the public, and this opinion does not change that. Prosecutors should still take every care not to exclude people from a courtroom and be certain that all alternatives are explored on the record before doing so. But *Cameron* does give hope to those cases that come up where the issue was not fully explored at trial and the record may not show much at all, including whether the courtroom was even actually closed. By clarifying that the defense still bears the burden of proof, the Court of Criminal Appeals has made it harder for a defendant to slip an undeveloped issue through and claim a victory on appeal. ❇

Endnotes

1 *Cameron v. State*, No. PD-1427-13, 2016 WL 859173, at *1 (Tex. Crim. App. Mar. 2, 2016) (op. on reh'g).

2 *Presley v. Georgia*, 588 U.S. 209 (2010).

3 *Steadman v. State*, 360 S.W.3d 499 (Tex. Crim. App. 2012).

4 *Lilly v. State*, 365 S.W.3d 321 (Tex. Crim. App. 2012).

5 *Cameron v. State*, No. PD-1427-13, 2014 WL 4996290, at *1 (Tex. Crim. App. Oct. 8, 2014) (reh'g granted Jan. 28, 2015).

A roundup of notable quotables

"We don't want anything sinister to go on with it either. It's just made for mainstream America, not criminal enterprise."

—Kirk Kjellberg, CEO of Ideal Conceal, a Minnesota start-up company that sells a double-barrel .380-caliber handgun that, when folded, looks like a cell phone. Kjellberg was inspired to create it when he was greeted with stares and a scared remark from a little boy while walking to a restaurant's bathroom with his lawfully permitted gun. (www.cbs19.tv/story/31602471/company-invents-gun-that-looks-like-a-cell-phone)

"Well, I do love shish kebab, but I don't think I can accept gifts just for doing my job."

—Manhattan U.S. Attorney Preet Bharara on Twitter to his followers, many of whom are Turks offering the New York prosecutor thank-you gifts, such as shish kebab and carpets, for pursuing "American justice" against Iranian-Turkish Reza Zarrab. Zarrab is a well-known figure in Turkey because of his involvement and arrest in a complicated, high-level Turkish government corruption case in 2013. Though those charges were dropped, he and two others are now charged in the U.S. with conspiring to process hundreds of millions of dollars in financial transactions for Iranian businesses or Iran's government—transactions that are banned by U.S. and international sanctions. (www.beaumontenterprise.com/news/us/article/ US-prosecutor-is-in-the-spotlight-in-Turkey-7209858.php)

"It's not so much that losers toke weed. It's that toking a lot of weed over several years turns someone into a loser."

—George Skelton, political reporter for the *Los Angeles Times*, in a March column about a recent University of California–Davis study. That study showed that persistent pot users experience "downward social mobility and more financial problems" than those who don't smoke regularly. (www.latimes.com/politics/la-pol-sac-skelton-marijuana-20160331-story.html)

"I'm sorry it happened, but I'm not going to sit here and boo-hoo about it."

—Texas Death Row inmate Coy Wesbrook, who was executed in March for the 1997 murders of five people, including his ex-wife, to an Associated Press reporter a few days before his execution. (www.chron.com/news/texas/article/Texas-inmate-set-to-die-for-1997-rampage-where-5-6878855.php)

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone

"The great joy of being a prosecutor is that you don't take whatever case walks in the door. You evaluate the case; you make your best judgment; you only go forward if you believe that the defendant is guilty. You may well be wrong, but you have done your best to ensure that as far as the evidence that you are able to attain, the person is guilty. … I think there is no greater job anybody can have than having been a prosecutor."

—U.S. Supreme Court nominee Merrick Garland in 1995. He was responding to a question before the Senate Judiciary Committee about which of his past jobs had best prepared him for the U.S. Court of Appeals' Washington D.C. Circuit, for which he was then nominated. He was confirmed for the court of appeals in 1997 and will soon go before the committee again, this time for his nomination to the Supreme Court of the United States. (blogs.wsj.com/law/2016/03/16/judge-merrick-garland-in-his-own-words/)

"I could be fair, but you need to know, sir, that I have a philosophical difference against folks who want to steal other people's stuff."

—a potential juror on a Smith County robbery case, to the defense attorney during voir dire. (Submitted by Taylor Heaton, Assistant Criminal District Attorney in Smith County)

Photos from our Crimes Against Children Conference

Prosecutors wanted to Fight Crime: Invest in Kids

By Joe McMahan
Texas State Director, Fight Crime: Invest in Kids

Fight Crime: Invest in Kids is a national, bipartisan, nonprofit, anti-crime organization of more than 5,000 police chiefs, sheriffs, prosecutors, attorneys general, and other law enforcement leaders and violence survivors. It operates under the Council for a Strong America, the umbrella nonprofit for five membership organizations comprising of unique and powerful voices of law enforcement, business, military, faith, and sports, working together to prepare young Americans for success.

We want to make sure you are aware of our law enforcement organization and the work that our members do to keep children from becoming involved in our criminal justice system, in hopes that you will consider becoming a member. Our organization takes a hard-nosed look at crime prevention strategies, informs the public along with state and federal policymakers about those findings, and urges investments in those programs proven to be effective by research.

For example, we encourage policymakers to invest in programs like high-quality pre-K, home visiting/parent coaching, after-school programs for children and teens, and interventions to get troubled kids back on track. All of these are proven by research to have the potential to reduce crime. While we don't provide these programs, our members are critical advocates for making these programs available in their state and educating others of the potential impact on crime prevention these programs have. Even though there are many effective programs geared for teenagers, our organization focuses on early education—that's because 90 percent of the brain development occurs between birth and 5 years of age.

"When it comes to the advantages of new approaches that have been shown to be effective, we should join partners who can help children from turning to crime in the first place," says Henry Garza, District Attorney in Bell County and a member of Fight Crime: Invest in Kids.

As you know from experience, a child who grows up in an at-risk environment is faced with challenges that other kids are not. These challenges negatively affect their behavior and learning abilities, which is why our members advocate for programs that are proven to keep them on the right track, give them an opportunity to succeed, and steer them away from crime. One example of the importance of early education is in regard to the communication between parent and child. Studies indicate that low-income parents speak significantly fewer words to their children than working-class and professional parents speak to their kids; because of this gap, the vocabulary of a lower-income child is limited. By age 3, children of parents receiving welfare had average vocabularies of only 525 words, compared to 749 words for children of working class parents and 1,116 words for children of professional parents.

The programs for which we advocate are backed by studies and data that show positive outcomes for kids and families, including impact on crime:

- High-quality pre-kindergarten programs leads to less abuse and neglect, better performance in school, fewer high school drop-outs, and ultimately fewer crimes committed.
- Children who participated in high-quality pre-K and parent coaching programs though Chicago's Child-Parent Centers found they were 20 percent less likely to be arrested for a felony or be incarcerated as young adults than those who did not attend.
- Michigan's Great Start Readiness program (Pre-K) reported a 35-percent increase in high school graduates.
- According to a randomized control trial of Nurse Family Partnership (home visiting/parent coaching program) in Elmira, New York, the high-risk mothers who did not receive home visits had more than three times as many crime convictions 15 years after the program began.

These data points provide a glimpse of why our members advocate for investments in early education. I hope you will consider becoming a member of Fight Crime: Invest in Kids and join more than 200 other law enforcement leaders in Texas. Please keep in mind that our membership is free, and we don't have meetings. The level of involvement with our organization is totally up to each member. Examples of how our members advocate for these programs include:

- testifying in committee on a state and federal level,
- one-on-one visits with your legislator and member of congress,
- sign-on letters for the Texas Legislature and U.S. Congress and
- submitting op-eds and letters to the editor of your local newspaper.

To become a member, visit our website at www.fightcrime.org/join. If you have any additional questions, please visit our website at www.fightcrime.org or contact me at 512/257-7399 or jmcmahan@fightcrime.org. ❇

Continued from the front cover

Coming to a courtroom near you: sexually violent predators (cont'd)

In the last two months, the civil attorneys at SPU have assisted prosecutors in Harris, Tarrant, Bexar, and Guadalupe Counties with taking their first SVP cases to trial. These cases are very different from regular criminal trials, so I have written this article to lay out the basics of how to prepare such a case. Though I can't possibly cover everything in a single article, this piece should point Texas prosecutors in the right direction. And of course everyone in the civil division at SPU is available to assist in any way possible, from answering questions via phone and email to trying one of these cases in your jurisdiction.

What is a Sexually Violent Predator?

According to the legislative findings in the SVP law, a small but extremely dangerous group of sexually violent predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and which makes them likely to engage in repeated predatory acts of sexual violence. Thus, civil commitment procedures for long-term supervision and treatment of sexually violent predators are necessary and in the interest of the State.[5]

These legislative findings clearly direct that not every sex offender released from TDCJ is a sexually violent predator. Instead, only a narrowly tailored group of very dangerous sex offenders are appropriate for civil commitment. Additionally, to pass constitutional muster, the focus of the civil commitment of SVPs must be on treatment and supervision, not on punishment and continued consequence.[6]

As the civil commitment chief at SPU, my goal has always been to seek an SVP civil commitment on the individuals who best meet the definition in the legislative findings, not on every sex offender referred. Every time I receive a new case, I evaluate whether I believe that this person is an SVP based on scientific research, expert opinions that I respect, and the experiences I've had with these cases. Again, not every sex offender is an SVP, and not every person in every case referred by TDCJ is automatically and necessarily an SVP. Keep in mind that while these are exclusively civil cases, the burden is on the State to prove beyond a reasonable doubt that the person is an SVP, and the jury verdict must be unanimous.

A person is a sexually violent predator for the purposes of Chapter 841 of the Texas Health and Safety Code if he:

1) is a repeat sexually violent offender; and

2) suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence.[7]

While there are several ways to be classified as a "repeat sexually violent offender," the most common is "if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses."[8] The SVP statute defines "sexually violent offense" as a number of contact or attempted contact sexual offenses occurring in Texas, as well as sex offenses under prior state laws that contain elements substantially similar to current sexual offense laws. Sexually violent offenses can also derive from the laws of other states, federal law, or the Uniform Code of Military Justice if those crimes contain elements substantially similar to the Texas sexual offenses listed in the law.[9] Possession of child pornography, indecent exposure, indecency with a child by exposure, and violations of sex offender registry laws do not qualify as sexually violent offenses in Texas.

"Behavioral abnormality" is defined as a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes him to commit a sexually violent offense to the extent that the person becomes a menace to the health and safety of another person.[10] The Texas Supreme Court has held that the definition of behavioral abnormality and the determination of whether a person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence is a single, unified issue that cannot be bisected.[11]

While an individual's convictions for sexually violent offenses are extremely important in proving someone is an SVP, the behavioral abnormality determination, which requires evidence that spans an individual's entire life, will be the focus of most evidence collection and trial.

Why was the case referred?

Before the case ever reaches a prosecutor's desk, the SVP statute pro-

vides a detailed process for referring prospective SVPs for civil commitment. (In this article, we'll call a possible sexually violent predator on trial for civil commitment "the person" and use male pronouns for simplicity's sake.) Twenty-four months prior to an anticipated release date, TDCJ shall give notice to the multidisciplinary team (MDT) of a person whom they believe is a "repeat sexually violent offender." (See the timeline at right for a visual depiction of the process.)

The MDT is established by the executive director at TDCJ and must include seven representatives from the follow disciplines:

- a mental health professional from the Department of State Health Services;
- two people from TDCJ, including one from victim services and one from the sex-offender rehabilitation program in the rehabilitation programs division;
- a licensed peace officer employed by the Department of Public Safety and who has at least five years' experience working for that department;
- two people from the Texas Civil Commitment Office (TCCO); and
- a licensed sex offender treatment provider from the Council on Sex Offender Treatment.[12]

Within 60 days of receiving notice from TDCJ, the MDT must:

1) determine whether the person is a repeat sexually violent offender and whether the person is likely to commit a sexually violent offense after release,
2) give notice of that determination to TDCJ, and
3) recommend the person for a

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Timeline for an SVP's civil commitment trial

24 months before an inmate's anticipated release date	TDCJ gives notice to the multidisciplinary team (MDT) that an inmate may be a repeat sexually violent offender.
Within 60 days of receiving notice from TDCJ	The MDT must determine whether the person is a repeat sexually violent offender likely to commit a sexually violent offense after release, give notice of that determination to TDCJ, and recommend the person for a behavioral abnormality evaluation.
Within 60 days of the MDT's recommendation for a behavior abnormality assessment	TDCJ must assess the inmate. If TDCJ finds that he has this abnormality, the case is referred to the prosecutor in the county in which the inmate was most recently convicted of a sexually violent offense.
Within 90 days of the case's referral to the local prosecutor	If the prosecutor decides to pursue civil commitment, she must file a petition stating facts sufficient to support the allegation that the inmate is a sexually violent predator; the petition must be served on the inmate as soon as practicable after the petition is filed. The petition should also include the State's requests for disclosure.
Once a trial date is set and the court establishes a docket control order laying out all deadlines	The discovery process begins. It continues until 30 days prior to the trial date.
Within 270 days of the State's serving the inmate with the petition (and no later than his sentence discharge date)	The trial must be conducted.

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behavioral abnormality evaluation.[13]

The MDT typically meets once a month over a two-day period where they evaluate about 80 cases for civil commitment consideration.

Within 60 days of the MDT's recommendation for a behavioral abnormality assessment, TDCJ shall assess whether the person suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. To aid in this assessment, TDCJ shall use an expert to examine the person and make a clinical assessment based on testing for psychopathy, a clinical interview, and other assessments and techniques as appropriate.[14]

If, as a result of this psychological assessment, TDCJ believes the person does in fact suffer from a behavioral abnormality, the case shall be referred to the attorney representing the State in the county in which the person was most recently convicted of a sexually violent offense.[15] This is where your job starts. On average, about 75 cases are referred from TDCJ for civil commitment consideration each year. Depending on a number of factors, including complexity, number of expert witnesses, and number of depositions, each of these cases costs approximately $10,000 to $45,000. (The local commissioner's court will want to know that!)

Once the local prosecutor receives the referral file from TDCJ, she may file a petition in the court of conviction for the person's most recent sexually violent offense stating facts sufficient to support the allegation that the person is a sexually violent predator.[16] Typically, this will include a statement that he is a repeat sexually violent offender with supporting facts specific to the sexually violent offenses and a statement that he suffers from a behavioral abnormality.

On a prosecutor's request, the SPU shall provide legal, financial, and technical assistance to that attorney for a civil commitment proceeding under the SVP law.[17] The State Counsel for Offenders (SCFO) shall represent an indigent person subject to a civil commitment proceeding.[18] Because these individuals are incarcerated when their cases are referred, most will be indigent and will be represented by the civil division of SCFO located in Montgomery County (Conroe).

If local prosecutors decide to pursue the person's civil commitment, the petition must be filed within 90 days of the date the person is referred to the prosecutor and served on the person as soon as practicable after the petition is filed.[19] The Texas Rules of Civil Procedure (TRCP) more specifically detail petition and service of citation requirements. In my original petition, I always include my requests for disclosure pursuant to TRCP 194.2.

Moving through the civil discovery process

Once the petition is filed, prosecutors should work with the defense and the court to get a docket control order that lays out all of the discovery deadlines, deadlines for dispositive motions, and the trial date. The discovery process begins once the petition is filed and continues until 30 days prior to the trial date. The trial shall be conducted within 270 days of when the person is served with the petition and no later than the person's sentence discharge date.[20]

Almost all of these cases will reach trial. There is nothing to plea bargain. The person may enter into an agreed judgment, which would declare him an SVP and require treatment and supervision, or the person may bring the case to trial. Because the focus of civil commitment is rehabilitation, there is no set length of time that the person may be in civil commitment. SVPs are to remain civilly committed until their behavioral abnormalities change to the extent they are no longer likely to commit a predatory act of sexual violence.

From the moment the petition is filed, my job is to provide my expert with as much data from as many sources as possible to support a finding that the person has a behavioral abnormality. Because these are civil cases, both parties—the person and the State—are required to comply with all aspects of civil discovery. I have collected records from law enforcement agencies, TDCJ, local agencies in the individual's prior counties of residence, military, out-of-state sources, CPS, and any other place that may come up in a particular case. The best way to gather this type of information is through subpoenas to non-parties,[21] requests for production and inspection to the opposing party,[22] and interrogatories.[23]

Both parties are entitled to a jury trial on demand, and both are entitled to an immediate examination of the person by an expert.[24] The person is entitled to retain and receive compensation upon the

court's approval for his expert, but not all cases have defense experts.[25] If the defense has an expert, that expert will offer the opinion that the person does not have a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Additional rights the person has include the right to appear at trial, cross-examine witnesses, and present evidence on his behalf at trial.[26] Because these are civil cases, the person is required to participate in and respond to all of the State's civil discovery requests.

In these cases, sexual and nonsexual criminal convictions, charges, and even mere allegations are crucial to proving the person has a behavioral abnormality. Perhaps the most useful part of Chapter 841 for that purpose is §841.142, which requires any entity with relevant information relating to the person to release that information to an entity charged with making an assessment or determination of a potential SVP. The prior bad acts uncovered through this discovery are vital to meeting the State's burden in these cases.

Requests for Admissions[27] are useful for eliminating facts for which there is no real controversy. Once offered into evidence at trial, the person cannot contradict a fact he has already admitted in a response to requests for admissions. Often, these are an additional way to prove that the person is a repeat sexually violent offender because the person will admit that he was (or is) incarcerated for sexually violent offenses.

For instance, from the thousands of pages of documents I collected through record collection and discovery for the James Rubio case, I learned that his issues with controlling his sexually assaultive behavior began while stationed in Georgia as a United States Marine in the late 1970s. Those documents included details about:

- a sexual assault from 1977 that was later dismissed;
- a five-year term of confinement in the Georgia State Penitentiary in 1978 after a jury convicted him of Aggravated Assault with Intent to Commit Rape involving a fellow Marine's wife;
- another allegation of rape in 1978 (while he was out on bond for the allegation above) that was ultimately dismissed due to insufficient evidence;
- a second conviction in Georgia for Aggravated Assault with Intent to Commit Rape for an incident in 1979, for which he served five years in custody and on probation pursuant to a plea bargain;
- a conviction in Bexar County (where he was then living) for the 1982 home invasion and rape of a woman who rebuffed his romantic advances, for which he was sentenced in 1983 to 20 years in TDCJ;
- within a few months of being released on mandatory supervision in 1990, he was charged in Bexar County with the Aggravated Sexual Assault of his 13-year-old stepdaughter, to which he eventually pled *nolo contendre* in 1992 and received another 20-year TDCJ sentence; and
- he also had a history of arrests for assaults and terroristic threats against women and law enforcement officers.

The person, witnesses, and experts are subject to oral depositions[28] and/or depositions upon written questions.[29] The oral deposition of the person, which is usually conducted just a few months prior to trial, is really where prosecutors can gather evidence to show that he suffers from the behavioral abnormality.

With every deposition of the person, many of the questions are to establish or provide the basic risk factors associated with sexual recidivism, sexual deviance, potential personality disorders, and mental health issues. I ask about his childhood and adolescence, his current relationships with family and friends, physical or sexual abuse he may have endured, and employment and relationship histories. I also ask about his non-criminal history, mental health history, prison adjustment, vocational history, and educational backgrounds. If he is in a TDCJ sex offender program, I question him on what he has learned and how he applies it to himself.

After a thorough history is established, I ask about his sexual history, including past and present sexual fantasies, masturbatory habits, partners, and fetishes. The most important line of questioning relates to his versions and insight into his sex-offending history. Does he deny the offenses, or does he recognize his fault? Does he understand that he is at risk of sexual re-offense, or does he believe he is at zero risk? Is he going to follow the law in the future, or does he believe he is above the law?

Proving Element One: Sexually Violent Predator

Based on his sexual offending history, Rubio easily met the criteria for

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being a repeat sexually violent offender. In the petition, I supported my allegation with the 1983 rape (a sexual offense under prior state law that is substantially similar to a sexually violent offense under current state law for which he was sentenced) and the 1992 aggravated sexual assault (a sexually violent offense for which he was sentenced).

After a quick subpoena to TDCJ for his penitentiary packets and after I received certified judgments and sentences from the district clerk's office, proving that Rubio is a repeat sexually violent offender was done. While Rubio's conviction history made it easy to prove the first element, in other cases I have had to use military judgments, out-of-state convictions, juvenile adjudications, and murder convictions (when the murder was committed with the intent to commit a sexually violent offense) to prove that someone is a repeat sexually violent offender.

James Rubio admitted to each of his convictions and sentences for the sexually violent offenses, as well as arrests for more sexual offenses for which he was never convicted. He admitted to details of a prison disciplinary action for attempting to establish an inappropriate relationship with a TDCJ staff member. Rubio also admitted to knowing it was wrong to sexually offend but committing the acts anyway.

The first evidence I presented at Rubio's trial were these admission statements, which I read to the jury. Because he was not able to present controverting evidence to these admission statements, once his penitentiary packets were admitted into evidence, I had proven beyond a reasonable doubt that James Rubio was a repeat sexually violent offender.

Proving Element Two: Behavioral Abnormality

The rest of my work on the James Rubio case focused on proving that he had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence. The behavioral abnormality cannot be proven simply with the sexually violent offense convictions. While those offenses are important and indicate certain risk factors, prosecutors must prove to the jury that the person, as he sits in the courtroom on the day of trial, has a condition that in some way affects his ability to control his sexual behavior to the extent that he may harm another person. This requires an examination of the person's entire life up to the moment the jury deliberates.

The last time James Rubio committed a sexually violent offense that I knew about was the 1990 sexual assault of his 13-year-old stepdaughter. My trial was scheduled for 21 years later. That meant I had to build a convincing case that his sexual deviancy began in the late '70s and did not remit simply because he went to prison. I had to make the jury understand that the James Rubio who committed sex offenses in 1977, 1978 (twice), 1979, 1982, and 1990 was the same James Rubio who sat in front of them in 2011.

The referral from TDCJ came with a behavioral abnormality assessment report written by Dr. Antoinette McGarrahan, a forensic psychologist from Dallas, who opined that James Rubio indeed has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. I had a forensic psychiatrist, Dr. Lisa Clayton, evaluate Rubio, too. Dr. Clayton also opined that James Rubio has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Because Rubio's psychopathy and manipulation was such a large part of his sexual offending history, I thought it was really important to highlight this through the scored instrument from the psychologist and also through the psychiatrist's personal interaction with him. Obviously, two forensic experts on one of these cases costs a lot more than one, but in some cases, such as Rubio's, the increased cost is necessary. (In hindsight, I probably could have gone forward with just one expert, but I choose to designate Drs. McGarrahan and Clayton as retained testifying experts according to the deadline set forth in the docket control order.)

James Rubio, while evaluated by his own expert, did not retain an expert for testimony at trial. Again, because these are strictly civil cases, the right to remain silent does not apply. The person must meet with and participate in the evaluation conducted by the State's expert.[30] If he fails to actively participate, the statute lists severe consequences, which include not being allowed to present a defense expert and being held in contempt.[31]

It was through deposition that I truly learned the most about James Rubio. Both doctors conveyed to me that they believed he was a psychopath suffering from adult antisocial behavior and a paraphilic attraction to non-consensual partners. Dr. Clayton further diagnosed him with sexual sadism and hebephilia (sexual attraction to adolescents). Even though I had conversations about

their opinions, it wasn't until I sat across the table from Rubio himself for his deposition that I truly understood who James Rubio was and how I needed to communicate that to my jury. During the deposition, he presented himself as a valiant Marine who never raped anyone, who was completely honest with his dutiful wife (No. 6 by the time I met him), who was well-connected with law enforcement in Bexar County (he had the business card of the police chief at the time), and who was well-respected by the wardens and officers in prison.

Once I had deposed Rubio, I set about debunking his claims. Through discovery, I had deposed his latest wife, who knew very little of his sexual offending history. I had gone to San Antonio to obtain affidavits from police officers Rubio said he knew, but who had never met with or spoken to him or his wife. I received a letter from the warden at his current TDCJ unit documenting physical threats from both Rubio and his wife. I uncovered TDCJ disciplinaries where his wife was operating an unauthorized business through him within the prison system. I learned that a unit transfer was necessitated because he was repeatedly threatening guards with physical assault. In his parole file, he had letters from his prior wives protesting his release, as well as letters Rubio wrote to parole board members mocking their decisions.

After receiving all of this newly collected information, Dr. McGarrahan felt the need to re-score the psychopathy instrument. Psychopathy relates to sexual recidivism in a very common-sense sort of way. The less a person cares about the physical and emotional well-being of other people, the more likely he is to cause them harm. James Rubio's new score on the psychopathy checklist had increased, which indicated that when he first met with Dr. McGarrahan, he was able to effectively conceal some of these traits. Not only did my deposition of Rubio help solidify my case that he was a sexually violent predator, but it also strengthened and further supported my doctors' opinions. Together, the experts and I could provide the jury with specific and recent examples of the lies, manipulation, and deceit he chose to spew while facing this case.

Trial

Trial began in September 2011. Through the documents I had collected and his deposition, Rubio's lies were debunked at trial and used to show that the man sitting in the 435th District Court was the exact same manipulative and sexually deviant man who entered prison 20 years earlier. The State's case included testimony from a fingerprint expert to admit the penitentiary packets into evidence, Drs. McGarrahan and Clayton to support their behavioral abnormality opinions, and James Rubio himself. (In a civil case, adverse parties can be called to testify, so he was required to take the stand and answer my questions in front of the jury.)

Rubio wanted me and the jury to believe that his wife would provide intense supervision and that the Veterans Affairs Office in San Antonio would give him sex-offender treatment upon his release. (To counter this claim, I had requested and miraculously received—on the last day of trial—a letter from the San Antonio Veterans Administration stating that the agency does not provide sex offender-specific therapy.) He also had detailed plans about the tow-truck company he was going to run once he discharged his sentence. I was able to admit into evidence everything I had learned about Rubio's lies and violent tendencies, and why a tow-truck company is the last business venture a man with his history should be operating. Everything he said at trial was used to show just how little insight he had about his current risk for sexual re-offense and how severe his sexual deviance was as he sat in that courtroom. It all showed that he was clearly a liar, that he was manipulative, and that neither prison nor time had changed him. And, given the opportunity, his entitlement and lack of insight would lead him to commit a new sexually violent offense. All of these things indicated that at the time of trial, Rubio suffered from a condition that affected his ability to control his behavior such that he was predisposed to commit a predatory act of sexual violence. I had made my case.

The defense focused on the fact that Rubio had not raped anyone in prison over the last 20 years. They pointed to his precisely laid-out employment plans as evidence that he had changed and wanted to live a better life. Rubio wanted the jury to focus on his 1974 United States Marine Corp photo and ignore the six accusations, charges, and convictions of sexual assault. He wanted the jury to focus on his lies, not the liar who sat in the courtroom.

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Rubio, his wife, and a friend testified on his behalf. He did not have an expert, but about half of these cases do have a defense expert.

After two days of trial and an hour of deliberation, a jury decided that James Rubio is a sexually violent predator and civilly committed him to supervision and outpatient treatment. As of this writing, Rubio is currently incarcerated in TDCJ for failing to register as a sex offender after removing his GPS ankle monitor and fleeing from the halfway house where he was required to live as part of his civil commitment. He was facing a third-degree felony for violating the terms of civil commitment.[32] (These days, all sexually violent predators civilly committed under this law reside in the Texas Civil Commitment Center in Littlefield unless they have been approved to live elsewhere.) His projected discharge date is January 7, 2023. Whenever he ultimately is released from TDCJ, he will immediately transfer back to civil commitment for treatment and supervision.

Biennial review and release

After a person is civilly committed as an SVP, he is statutorily required to receive a biennial examination by a psychologist or psychiatrist paid for and submitted to the court by the Texas Civil Commitment Office (TCCO).[33] As part of the biennial review, a report must include consideration of whether a modification of a civil commitment requirement should be made and whether the person should be released from all requirements imposed on him.[34]

At the biennial review, the person is entitled to be represented by counsel but is not entitled to be present at the review, as it is to be conducted by submission.[35] Based on the documentation submitted, the judge can either continue civil commitment or set a hearing on the biennial review, but only if a modification of the civil commitment order is requested by TCCO or probable cause is found to believe that the behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.[36] If a hearing is set, the attorney representing the State must conduct a new jury trial to prove beyond a reasonable doubt that the behavioral abnormality continues to exist and has not sufficiently changed.[37]

The person may at any time file an unauthorized petition for release.[38] The TCCO shall authorize the person to file a petition for release if that office determines that the committed person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.[39] A hearing set as a result of an authorized petition for release is conducted in front of a jury and requires the State to prove to a jury that the person's behavioral abnormality continues to exist and has not sufficiently changed.[40]

Conclusion

The civil commitment of sexually violent repeat offenders protects our communities while providing treatment and rehabilitation to a very dangerous population of sex offenders in our state. While these cases can be time-consuming, laborious, and emotionally gut-wrenching, knowing that one fewer sexually violent predator is in our communities makes the process worthwhile. My hope is that the next time one of these cases lands on your desk, you have a good understanding of the process so that you may civilly commit a person you believe to be a sexually violent predator. If you need further assistance in an SVP civil commitment proceeding, remember that prosecutors may request legal, financial, and technical assistance from the SPU.[41] We are always willing and ready to help. ❇

Endnotes

1 For use as a case study, I have included the story of my 2011 civil commitment trial of James Rubio.

2 Tex. Health & Safety Code §841.002(1).

3 *Id.* at §841.023(b).

4 *Id.* at §841.042.

5 *Id.* at §841.001.

6 *In re Commitment of Fisher*, 164 S.W.3d 637 (Tex. May 2005); *Kansas v. Crane*, 534 U.S. 407 (2002).

7 Tex. Health & Safety Code at §841.003(a).

8 *Id.* at §841.003(b).

9 *Id.* at §841.002(8).

10 *Id.* at §841.002(2).

11 *In re Commitment of Bohannan*, 388 S.W.3d 296, 302-03 (Tex. August 12, 2012).

12 Tex. Health & Safety Code §841.022(a).

13 *Id.* at §841.022(c).

14 *Id.* at §841.023(a).

15 *Id.* at §841.023(b).

16 *Id.* at 841.041(a).

17 *Id.* at §841.042.

18 *Id.* at §841.005(a).

19 *Id.* at §841.041(a) and (b).

20 *Id.* at §841.061(a)(1) and (2).

21 Tex. Rule of Civil Proc. 176.

22 Tex. Rule of Civil Proc. 196.

23 Tex. Rule of Civil Proc. 197.

24 Tex. Health & Safety Code at §841.061(b).

25 *Id.* at §841.145.

26 *Id.* at §841.061(d).

27 Tex. Rule of Civil Proc. 198.

28 Tex. Rule of Civil Proc. 199.

29 Tex. Rule of Civil Proc. 200.

30 Tex. Health & Safety Code §841.061(f).

31 *Id.* at §841.061(f)(1)-(3).

32 *Id.* at §841.085(a) and (b).

33 *Id.* at §841.101(a).

34 *Id.* at §841.101(b).

35 *Id.* at §841.102(b).

36 *Id.* at §841.102(c)(1) and (2).

37 *Id.* at §841.103.

38 *Id.* at §§841.122 and 841.123.

39 *Id.* at §841.121(a).

40 *Id.* at §841.121(e).

41 *Id.* at §841.042.

But I already know everything there is to know about grand juries

The law on grand juries doesn't change often, but it did recently. Here's an update on such proceedings and how to remedy what might go wrong with them.

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Grand jury practice can be a particularly unsexy portion of the prosecutorial practice of law because it generally changes little and nothing usually goes wrong. But what if something *does* change or something *does* go wrong? The 84th Texas Legislature passed changes to grand jury practice, and although not terribly common, problems do occur in these proceedings. This article is designed to update practitioners on the most recent changes and give helpful examples of what can go wrong, along with suggestions on how to remedy those issues.

The most recent legislative changes

The most notable change to grand jury practice was the elimination of the "key man" system of selecting grand jurors.[1] House Bill 2150 eliminated this option, which allowed the judge to select grand jury commissioners, who would then select members of the community to appear as potential grand jurors. The key-man system was repealed, requiring courts to use the only remaining option of the "wheel" or "cattle call" system, wherein grand jurors are selected at random from the community in the same manner as for civil trials.[2]

Article 19.26 of the Code of Criminal Procedure was amended to reflect the elimination of the key-man system in that it now requires that grand jurors be selected at random from the county's jury wheel. However, this section also allows the judge to adjust the grand jury's composition if the first 16 people selected at random from the community do not represent a fair cross-section of the population.[3] The statute has been amended to allow the judge charged with impaneling the grand jury to "select" grand jurors from a fair cross section of the population.[4] The statute previously read that if "14 qualified jurors are found to be present, the court shall proceed to impanel the grand jury."[5] Interestingly, this change would seem to fail to alleviate the concerns of those who opposed the previous key-man

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system in that it still allows for the impaneling judge's intervention—most complaints about the key-man system related to the judge's perceived ability to influence the grand jury process by selecting the commissioners. One can hardly help but wonder if this procedure will someday be subject to the same complaints.

Article 19.31 was amended to add several specific challenges for cause to a potential grand juror,[6] and Article 19.315 was added to require a grand juror to recuse himself when he could be subject to a challenge for cause under Article 19.31 until the reason for the recusal no longer exists.[7]

What could possibly go wrong?

Several issues can and do arise in grand jury practice. What happens when a disqualified person serves on a grand jury? What happens when someone who was originally qualified later on does something to bring her qualifications into question? What happens if a defendant claims that the grand jury that indicted him was composed in a racially discriminatory manner? These are issues that have arisen in the past and for which caselaw provides guidance.

Grand juror qualifications. First ask, "What constitutes a disqualifying event?" Article 19.08 of the Texas Code of Criminal Procedure requires a grand juror to:

1) be a citizen of the state and county in which the person is to serve,
2) be of sound mind and good moral character,
3) be able to read and write,
4) not have been convicted of misdemeanor theft or a felony,
5) not be charged with misdemeanor theft or a felony,
6) not be related within the third degree of consanguinity or second degree of affinity to any person selected to the grand jury,
7) not have served as a grand juror within the previous year, and
8) not be a complainant in any matter to be heard by the grand jury.

If a potential grand juror cannot meet these qualifications, then he is disqualified from grand jury service.[8]

But what, you ask, happens if a disqualified person serves on the grand jury? As any appellate lawyer will ask you, "Has the issue been waived?" "A challenge to the array of jurors or to any person presented for grand jury service must be made before the grand jury is empaneled."[9] Where a disqualified person serves on a grand jury, the defendant will waive any objection to a subsequent indictment issued by that grand jury unless he objected to the array before the disqualified person was seated on the grand jury.[10]

This rule seems clear enough in theory, but there is language in several decisions that suggests that a defendant may raise a complaint about the qualifications of a grand juror by way of a pre-trial motion to quash the indictment, and this has occurred in numerous scenarios.[11]

In *Mullings v. State*, the 11th Court of Appeals examined whether the officers of a nonprofit corporation, which was alleged to have been the victim of a crime, were themselves complainants and therefore disqualified from serving as grand jurors in that case.[12] The court decided that the officers were not disqualified under Article 19.08 of the Code of Criminal Procedure.[13]

In *Howard v. State*, the 9th Court of Appeals considered whether a grand juror, who was qualified when impaneled, became disqualified after moving out of the county during the grand jury's term.[14] The court held that the grand juror's move across county lines did not disqualify him but explicitly declined to touch on whether any other action might disqualify him (i.e., being convicted of a crime).[15]

Unlike many grand jury issues that have been rarely, if ever, contested, whether a grand jury is composed of members representative of the community has been extensively litigated. "Every criminal defendant is entitled to be indicted by a grand jury whose members have been selected in a non-discriminatory manner."[16] To make a successful challenge to a grand jury based on its members having been selected in a racially discriminatory manner, the movant must establish that the grand jury that indicted him was so composed, not just that prior grand juries in the same county were composed of non-representative members.[17] "Only if the [movant's] class is substantially underrepresented on the indicting grand jury does the makeup of prior grand juries become relevant to explain whether this underrepresentation on the indicting grand jury is a statistical accident or the result of purposeful discrimination."[18] The movant will also have to show evidence of the racial composition of the members of the county in which he is indicted to establish that

the composition of the grand jury was not representative of the county.[19]

A defendant may obtain federal habeas relief on the grounds that his due process rights were violated by virtue of the racial composition of the grand jury that indicted him if he can:

1) establish that the group against whom discrimination is asserted is a recognizable, distinct class singled out for different treatment;
2) prove that the group has been underrepresented over a significant period of time; and
3) support the presumption thus created by showing that the selection process is susceptible to abuse or is not racially neutral.[20]

Conclusion

Though some areas of grand jury practice remain unlitigated, others have clear direction from caselaw and recent legislative changes. Please feel free to contact me if I can be of any assistance, and have fun making new law if you get the chance to litigate a grand jury issue. ❇

Endnotes

1 Tex. Code Crim. Proc. Art. 19.01, effective Sept. 1, 2015 (HB 2150, §1).

2 *Id.*

3 Tex. Code Crim. Proc. Art. 19.26, effective Sept. 1, 2015 (HB 2150, §8).

4 *Id.*

5 Tex. Code Crim. Proc. Art. 19.26, acts 2003, 78th Leg., ch. 889, §1, effective Sept. 1, 2003.

6 Tex. Code Crim. Proc. Art. 19.31 adds challenges for insanity, various medical conditions, being a target of a grand jury investigation, etc., effective Sept. 1, 2015 (HB 2150, §10).

7 Tex. Code Crim. Proc. Art. 19.315 enacted effective Sept. 1, 2015 (HB 2150, §11).

8 Tex. Code Crim. Proc. Art. 19.08.

9 *Caraway v. State*, 911 S.W.2d 400, 401 (Tex. App.—Texarkana 1995, no pet.), citing Tex. Code Crim. Proc. art. 19.27.

10 *Id.*

11 See, e.g., *Ex parte Covin*, 277 S.W.2d 109 (Tex. Crim. App. 1955) (stating, albeit *in dicta*, that grand juror's lack of qualifications could be raised by motion to quash); *Mullings v. State*, 917 S.W.2d 334, 336 (Tex. App.—Eastland 1996, pet. dism'd as improvidently granted) (assuming without deciding that complaint that grand juror was a complainant could be heard by way of pre-trial motion to quash the indictment); *Acosta v. State*, 640 S.W.2d 381, 383 (Tex. App.—San Antonio 1982, habeas relief granted, jdgm't vacated on other grounds by 672 S.W.2d 470) ("Challenge to the array may be by a motion to quash the indictment before trial").

12 *Mullings*, 917 S.W.2d at 336.

13 *Id.*

14 *Howard v. State*, 704 S.W.2d 575, 579 (Tex. App.—1986, no pet.).

15 *Id.*

16 *Espinoza v. State*, 604 S.W.2d 908, 909 (Tex. Crim. App. 1980).

17 *Id.* at 909-10.

18 *Pimentel v. State*, 710 S.W.2d 764, 777 (Tex. App.—San Antonio 1986, pet. ref'd).

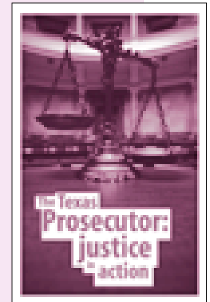
19 *Evans v. State*, 656 S.W.2d 65, 66 (Tex. Crim. App. 1983).

20 *Enriquez v. Procunier*, 752 F.2d 11, 115 (5th Cir. 1984).

News Worthy

Prosecutor booklets available for members

We at the association offer to our members a 12-page booklet that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to email the editor at sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇



Texas Investor Guide available online and on paper

Our friends over at the Texas State Securities Board (TSSB) passed along a link to its Texas Investor Guide, which is available at www.ssb.texas.gov/flash/TexasInvestorGuide/index.html. It includes information on budgeting, saving for retirement, and avoiding financial fraud. The flipbook cannot be printed, but print copies are available by emailing Robert Elder at relder@ssb.texas.gov with your mailing address, phone number, and how many copies you'd like to receive. Thanks to the TSSB for making this booklet available! ❇

Filing a Public Information Act lawsuit in seven easy steps

Every now and again, a governmental body must sue the Attorney General for declaratory relief from compliance with the AG's decision on PIA requests. Here's how to do it.

By Scott A. Durfee
Assistant District Attorney in Harris County

Every year, the Texas Attorney General's Open Records Division receives thousands of opinion requests from governmental bodies throughout the State of Texas, asking for clarification of their responsibilities under the Public Information Act to release or withhold the information these bodies maintain. As an observer of this process, I admire the work they do—on short statutory deadlines, the Attorney General's staff quickly and efficiently process the opinion requests and issue well-reasoned decisions. It's pretty amazing that, under that kind of pressure, the Attorney General's staff reaches the right conclusions in the vast majority of the cases.

But sometimes they don't. And that's when a governmental body has a really hard decision to make. The governmental body can acquiesce to a decision that appears to be incorrect and publicly release the information at issue. Or the governmental body can sue the Attorney General for declaratory relief from compliance with the AG's decision.[1]

Suing the Attorney General is the only way to get relief from an adverse letter opinion.[2] It is also an element[3] of an affirmative defense in a criminal prosecution for refusing to provide access to or copying of public information. Although criminal prosecutions under the Public Information Act are rare, this affirmative defense is a get-out-of-jail-free card that we don't want to waive in the event that the open government police come knocking on the door.

All of that said, I want to be clear that I am not encouraging anyone to sue the Attorney General. It is very much an uphill battle: The Act requires us to file suit in a Travis County district court,[4] and I can assure everyone that the Attorney General has home-court advantage in the byzantine Travis County district court system. Also, if the Attorney General substantially prevails in the suit, the district court has discretion to assess costs of litigation and reasonable attorney's fees incurred by the Attorney General.[5]

But … if you believe that you have no choice but to sue, then don't be intimidated by the process. It's not as hard as you might think. What follows is my checklist for properly suing the Attorney General in Travis County under §§552.324 and 552.325 of the Public Information Act.

1 **Prepare an original petition for declaratory relief.** Although it is beyond the scope of this article to counsel readers on what the grounds for declaratory relief should be, the blueprint for the petition should be the original opinion request. This is because we are generally foreclosed from raising any arguments in the Travis County district court that were not raised in the opinion request to the Attorney General.[6] (Exception: You can raise exceptions for the first time in the district court that are "based on a requirement of federal law" or that "involve the property or privacy interests of another person.")[7] Note that you do *not* sue the requestor—the only person you are authorized to sue is the Attorney General.[8] If you need examples, please feel free to contact me.

2 **Prepare a case information sheet.** A civil case information sheet must be completed and submitted when an original petition is filed to initiate a new civil case. The link to Travis County's version is in Endnote 9.[9] Note that this document has to be hand-signed, so you will need to sign and scan it.

3 **Prepare a Service Request Form.** Obviously, you have to serve the Attorney General with your petition. The Attorney General's physical

address is 300 W. 15th Street, Austin, TX 78701, and his mailing address is P.O. Box 12548, Austin, TX 78711-2548. The link to the Travis County Constable for Precinct 5's service request form is in Endnote 10.[10] Note that you will have to establish an electronic signature with the constable, which you can do by clicking on the red ribbon by the signature block; it creates a pop-up window to establish your credentials.

4 **Prepare notice to the requestors.** Section 552.325(b) requires you to demonstrate to the district court that you "made a timely good faith effort to inform the requestor, by certified mail or by another written method of notice that requires the return of a receipt" of 1) the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed; 2) the requestor's right to intervene in the suit or to choose to not participate in the suit; 3) the fact that the suit is against the Attorney General in Travis County district court; and 4) the address and phone number of the Office of the Attorney General. This is easily accomplished with a letter that tracks these four elements.

5 **Call the Attorney General's Office.** As a courtesy, you should call the Attorney General's Administrative Law Division (512/475-4300) and ask to speak to an attorney in Open Records Litigation to let them know you are about to file the petition. When I have sued the Attorney General in the past, they have always appreciated the heads-up, and it's an opportunity to acquaint them with your sympathetic facts. Do not be adversarial, however—arguing with them is not productive at this stage of the proceedings.

6 **E-file documents.** When you electronically file your case—as you must in Travis County—the declaratory judgment petition is the primary document, and the case information sheet, the service request form, and any exhibits will be the attachments. Don't procrastinate: To take advantage of the affirmative defense in §552.353(b), the suit has to be filed "not later than the 10th calendar day after the date of receipt" of the Attorney General's letter opinion.[11]

7 **Verify filing.** To be sure that the documents have been received and filed by the Travis County District Clerk, complete an "Attorney Access to Records Online" form for the password to access the clerk's electronic system. The link to the clerk's information page on accessing online records is in Endnote 12.[12] If you have any difficulty locating your case, call the Clerk's Government Litigation Division at 512/854-9457.

If you follow these seven steps, the suit will be filed with, served on, and noticed to the appropriate people. And all you have to do after that is win your case! ❇

Endnotes

1 See Tex. Gov't Code §552.324.

2 Many years ago, a governmental body could ask the Attorney General to reconsider its decision, but in 1999, the Legislature expressly prohibited governmental bodies from seeking reconsideration of an opinion. See Tex. Gov't Code §552.301(f).

3 I say "element" because filing the declaratory judgment suit is not the only thing the officer for public information has to prove to perfect the affirmative defense. The officer is also obliged to show that he "reasonably believed that public access to the requested information was not required." This additional element forecloses the use of this litigation as a bad-faith tactic to delay production of otherwise disclosable information. See Tex. Gov't Code §552.353(b)(3) ("It is an affirmative defense to prosecution … that the officer for public information reasonably believed that public access to the requested information was not required and that not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, the officer or the governmental body for whom the defendant is the officer for public information filed a petition for a declaratory judgment against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, as provided by §552.324, and the cause is pending").

4 Tex. Gov't Code §552.324(a)(1).

5 Tex. Gov't Code §552.323(b); see also *Adkisson v. Paxton*, 459 S.W.3d 761, 779 (Tex. App.–Austin 2015) (good discussion of trial court's discretion to award fees).

6 Tex. Gov't Code §552.326(a).

7 Tex. Gov't Code §552.326(b).

8 Tex. Gov't Code §552.324(a)(1).

9 http://www.traviscountytx.gov/probate/new-cover-sheet.

10 http://constable5.com/docs/e-file_caseID-form-CN5.pdf.

11 See Tex. Gov't Code §552.353(b)(3). Note that this deadline is inconsistent with §552.324(b), which gives a governmental body 30 calendar days to file the declaratory judgment action. In 2009, the Legislature resolved this inconsistency by amending §552.324(b) to expressly provide: "If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in §552.353(b)(3), suit must be filed within the deadline provided in §552.353(b)(3)."

12 http://www.traviscountytx.gov/district-clerk/public-access.

The quest for board certification

Why embark on the journey to become a board-certified paralegal in criminal law? There are lots of good reasons.

By Donelle Keen, TBLS-BCP
Administrative Paralegal in the Milam County District Attorney's Office

To some people outside the legal community, when they hear the word "paralegal," they might think of Della from the old "Perry Mason" TV series. She was great at getting coffee, answering the phone, and filing the occasional sheet of paper, all while keeping an impeccable figure and the best manicured fingernails in history. But she hardly represents paralegals in the real world—especially the world of a district or county attorney's office! A paralegal is not simply someone employed by an attorney but rather a skilled professional who works under an attorney's supervision to draft pleadings, calculate deadlines, juggle settings, organize trial notebooks, and handle as much as possible to free up the attorneys to focus on prosecuting cases.

I have been a member of the State Bar of Texas's Paralegal Division since 1997 and as such have annual CLE requirements. For several years, I noticed the Texas Board of Legal Specialization vendors at various seminars and had picked up the information packets on getting board-certified more than once—earning my certification had long appealed to me because certified attorneys and paralegals are the best in their field. I would often think, "I want to do that someday," but then the workload of the office and the daunting task of studying for an exam would push certification to the background.

Working for a small, rural county means there is no financial reward in being certified, but it was a personal and professional goal that I longed for—I just postponed taking the first step for a while. I also did not know if my elected DA, Bill Torrey, would have an opponent in the upcoming election, but I thought if he had the only board-certified paralegal on his staff, it would look good for our office and administration. Mr. Torrey did not end up having an opponent, but I still felt that having a certified paralegal would reflect well on this office.

Then in May 2015, my mother passed away, which was devastating to my world. But it also woke me up. I realized that tomorrow might not always be there. As do many in the legal world, I adhere to Scarlett O'Hara's approach to "tomorrow" ("After all, tomorrow is another day") way too often. My mother had encouraged me to go for it when it came to certification, and she never doubted my ability, so shortly after her death, I began my quest.

Requirements

The Texas Board of Legal Specialization (TBLS) has a great website, www.tbls.org, which contains all of the information for attorneys and paralegals to navigate the process of becoming board-certified. The first step is to apply to sit for the exam. The application deadline is usually mid-summer; for me it was July 1, 2015, with a test date of November 7. One requirement is a minimum of five years' experience in the field for which you want to test (in my case, criminal law). In addition to the five years, a paralegal must have either two additional years of experience, a National Association of Legal Assistants (NALA) certification, a bachelor's degree or higher in any field, completion of an American Bar Association paralegal program, or completion of paralegal programs with various semester credit hours. You must also complete 30 hours of CLE in the specialty area in which you are testing within three years prior to the test.

The nine-page application includes employment history and details of your work, such as the number of trials, appeals, plea papers, post convictions remedies, federal tasks, and probation revocation hearings in which you have been involved; current job duties; and of course certification by your supervising attorney that you are able to complete the various tasks listed. You must be in good standing with State Bar with no disciplinary issues and

must also attest that a minimum of 50 percent of your paralegal duties have been devoted to the specialty area in which you are seeking certification. TBLS will also contact local judges and attorneys to attest to your competence. I sent in my application along with the required $75 fee by the deadline. At this point, I was invested—and determined.

There is no study guide, no class to take, and no practice test—only a two-page guide from TBLS describing the test's format and an outline of what it might cover: the entire Penal Code, Code of Criminal Procedure, and federal matters. This seemed rather daunting, so I decided to start the study process before finding out if I was accepted to sit for the exam. It took several weeks before I received the email stating I was accepted. I was excited for about a whole 10 minutes before reality set in … I would be taking a four-hour test on November 7!

Studying for the exam

I took my Penal Code home nightly to study, talked to another board-certified paralegal I met at a TDCAA training, and peppered my elected DA as well as the assistant prosecutors with questions. I am grateful that my boss and office were very supportive. My elected, Bill Torrey, encouraged me to "go for it" and would occasionally check up on my study progress, thus making me accountable. Sometimes, rather than answering my questions, my coworkers handed me a book (I gained strength in my biceps from toting these books daily), and a young ADA, Joseph P. Johnson, loaned me his criminal law course books, notebook, and handwritten notes from law school. Plus, TDCAA has done a great job training on *Brady* and the Michael Morton Act at every seminar I have attended, so that helped as well. And because the test covers both prosecution and defense, it greatly assisted me that I worked with my DA for eight years in private defense before he was elected. Most of what I studied I already knew and used in my job on a frequent basis, but now I understood why.

About two weeks before the test, as feelings of panic and inadequacy set in, I looked on the TBLS website for the last paralegal certified in Criminal Law—she tested and passed last year. I sent her a panic-stricken email begging for whatever assistance she could provide. She kindly responded to my note, and finding this previously unknown cheerleader was calming to me. My boss allowed me to take a vacation day the Friday before the test; I crammed all that I possibly could and then drove to Austin so I would not have to make the trip the morning of the test.

Taking the exam

The TBLS staff was very friendly and the test was handled very professionally. All paralegals take the test on the same date, regardless of the specialty area; I'd estimate there were 40 nervous individuals testing that day. I will not lie: The test is brutal. There are a series of essay questions that cover ethics, procedure, deadline, etc., with practical, real-office scenarios. I have the gift of gab, so I was comfortable with the essay portion and wrote anything and everything that I thought was remotely relevant to the questions. I felt pretty good at the completion of the essay. We took a short break and began the multiple-choice portion next. After I finished that section, I wondered whether I had ever even sat in an attorney's waiting room, let alone having spent the last 20 years in the legal field—that's how hard it was. But I knew I had given it my best shot, and I could sit again next year if I did not pass.

Then began the wait for my results. I thought everyone would have results by the end of December, but December came and went, and I heard nothing. Finally I broke down and called TBLS, and they told me they were nearing the end of the grading and that I would receive an email in mid-January. That week in January, I was checking my personal email account every hour, and finally on January 13 at 4:41 p.m. I received the message congratulating me on passing. Pandemonium ensued at the office! I was excited, elated, and so grateful to all the people in my office who encouraged me and helped me in the process. At first, I was aggravated that TBLS waited so late in the day to email—but then it occurred to me that my whole office was disrupted and I was completely unproductive for the next 19 minutes. It was probably a good thing that the email hadn't come earlier in the day and disrupted even more of it.

Calling more paralegals in criminal law

I am the ninth paralegal to receive certification in Criminal Law since 1998. This number is very low com-

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pared to other certification areas, such as family law (131 certifications), civil trial (98), and personal injury (75). (You can go to the TBLS website for the complete listing.) Twenty-five paralegals were inducted in 2015, only one in criminal law. I would like to see this change. The work we do in criminal law is as important, if not more so, than any other area of the legal field. We are protecting society from criminals, and we do so ethically. And the knowledge I gained while studying for the test is priceless.

It also reflects well on the office that I am board-certified. I hate the jokes about incompetent county or government employees—even some of my colleagues and attorney friends whom I've known for years from private practice teased me about joining the team at the DA's office. I did not, as they might've seen it, take a step down. My work is important, as is the work in every district and county attorney's office in the state of Texas. It would be wonderful for more paralegals to become board-certified. We already know what we are doing as we prep our attorneys for trial, revocation hearings, and so on—let's prove it by earning our certification!

I encourage everyone to check out the TBLS website, www.tbls.org, for more information. And please do not hesitate to contact me if you have questions or need encouragement—I would love to help others attain their certification. It is a great feeling, and it reflects well on your office and on prosecution as a whole. ❇

A late breakfast with a county commissioner

What are the obligations of a prosecutor's office in advising a county commissioners court? Find answers to that burning question (and more).

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

Just last week, I was preparing for a particularly vexing Sexual Assault of a Child case. At 4 o'clock one morning, my neighbor's dog woke me up with its barking. Despite my annoyance at being awake so early, an idea for my closing argument popped into my head. Unable to sleep with the idea simmering, I got up and went to work so I could figure out the particulars of my closing.

A couple hours into building my PowerPoint, my stomach rumbled and reminded me that, in my haste, I had forgotten to eat breakfast. It was after 8 already, but because I had been at the office for a while already, I figured that I deserved my favorite drive-through guilty pleasure.

Twenty minutes later, I returned to the courthouse with breakfast-on-a-bun in hand. As I strode across the parking lot, I heard, "Good morning, Mr. Wavrusa," from behind me. Whom did I have the good fortune of running into as I arrived an hour "late" for work? Only one of our wonderfully hard-working and budget-conscious county commissioners, of course.

Before I could deliver the explanation for my apparent tardiness, the commissioner launched into a problem he was having with a stretch of county road in his precinct. He ended with a question about the procedure for permanently closing a county road, and I gave him my promise to get him an answer as soon as I could.

As an attorney in a rural prosecutor's office, I am now used to interactions with our county commissioners, so I took this exchange (which forced me to shift gears from my Sexual Assault of a Child case to a question on closing a county road) all in stride. However, for new attorneys and those making the transition from a large to a small office, this kind of request could create some uneasiness, especially if the focus of your practice has been entirely criminal. So in the spirit of offering advice, I hope to provide some important considerations before you decide to advise or undertake representation of your county's commissioners court.

How *must* I help?

If you are employed in any capacity by a prosecutor's office in Texas, you should be familiar with the job

description. Article V, §21 of the Texas Constitution provides that:

> "A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county. … The County Attorneys shall represent the State in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature."

In addition, the Texas Code of Criminal Procedure articulates, "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused."[1]

What you might not realize is that the obligation to see that justice is done is only part of our duties. Article 2.01 of the Code of Criminal Procedure is more directly aimed at district attorneys and requires them to represent the State in all criminal cases in district courts as well as examining trials, appeals, and writs of habeas corpus.

Article 2.02 discusses the duties of county attorneys. They are obligated to attend the terms of court in their counties below the grade of district court and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney the county attorney shall represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case on behalf of the State in the district court. He shall also represent the State in cases he has prosecuted which are appealed.

These three provisions are the most well-known in describing the duties and responsibilities of county and district attorney offices. Based on them, you might guess that county and district attorneys do not represent the county or state in civil matters, and you would be right for the most part. Generally, there is no obligation to provide representation in the civil matters of the county or state, but there are instances where statute expressly requires a county or district attorney's office to engage in civil representation.

To determine the civil duties of your office, first consult the statute in the Government Code that creates your office or that is specifically applicable to it. There are three types of prosecutors' offices in Texas: 1) county attorneys, 2) district attorneys, and 3) criminal district attorneys.[2]

The Legislature lays out General Provisions and Provisions Applicable to Specific Districts in Chapter 43 (District Attorneys), Chapter 44 (Criminal District Attorneys), and Chapter 45 (County Attorneys). The General Provisions for each chapter are outlined in Subchapter A; provisions applicable to specific districts are found in Subchapter B.

Subchapter A just isn't that interesting. Its provisions vary depending on the type of prosecutor's office, but generally, Subchapter A covers topics like Bonds, Failure to Attend Court, and Expenses.

Subchapter B of each chapter is where you'll find the meat and potatoes of each office's authority. When a county official approaches a county prosecutor with a civil issue, it is *critical* that you consult the provision in relevant Subchapter B that specifically applies to your office. Chances are that you are simply obligated to prosecute criminal matters in a particular set of courts, but you may find the odd provision about your county's ability to accept grants[3] or the even odder provision allowing your office's investigator to be someone other than a licensed attorney.[4]

But it could well be that your county or district has specific civil obligations placed on it.[5] For example, the Fort Bend County Attorney's Office is obligated to represent the Fort Bend County Drainage District and any other county entity created by law.[6] The Grimes County Attorney shall represent the State, Grimes County, and the officials of the county in all civil matters pending before the courts of Grimes County and any other court.[7] Conversely, the Grimes County Attorney, per statute, has no power, duty, or privilege in Grimes County relating to criminal matters, including asset forfeitures under Chapter 59, Code of Criminal Procedure, appearance bond forfeitures under Chapter 17, Code of Criminal Procedure, or habeas corpus related to criminal matters.[8]

If, in your review of the relevant portion of Subchapter B, you discover that you have an obligation to whatever entity is requesting your help, you don't have much of an option. However, many offices will see that they have no duty to undertake representation.

But even if you do not have an obligation to the entity, you are not necessarily barred from helping out.

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Chapters 43, 44, and 45 are not the only areas of the Government Code that place civil obligations on the county or district attorney's offices. Other responsibilities are scattered throughout the Government Code, and if you don't know where to find them, it would be easy to overlook them.

For instance, a district or county attorney, on request, shall give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official.[9] "County or precinct official" is a pretty broad term that applies to more than just elected officials.[10] If a county or precinct official requests an opinion from the county or district attorney, that official is not bound by that opinion.[11] (Nothing like someone asking for your opinion then completely disregarding it, right?)

How *may* I help?

When you work in a rural county, you will inevitably come to know the local officials regardless of your high or low position in the office. In many ways knowing most everybody can work to your benefit. In other ways it does not. One such way is that a personal relationship with these county officials often leads to their being comfortable enough with you to just drop in and ask questions about their official duties.

The county commissioners court will be the likely source of most civil legal questions you receive. It is the largest source of executive power in the county, and it will be the final decision-maker in all of the county's business. This role leads to lots of questions from a group that is not normally composed of individuals with a legal education.

The power of the county commissioners court comes from Article V, §18(b) of the Texas Constitution, which provides that the county be divided into four commissioners precincts and that each shall elect one county commissioner. The county judge presides over the commissioners court.

The Texas Supreme Court has construed Article V, §18 to mean "that although a commissioners court may exercise broad discretion in conducting county business, the legal basis for any action taken must be grounded ultimately in the constitution or statutes."[12] However, the *Guynes* court noted, "As the administrative head of county government, a commissioners court also possesses broad implied powers to accomplish its legitimate directives."[13] These powers include the authority to contract with experts when necessary, including attorneys,[14] because the commissioners court has the implied power to control litigation and choose its legal remedies.[15]

The commissioners court's power to contract with attorneys means that the ability of a prosecutor's office to represent a county entity in civil matters can be contracted away as long as the legislature has not specifically obligated the office to undertake representation. Counties have taken different approaches in contracting civil work away from the local prosecutor's office. Some commissioners courts will create a team of "in-house" attorneys, who are not members of the local prosecutor's office, to advise them in civil matters. In *In re Cascos*, for example, the Cameron County Commissioners Court transferred the Cameron County Civil Legal Division out of the County Attorney's Office. A suit was brought by the County Attorney's Office to prevent this action, and the appellate court held that because Texas Government Code §45.131 did not grant the Cameron County Attorney's Office authority to represent the county in civil matters, it was within the commissioners court's powers to move civil representation out of the County Attorney's Office.[16]

The ability of the commissioners court to contract away civil representation does come with one significant limitation. The commissioners court of a county with a population of more than 1.25 million may employ an attorney as special counsel. The special counsel may be employed to represent the county in any suit brought by or against the county; prepare necessary documents and otherwise assist the court, the county engineer, and other county employees in the acquisition of rights-of-way for the county and for state highways; or represent the county in condemnation proceedings for the acquisition of rights-of-way for highways and other purposes for which the county has the right of eminent domain. The county attorney[17] is obligated to select this special counsel. The county attorney determines the terms and duration of the special counsel's employment subject to approval by the commissioners court.[18]

The more common approach is to retain independent counsel in civil disputes on the recommendation of the county insurance provider. A

good example is the Texas Association of Counties (TAC). TAC has a risk management pool to help protect against a variety of liabilities including workers compensation, workplace discrimination, harassment, retaliation, wrongful termination, and claims under the Americans with Disabilities Act.[19] For the many counties that participate in this risk management pool, TAC provides a list of local attorneys who are approved to represent counties in civil matters. If your county participates in such a program, you have two options. The first is to simply decline to answer the commissioner's question and recommend he consult with the commissioners court's insurance provider. The second is to answer the question with the caveat that he should consult with the insurance provider, as the provider will bear the responsibility of representing the official and/or county in court should litigation result.

What are expectations?

The obligations of each county and district attorney's office to represent local officials vary a bit from one jurisdiction to the next—but the differences in responsibilities don't hold a candle to the differences in personalities and expectations. For that reason, there is no one-size-fits-all strategy that I can offer for dealing with local commissioners and elected officials. What I can give you, though, are some considerations for each time you decide to offer advice.

Time. I have yet to meet a county or district attorney who is a bona-fide expert in everything from deceptive trade practices, to wills and probate, to the administration of county roads. Yet county and precinct officials will ask questions on all of these subjects and more. I would expect that at least a little bit of research will be required for almost every question you are asked, which is why it is important to establish a timeline for the expected response early on.[20] You don't want a county commissioner to expect an answer in a day when you don't plan on researching it for a week. That type of miscommunication won't be remembered kindly during the county budget discussions.[21]

Detail of response. Sometimes the county or precinct official is simply looking for a yes or no answer to the question, "Can I do this?" Other times, he is looking for a more detailed response that discusses the ramifications of one course of action versus another. Find out what is expected when the official poses the question.

Form of response. I would be absolutely fine if voicemail had never been invented—I would rather respond to 10 emails than two voicemail messages. Unfortunately, technology is not the strong suit for most officials in my county. Chances are that at least a few of your local authorities are the same way, so be sure to ask them how they would like to hear back from you on their questions.

Follow-up. This is just a customer service tip more than anything else. All people, county officials especially, want to feel important. Following up with the local official within a couple of days will go a long way toward building a good rapport. If you are supplying the answer to a governmental body that will be making a decision with the information, offer to prepare a presentation for the meeting or be available via phone or email to the other members in case there are additional questions.

Conclusion

Working in a rural county is a lot like running a small business. You quickly get to know everyone who works there, from top to bottom, and what their responsibilities are. Most attorneys in county and district attorney offices will be seen simply as prosecutors, but there will be times when a county official has a legal question. In that moment, you won't be thought of as "the prosecutor"—you will be thought of as "my attorney." When that moment arises, it will be important to know what you as a prosecutor *can* do, what you *must* do, and what you *shouldn't* do for that county official. You will be doing yourself a huge favor by having an understanding of these rules and, if you're lucky, you won't have to explain why you didn't bring enough breakfast for everybody. ❇

Endnotes

1 Tex. Code Crim. Proc. Art. 2.01.

2 There are a handful of County Attorney's Offices with felony jurisdiction, which is the constitutional default in the absence of a statute creating an overlapping district attorney for that county. We often refer to them as "County & District Attorney's Offices," and not all of them have an enabling statute in the Government Code.

3 For example, Tex. Gov't Code §43.115 allows the county commissioners for the 29th Judicial District to accept gifts and grants from any political subdivision to finance adequate and effective prosecution programs within the county or district.

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Don't fear the *Franks* motion

Though defense counsel's accusations that an officer lied in an affidavit for search warrant might strike panic in a prosecutor's heart, you need not fear.

By Tara Tzitzon
Assistant District Attorney in Nueces County

I recently had a misdemeanor driving while intoxicated (DWI) case where defense counsel asserted in his motion to suppress the blood draw results that the peace officer lied in the affidavit for a search warrant, even going so far as to accuse the officer of perjury. In my case, the officer had not administered field sobriety tests because the defendant had just been in a major collision where she struck another vehicle and injured the driver, and it is the general policy of the Corpus Christi Police Department (CCPD) not to ask or require a suspect to perform SFSTs when she has been in a wreck.

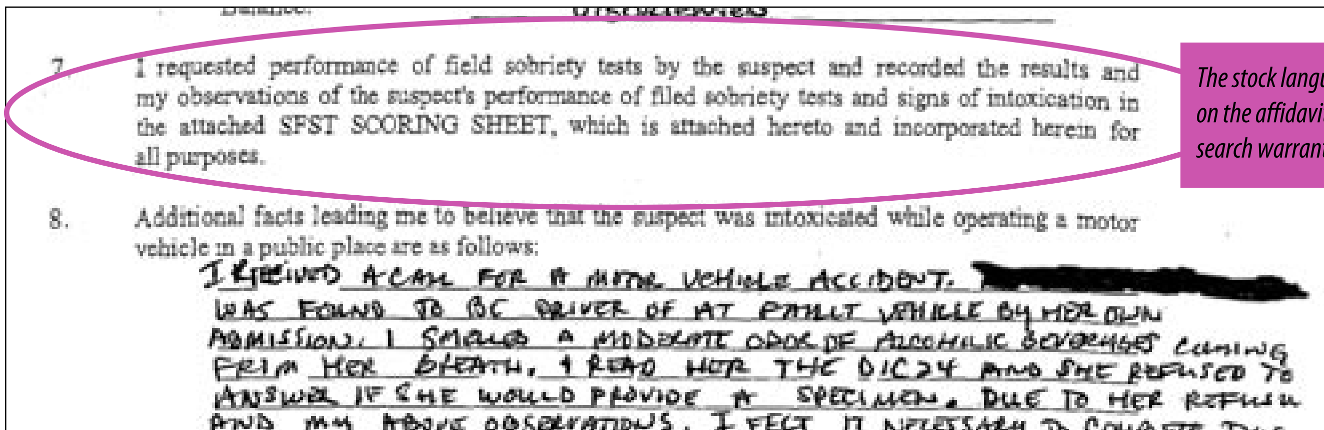
In Nueces County, the police department's affidavit for search warrant contains a paragraph that reads, "I requested performance of field sobriety tests by the suspect and recorded the results and my observations of the suspect's performance of filed [sic] sobriety tests and signs of intoxication in the attached SFST scoring sheet, which is attached hereto and incorporated herein for all purposes." This is stock language included in all Nueces County affidavits for search warrants (see below for a scan of the affidavit), and it implies that all DWI suspects undergo SFSTs. Because of the wreck in my case, the officer did not perform the tests and noted such on the Field Sobriety Incident Report, where he checked the boxes to say that he did *not* administer SFSTs to the defendant (see page 36 for a scan of it)—but admittedly there was a discrepancy between the stock language in the affidavit and the checkboxes on the worksheet.

Defense counsel accused the officer of lying to obtain the search warrant simply because he had left in the aforementioned stock language. Based on this error in the warrant, he filed a *Franks* motion, asking the search warrant be suppressed. This motion is a useful tool for defense attorneys but relatively easy for prosecutors to defeat.

When defense counsel files a *Franks* motion, he is alleging that an officer was intentionally untruthful in obtaining a warrant. More specifically, the motion attacks a warrant on the ground that an officer intentionally lied or misstated facts that are the basis for the probable cause and therefore misled the judge to obtain the warrant. A *Franks* motion will usually arise in the context of a suppression hearing, but it can also be the subject of its own hearing.

The *Franks* decision

The *Franks* motion is derived from the United States Supreme Court



7. I requested performance of field sobriety tests by the suspect and recorded the results and my observations of the suspect's performance of filed sobriety tests and signs of intoxication in the attached SFST SCORING SHEET, which is attached hereto and incorporated herein for all purposes.

8. Additional facts leading me to believe that the suspect was intoxicated while operating a motor vehicle in a public place are as follows:
I RECEIVED A CALL FOR A MOTOR VEHICLE ACCIDENT. [redacted] WAS FOUND TO BE DRIVER OF AT FAULT VEHICLE BY HER OWN ADMISSION. I SMELLED A MODERATE ODOR OF ALCOHOLIC BEVERAGES COMING FROM HER BREATH. I READ HER THE DIC24 AND SHE REFUSED TO ANSWER IF SHE WOULD PROVIDE A SPECIMEN. DUE TO HER REFUSAL AND MY ABOVE OBSERVATIONS, I FELT IT NECESSARY TO [illegible]

The stock language on the affidavit for search warrant

case *Franks v. Delaware*,[1] which held, "Where the defendant makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant with a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."[2]

However, if after a *Franks* hearing, the false material is set aside and there remains sufficient content in the affidavit to support a finding of probable cause, the warrant will stand. Additionally, "allegations of negligence or innocent mistake are insufficient."[3] Defense counsel cannot simply pick any discrepancy and claim that it was done intentionally but rather must affirmatively prove that it rises to the level of knowingly false.

The simple truth is that we expect a lot of our officers, and they sometimes make mistakes. Officers cannot be expected to focus on only one thing during an investigation involving DWI or a crash—they are performing numerous tasks at once, often late at night, in dangerous

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A late breakfast with a county commissioner (cont'd)

4 For example, Tex. Gov't Code §43.105 specifically allows the 9th Judicial District to hire an investigator who is not a licensed attorney.

5 County Attorneys in Fort Bend, Grimes, Harris, Lee, Matagorda, Montgomery, Oldham, Swisher, and Wharton Counties are empowered with the exclusive right to represent their respective commissioners courts in civil matters or in all county matters. See Tex. Gov't Code §§45.179, .193, .201, .244, .261, .270, .280, .319, and .341.

6 Tex. Gov't Code §45.179.

7 *Id.* at §45.193.

8 *Id.*

9 Tex. Gov't Code §41.007.

10 For example, members of the Harris County Sheriff's Department Civil Service Commission in regards to their official duties. Each member of the commission is a "public official" of Harris County. Tex. Op. Att'y Gen. JM-0633 (1987).

11 A county auditor is not bound by the advice or opinion of the county attorney regarding the lawfulness of a claim, bill, or account against a county. Tex. Op. Att'y Gen. GA-0604 (2008).

12 *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993) (citing *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451, 453 (1948); *Renfro v. Shropshire*, 566 S.W.2d 688, 690 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e)).

13 *Id.* (citing *Pritchard & Abbott v. McKenna*, 162 Tex. 617, 350 S.W.2d 333, 334 (1961); *Anderson v. Wood*, 137 Tex. 201, 152 S.W.2d 1084, 1085 (1941); *Galveston County v. Gresham*, 220 S.W.560, 562 (Tex. Civ. App.—Galveston 1920, writ ref'd)).

14 *Id.* (citing *McKenna*, 350 S.W.2d at 334; *McClintock & Robertson v. Cottle County*, 127 S.W.2d 319, 321 (Tex. Civ. App.—Amarillo 1939, writ dism'd judgm't cor.)).

15 *Looscan v. Harris County*, 58 Tex. 511, 514 (1883).

16 *Cascos v. Cameron County Atty.* (*In re Cascos*), 319 S.W.3d 205, 2010 Tex. App. LEXIS 5543 (Tex. App. Corpus Christi 2010). In *Cascos*, the appellate court found it irrelevant that the commissioners court had acquiesced to the county attorney handling the county's civil work load for more than 100 years. The appellate court also held that the mandatory duty of the county attorney's office to provide written advice to county officials only if asked or requested by a county official, under Tex. Gov't Code §41.007, did not require the commissioners court to seek advice solely from the county attorney's office.

17 Or the district attorney or criminal district attorney if there is no county attorney.

18 See Local Govt Code §89.001.

19 TAC's website also boasts that it protects members of the risk management pool against "alleged malicious prosecution by county prosecutors." That was infuriating to see.

20 Timing is also especially important if the information a prosecutor provides is critical to the meeting of a governmental body. The Texas Open Meetings Act places strict requirements on the form and substance of notices of open meetings. Providing your response in a timely manner will help the elected official stay in compliance with this important legislation.

21 Helpful hint: I have a canned answer that I give to officials when they inevitably ask me about a topic that I'm unfamiliar with: "You know, I don't know the perfect answer to that question off of the top of my head, but if you will give me some time, I'll make myself an expert in

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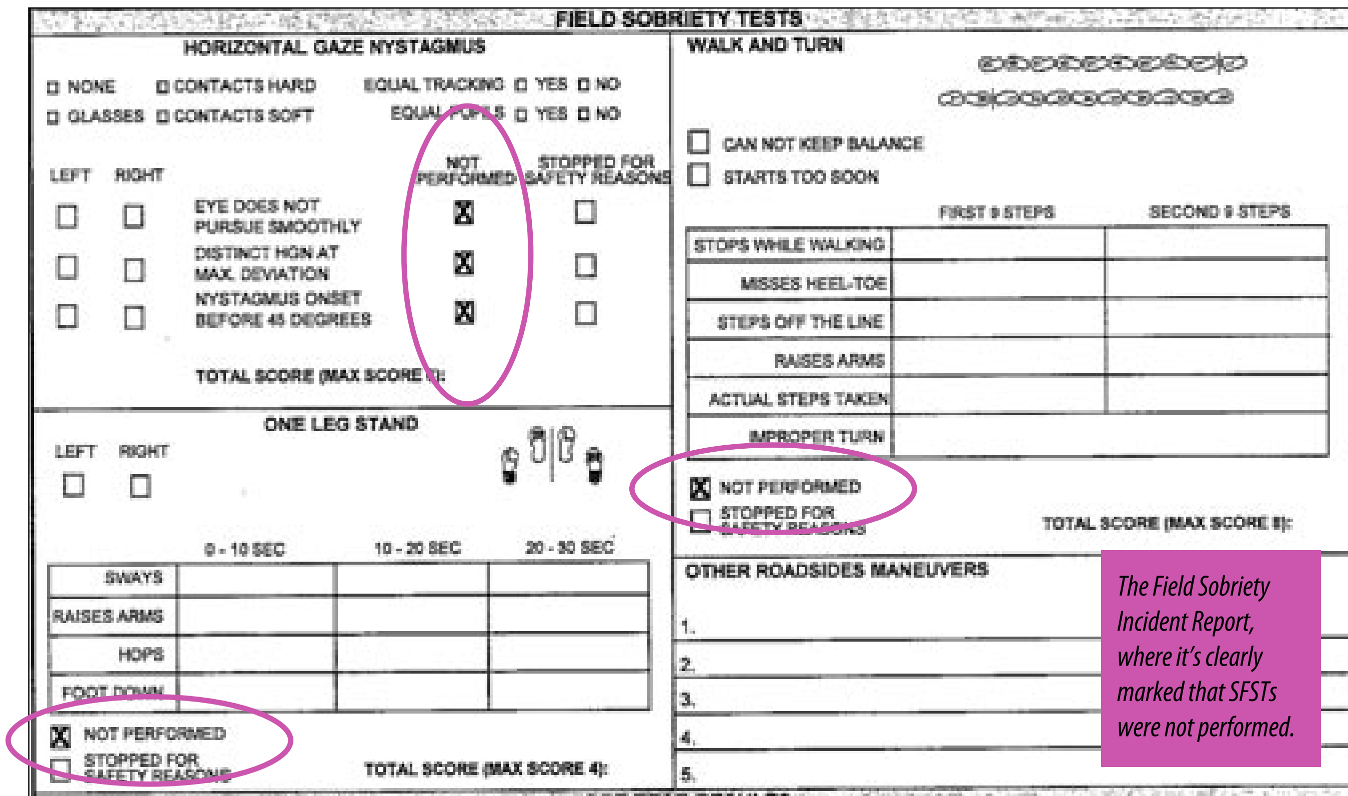

FIELD SOBRIETY TESTS

HORIZONTAL GAZE NYSTAGMUS

☐ NONE ☐ CONTACTS HARD EQUAL TRACKING ☐ YES ☐ NO
☐ GLASSES ☐ CONTACTS SOFT EQUAL PUPILS ☐ YES ☐ NO

LEFT	RIGHT		NOT PERFORMED	STOPPED FOR SAFETY REASONS
☐	☐	EYE DOES NOT PURSUE SMOOTHLY	☒	☐
☐	☐	DISTINCT HGN AT MAX. DEVIATION	☒	☐
☐	☐	NYSTAGMUS ONSET BEFORE 45 DEGREES	☒	☐

TOTAL SCORE (MAX SCORE 6):

ONE LEG STAND

LEFT ☐ RIGHT ☐

	0 - 10 SEC	10 - 20 SEC	20 - 30 SEC
SWAYS			
RAISES ARMS			
HOPS			
FOOT DOWN			

☒ NOT PERFORMED
☐ STOPPED FOR SAFETY REASONS

TOTAL SCORE (MAX SCORE 4):

WALK AND TURN

☐ CAN NOT KEEP BALANCE
☐ STARTS TOO SOON

	FIRST 9 STEPS	SECOND 9 STEPS
STOPS WHILE WALKING		
MISSES HEEL-TOE		
STEPS OFF THE LINE		
RAISES ARMS		
ACTUAL STEPS TAKEN		
IMPROPER TURN		

☒ NOT PERFORMED
☐ STOPPED FOR SAFETY REASONS

TOTAL SCORE (MAX SCORE 8):

OTHER ROADSIDES MANEUVERS

1.
2.
3.
4.
5.

The Field Sobriety Incident Report, where it's clearly marked that SFSTs were not performed.

areas, and under a time crunch. (That was certainly true for my officer: He encountered the defendant and her crashed car at a major Corpus Christi intersection that's always busy, and the woman in the other car was badly bruised and having chest pain.) To further complicate the issue, many police departments, like ours, use stock forms for search warrants, and a lot of times the officers who are writing reports are the newest on the force, and they may not have a lot of experience with these forms.

Defeating the motion

The court asked defense counsel and myself to write briefs on the *Franks* motion. In my brief I reiterated the holding in *Franks* and pointed out that defense counsel failed to make the required "substantial preliminary showing" that the officer knowingly, intentionally, or with reckless disregard for the truth included a false statement in the warrant affidavit.[4] My argument was that inclusion of stock language in the affidavit did not negate the search warrant because that stock language was not meant to manufacture probable cause. In fact, the officer had an abundance of probable cause to stop the defendant. The defendant admitted she was alone in the car (so she was clearly the driver) and could be heard crying on the dash-cam video, asking if she had hurt the other motorist. Her blood test came back with a .187 BAC.

Also helpful to me was that for all DWI stops, CCPD officers complete a worksheet for standardized field sobriety tests. It includes checkboxes next to the horizontal gaze nystagmus (HGN), one-leg stand, and walk-and-turn tests to indicate whether the test was performed. The officer in my case checked boxes for all three SFSTs that clearly indicated that the tests were *not* performed. I pointed out to the court that the officer had to affirmatively mark on the scoring sheet that none of the three field sobriety tests were performed, whereas the stock language is a standard paragraph that is included in every affidavit for search warrant in Nueces County.

I also called the officer to the stand during the *Franks* hearing. As *Cates v. State* says, "When a defendant challenges the warrant affidavit on the grounds that it contains known falsehoods, the trial court is not limited to the four corners of the affidavit,"[5] so an officer's testimony at a suppression hearing can be used to address and clarify the allegations of untruthfulness. My officer testified that he made a mistake by not

striking the stock language, but it was not purposeful or intentional at all. When the court heard from the officer, it was clear that he did not act with the intent to manufacture probable cause—he had simply overlooked the stock language in the affidavit.

After reading counsels' briefs, the court ruled in the State's favor. The defendant ended up pleading guilty to DWI above a 0.15 and received a jail sentence.

Conclusion

In conclusion, don't fear the *Franks* motion. It is understandable that allegations of untruthfulness against our officers strike fear into the hearts of prosecutors, but in most cases it is simply an intimidation tactic from the defense to throw the State off-guard. Face it head on, let the officer explain the realities of getting a blood search warrant, and do your research—with a little bit of time and dedication, the State can easily prevail over this type of motion. ❇

Endnotes

1 *Franks v. Delaware*, 438 U.S. 154 (1978).

2 *Id.* at 155-156.

3 *Id.* at 171.

4 *Id.* at 154, 155-156.

5 *Cates v. State*, 120 S.W.3d 352, 355 n. 3 (Tex. Crim. App. 2003.)

Intervening with intoxication before a crime occurs

Two prosecutors are attempting to change the culture around driving while intoxicated in Hidalgo County.

By Lauren Renee Sepulveda
Assistant Criminal District Attorney in Hidalgo County

One night during my sophomore year of high school, some upperclassmen and I sat in a traffic jam on the freeway. We could see the red and blue lights of police units piercing through the darkness, and it was clear there had been a pretty serious wreck on the frontage road. As we inched past the scene, Jesse Diaz—a boy who would later be the valedictorian of his graduating class—wondered aloud if we knew someone hurt in the wreck. As it turns out, we did.

The three teens involved in the one-vehicle crash were all schoolmates of ours, including the intoxicated driver. The one fatality was the backseat passenger—a smiling, friendly freshman named Charlotte Rhae Bustillos. At a point in our lives where we felt invincible, the dangers of driving while intoxicated (DWI) were suddenly very real and sobering. No longer was a DWI just a vague threat of criminal repercussions but a possible death sentence.

Back at school, all of us reeled from a young life cut short far too soon. But sadly, Charlotte was not the last death from an intoxicated driver we'd see during our youth. A couple of years after he graduated, Jesse was also killed when an intoxicated driver crashed into a car in which he was a passenger. Another brilliant young life that was full of potential was extinguished because an impaired driver got behind the wheel.

A culture of drinking

Growing up in Hidalgo County, I watched alcohol become part of the youth culture at an early age. When I was in high school, teenagers would cross into Mexico every weekend to get around the 21-year drinking age in Texas—you could drink at 18 across the border. My peers and I would routinely get into cars whose drivers we knew to be intoxicated by drugs or alcohol without a second thought. When I returned home after college and worked for a local school district, several of my fifth- and sixth-grade students were already openly experimenting with drugs and alcohol.

After law school, I returned to Hidalgo County and began working as an assistant public defender. A large percentage of my clients were charged with DWI or other intoxication offenses. When I began working at the Criminal District Attorney's Office in 2013, the reality of just how many crimes involved alcohol or drug intoxication hit me full-

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force. As Operation Strong Safety came into effect during the immigration crisis and more law enforcement agents flooded our county, those arrests continued to increase. Synthetic drug arrests were also on the rise, and we saw an uptick in the number of DWIs, intoxication assaults, and intoxication manslaughters that involved drugs alone or a combination of alcohol and drugs. Even more startling was the number of cases where intoxicated parents or guardians were arrested for DWI with minor children in their cars. At every turn since I entered adulthood and the legal profession, intoxication has consistently been a large problem in our community—albeit one that is rarely addressed before someone is in trouble with the law or has developed a substance abuse problem.

As in many jurisdictions, driving while intoxicated is a huge problem in Hidalgo County. It is the eighth largest county in Texas with a population of 831,073 at the last census.[1] According to the Texas Department of Transportation (TxDOT), last year Hidalgo County saw 884 alcohol-related car crashes, 24 of which had a fatality.[2]

In 2014, three out of the five intoxicated-driver crash fatalities in Hidalgo County were people under age 21.[3] By comparison, Dallas County, which has a significantly larger population of 2.5 million, had only six such fatalities,[4] and Travis County, with a population of 1.2 million, had zero.[5] The National Highway Traffic Safety Administration estimates that every two minutes in the United States, a person is injured in a drunk driving crash and that on average, two of three people in their lifetime will be involved in a drunk-driving crash.[6] While these statistics may seem shocking, they expose what a large problem intoxicated driving is in Hidalgo County, our state, and our nation.

Doing something about it

In late summer of 2014, Carisa Casarez and I attended the State Bar Leaders Conference in Houston as representatives for the Hidalgo County Young Lawyers Association (HCYLA). At that time, Carisa was an assistant public defender for Hidalgo County but now serves as an assistant criminal district attorney in our felony section. As part of the conference, we had discussed issues within our local communities with other attorneys from across the state. Carisa and I both voiced our concern about increasing arrest rates in Hidalgo County, specifically DWI arrests.

Carisa Casarez

The following year, during the 2015 State Bar Leaders Conference, the Texas Young Lawyers Association (TYLA) announced it was giving out local affiliate grants for community service projects for the upcoming year. Carisa and I, both board members for HCYLA, knew we wanted our organization to perform more community service in 2016 and began brainstorming about a possible grant project. We wanted to do a project centered on DWIs but were stumped as to the specifics. As prosecutors, we knew there were already programs in place within our office to address DWIs once a person had been arrested and charged with the offense, so we decided to focus on prevention. After several hours of planning, we decided on a public service and education campaign focusing on DWI education and prevention in our young adult population. The goal is to intervene and change the culture of intoxication before young adults begin to commit DWIs or get in vehicles with intoxicated drivers—sort of a D.A.R.E.[7] campaign for DWI.

After we returned from the Bar Leaders Conference, we began writing the grant application. We decided to call it the Young Adult DWI Intervention Program, or YADI for short. Once we completed the application, we submitted it and waited patiently for TYLA's response. In the fall of 2015, HCYLA was notified that our grant request was accepted and we were to receive a grant of $1,250 for the YADI project. Our HCYLA Board of Directors decided all the grant money would be spent on promotional and education materials for the students we want to reach. (The board has already discussed future fundraising projects and the possibility of soliciting donations from local businesses and attorneys to fund the YADI program beyond our one-year grant.)

As Carisa and I began writing the curriculum for the YADI program, the first person we talked to was our boss, Criminal District Attorney Ricardo Rodriguez. Since taking office in January 2015, he has been very supportive of his ACDAs participating in leadership organizations

and community service projects. When we told Mr. Rodriguez about the YADI project focusing on prevention and education concerning DWIs, he immediately told us that the office would give us any support we needed and agreed to partner with our project.

Carisa and I then contacted the three judges who deal with juvenile cases in our county— the Honorable Jesse Contreras of the 449th District Court, the Honorable Israel Ramon Jr. of the 430th District Court, and the Honorable Mario E. Ramirez Jr. of the 332nd District Court—all of whom gladly endorsed our cause and offered their assistance in implementing the program.

Next we contacted Ana Verley and Rudy Rodriguez, victim services specialists with the local Mothers Against Drunk Driving (MADD) affiliate. Carisa and I have both previously worked with MADD when prosecuting intoxication cases. When we pitched the idea for the YADI program as a community service project, MADD offered its support and resources without hesitation. The HCYLA Board of Directors then began contacting our local law enforcement agencies to appoint liaison officers for YADI within each department. Each agency we contacted responded enthusiastically. At every turn, we were pleasantly surprised with the positive feedback we received for our program from our local law enforcement community.

Starting in April, we rolled out the YADI project. HCYLA members staff it, along with MADD employees and local law enforcement. Our plan was to visit local schools and meet with parents to distribute education and prevention tools to combat DWIs. On Friday, April 15, HCYLA did its first presentations of the YADI Program to the students of Sgt. William G. Harrell Middle School and Mercedes Early College Academy. Ana Verley from MADD, Trooper Maria Montalvo from the Texas Department of Public Safety, local juvenile judge Jesse Contreras. and I presented to the students about the dangers of minor drug and alcohol abuse. We got an overwhelmingly positive response from both the students and staff at each school.

YADI is currently targeting middle school and high school students and their parents. We felt that this age is where several behaviors that lead to future problems with alcohol and drugs first develop—but drinking and drug use are not yet part of their culture. It's also the least-served group when it comes to DWI prevention and education. When we expressed this idea to Ana Verley from MADD, she agreed that this was a good age group to target and told us that we could potentially create future advocates for our message of prevention by targeting these particular kids.

When we visit local schools we will be doing "safe and sober" activities with local kids, sponsoring art contests, and educating children by talking about DWI and its consequences from several different points of view. We aim to teach them preventative measures to keep them from driving while intoxicated or getting into a car with a drunk driver, and how to prevent intoxicated friends from getting behind the wheel. We are excited to visit local schools and have the students bring their materials home to start addressing this issue with local families. HCYLA hopes that by rolling out the YADI program, we can educate the local community and provide both parents and kids with the tools to prevent DWIs in the future.

Together, HCYLA—with the support of the Hidalgo County District Attorney's Office, TYLA, MADD, local juvenile justice judges, and local law enforcement agencies—is trying to change the culture surrounding driving while intoxicated in our community. ❇

Editor's note: Prosecutors in Hidalgo County have been so gracious as to provide electronic copies of the materials they present to students and parents for other Texas prosecutors to view and download. Find them on our website at www.tdcaa.com/journal. Look for this story in this issue.

Endnotes

1 Texas Counties by Population, http://www.texas-demographics.com/coun-ties_by_population.

2 May Ortega, "More Drinking Means Less Dodging," *The McAllen Monitor*, March 9, 2016, www.themonitor.com/news/local/more-drinking-means-less-dodging/article_a1a4f72c-e5a0-11e5-8b33-ff40435be4c5.html.

3 Texas Department of Transportation, DUI (Alcohol) Driver Fatalities by County and Age (2014).

4 *Id*.

5 *Id*.

6 National Highway Traffic Safety Administration. "The Economic and Societal Impact Of Motor Vehicle Crashes, 2010," March 2016, DOT HS 812 013. www-nrd.nhtsa.dot.gov/Pubs/812013.pdf.

7 Drug Abuse Resistance Education.

A deeper discussion of BODA's *Schultz* decision

Three experienced prosecutors weigh in on *Schultz v. Commission for Lawyer Discipline of the State Bar of Texas*, its reach, and what it means for Texas prosecutors.

Editor's note: For more information on the Schultz *decision, see the cover story of the March–April 2016 issue of this journal.*

What is the most significant take-away from this decision for prosecutors?

C. Scott Brumley County Attorney in Potter County

When the blast wave passed after the Michael Morton Act became law, we tended to nod and accept that the gist was "disclose it all." The *Schultz* decision is a granite monolith signifying the reality and gravity of that conclusion. The clear implication of BODA's opinion (which, unlike most of its other opinions, is not a cut-and-paste recitation of rote reasoning and consequences) is to put prosecutors on notice that disclosure is a matter of such significance that even relatively minor mistakes can leave one's law license in the balance. And, to me, it is a clear indication that until the prevailing winds change, the weight of correcting discrepancies in the criminal justice system (real or otherwise) will continue to be borne by prosecutors. The white hat is heavy, and it's not a helmet.

Scott Durfee Assistant District Attorney in Harris County

In my opinion, there are two takeaways from *Schultz*, and we won't know for a while which is going to be more significant to prosecutors in the long run. The immediate impact is that it drew an equivalency between Rule 3.09(d) and Article 39.14(h). As BODA observed, "Although Art. 39.14 is not dispositive in this case, its promulgation refutes Schultz's position that imposing a broader duty on prosecutors to disclose information to the defense than *Brady* creates an unworkable burden. That 'unworkable burden,' if there is one, already exists."

This is significant because *Schultz* affirmed an ethical sanction for misconduct that, by legislative design, would not have been sanctionable under the Michael Morton Act. The decision to leave sanctions against prosecutors and defense attorneys out of the Morton Act was a compromise forged after much debate and discussion, intended to give both sides some time to get up to speed with the new responsibilities and to show their ability to comply without threat of punishment. BODA has now upset that careful balance, giving a defendant leverage to threaten a prosecutor's license under a strict liability standard without a reciprocal right to sanction defense attorneys for violating their duties under the Morton Act. This is not to say that Rule 3.09(d) was not intended to be enforced—ask Terry McEachern[1] about that—but this decision creates a back-door sanction that the Legislature specifically chose to avoid.

The long-term impact of *Schultz* is more subtle. BODA basically concluded that, because Rule 3.09(d) was identical to the ABA's Model Rule of Professional Conduct 3.8(d), it was going to give great weight to the ABA's interpretation of the rule, and it relied heavily on ABA formal opinions in clarifying the scope and application of the Texas disciplinary rule. I understand why BODA would do this—if the scholarship has been done, why reinvent the wheel?—but deferring to the ABA's interpretations is problematic for many reasons. The ABA has traditionally not been a prosecutor-friendly association, and its opinions may not necessarily reflect the beliefs of the current Texas bar membership, much less the beliefs of those Texas lawyers who voted on the Disciplinary Rules when they were passed by referendum in 1989. If BODA is going to look to the ABA, instead of to Texas lawyers, to define prosecutorial ethics standards for Texas, that does not bode well for us.

Rob Kepple TDCAA Executive Director in Austin

The *Schultz* decision is a reminder that compliance with the Michael Morton Act doesn't end with the production of offense reports, exhibits, photographs, and videotapes. Prosecutors must remain alert to potential impeachment evidence that may not have made it into an offense report. It is also a demonstration of how quickly something that

would probably have been inconsequential had it been disclosed before trial (I will suggest that no one in that courtroom really thought the State was prosecuting the wrong guy) can derail a case and lead to a Bar sanction.

The case also reinforces the principle that if evidence can be viewed as favorable, materiality should not part of the prosecutor's disclosure analysis. That has been the way TDCAA has been teaching *Brady* and the duty to disclose exculpatory and mitigating evidence, but BODA attached a significant penalty to falling short here.

Of what precedential value is this BODA decision, both within the grievance process and in our district courts?

Durfee: *Schultz* is the law until it's not the law. Rule 7.11 of the Texas Rules of Disciplinary Procedure allowed Schultz to appeal BODA's determination to the Texas Supreme Court, but he chose not to pursue that remedy. Another prosecutor could challenge *Schultz* in the Supreme Court after exhausting his or her remedies in the disciplinary system, but as a practical matter, the longer *Schultz* goes unchallenged, the harder it will be to dislodge without a change to Rule 3.09(d). Jurisprudential inertia is a real thing.

Brumley: Its precedential value will depend, at least in part, on the procedural avenue a responding prosecutor chooses. Scott Durfee has eloquently explained the procedural and practical considerations attendant with either option (above), so I won't recount them here. Ultimately, I would agree with Scott: It is the law until it's not the law. It may be that a prosecutor could choose to proceed in district court, and an appellate court might decide the matter differently than BODA did. In the current social and political environment, I don't know that I would risk my law license on that prospect.

Procedurally, if a prosecutor is faced with a *Brady*-related complaint in the future, should that prosecutor consider alternatives to the bar evidentiary panel/BODA route?

Brumley: To me, it loops back to what I see as the intended upshot of the *Schultz* opinion: The most viable defensive strategy will be prevention. By the time the matter gets to a grievance, the die may already be cast. If a prosecutor opts to proceed before an evidentiary panel, it would be advisable to be prepared to show that a premium was placed on full disclosure and that any nondisclosure was purely accidental. While the *Schultz* opinion indicates that lack of intent will not be a legal defense under Rule 3.09, under the right facts the stark nature of *Schultz* might wind up being tempered a bit by the mitigating factor of inadvertence despite best efforts being applied. Of course, the efficacy of that approach will largely be a product of making full disclosure a culturally habitual practice within the office.

Durfee: After a determination of "just cause" to proceed with an ethics complaint has been made, a lawyer has 20 days to elect whether to have to complaint heard in a district court or before an evidentiary panel of the State Bar's Grievance Committee.[2] The incentive to proceed with an evidentiary panel is that the panel can issue a private reprimand, which does not identify the lawyer by name, which a district court cannot do. That sanction is not available, however, to prosecutors found to have violated Rule 3.09(d).[3]

Whether to proceed with an evidentiary panel or district court is a case-specific decision based on the nature of the case, the makeup of the local evidentiary panel, and the resources available to the accused lawyer. I really cannot express a hard-and-fast preference.

To what extent do you believe legal and ethical standards involving exculpatory and mitigating evidence have evolved in the last 25 years?

Brumley: I think that the move toward open-file policies and a very liberal approach to exculpatory evidence disclosure was at a full head of steam when the Michael Morton case rose to statewide consciousness. In other words, I think prosecutors generally were already well on their way in the right direction. Unfortunately, the Morton case—retrospective as it was—has been leveraged to serve the narrative that prosecutors still predominantly

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do business the way it was done in that case (and, perhaps, in the early 1990s as a generalization). The case itself and the eponymous statute are now serving the agenda to erode any protections enjoyed by prosecutors against disgruntled defendants and defense lawyers by imposing a mildly kinder and gentler form of strict liability. In short, prosecutors have made progress. Some who are not prosecutors see it as too little, too late, and those advocates seem to have the ear of the ABA and now, perhaps, the disciplinary apparatus.

Kepple: There is no doubt that both the legal and ethical standards have evolved. Example: There is caselaw to support the legal position that potential impeachment evidence concerning the strength of an identification is not evidence that need be disclosed pre-trial, as it is something that would be fleshed out in an identification hearing or at trial.[4] I wouldn't rely on that case today. And although one of our ethics gurus, author and Tarrant County prosecutor Chip Wilkinson often noted that Texas Disciplinary Rule of Professional Conduct 3.09 does not have a materiality requirement, the *Schultz* opinion today brings that home.

Although "when in doubt, disclose" was the constant refrain at prosecutor trainings, *Brady* took center stage after the Court of Criminal Appeals released *Ex Parte Masonheimer*.[5] That case focused our profession on our obligations and led to a stream of *Brady* training at TDCAA events. I am impressed that Texas prosecutors are uniformly aware of their obligations and are dutifully trying to live up to the expectations. And things will continue to evolve. Just look at how prosecutor offices are working to develop polices relating to the disclosure of disciplinary records of police officers. No one was even talking about that five years ago.

Is this a motivator for reciprocal discovery?

Brumley: Yes. How are prosecutors to know what might be potentially useful within the universe of exculpatory or mitigating evidence if we have no idea what the defensive approach to the case might be? The tenor of the opinion—and the advocacy that spawned it—seems to envision a responsibility upon the prosecutor to know all and see all; to not only anticipate but also effectively construct potential defenses. That duty is nowhere to be found in the explicit terms of the Disciplinary Rules of Professional Conduct or Code of Criminal Procedure, and it is antithetical to the very idea of an adversarial system of justice. But it is the reality dawning upon us.

Durfee: Yes. Despite BODA's implication that *Schultz*'s bright-line rule is easy to follow, compliance with this rule is *not* easy. In theory, it could require the production of non-existent evidence that a prosecutor could fairly have never realized could aid in a defense (e.g., the absence of the defendant's fingerprints or DNA at the scene of an assault captured on video or the neighbors who did not hear the family dog bark in a home invasion case in which the defendant was arrested in the house).

If a prosecutor is going to be held responsible for failing to produce evidence tending to support a defendant's defense, it is only fair that the prosecutor know what the defendant intends to argue. Obviously, the defense should first have the opportunity to review the available evidence to identify potential defenses, but at some point, there should be a defense disclosure with enough detail to allow the State to seek and disclose information responsive to the State's discovery responsibilities. The difficulties speculating on possible ways that a "piece of information could be viewed as exculpatory, impeaching, or mitigating," as *Schultz* requires, justifies this kind of notice to the State.

Kepple: Yes. Many of you have heard W. Clay Abbott, TDCAA's DWI Resource Prosecutor and frequent ethics speaker, talk about the "Oh s&%#!" moment when you see or hear something that may not be so swell about your case and our need to recognize that as "a *Brady* moment." That is good advice. But it is quite a challenge for a prosecutor to recognize everything that *may* help a defense when the prosecutor doesn't know what the defense will be. Virtually every state and the federal rules require the defense to provide the prosecutor with notice of various defenses, such as alibi, and a witness list. It only makes sense that if the defense is going to try to punch your ticket for failing to provide exculpatory or impeaching evidence that the defense should be required to provide basic notice about the nature of the defense. No more trial by ambush.

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What guidance and insight can we offer our members going forward?

Brumley: The apparent takeaway is that prudence would counsel changing the *Brady* paradigm. Historically, we have looked for potentially exculpatory (and material) evidence, then whittled it down by an instinctive standard of "general rule: don't disclose. Is there any reason to refute that general rule?" Now, it seems, it should be something more like "general rule: make sure you have everything from every agency, and then disclose everything. Is there any compelling reason to refute that general rule as to any particular item of evidence?"

Durfee: As sympathetic as I am to Mr. Schultz for becoming the object lesson on the scope and applicability of Rule 3.09(d) on a set of facts that may not have been fully and fairly developed by BODA, the opinion was intended to leave little wiggle room for a prosecutor to hold back in discovery exculpatory, impeaching, or mitigating evidence of any kind. BODA makes it clear: "The clarity of Rule 3.09(d) is a safeguard for prosecutors and citizens alike: If there is any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure." Once BODA and the ABA took the position that materiality is not an element to establishing a Rule 3.09(d) violation, they could not have written the opinion any other way (which is not to say that the opinion is right, just that it was inevitable).

So *Schultz* is the law and disclosure is the rule. The only saving grace is that in observing that the "unworkable burden" of Rule 3.09(d) already exists in Article 39.14(h), BODA implicitly acknowledged that compliance with Article 39.14(h) is compliance with Rule 3.09(d). In my opinion, our status quo really should not change—we are already making these disclosures. The only difference post-*Schultz* is that the price of noncompliance has gone way, way up.

Kepple: I continue to be impressed with how seriously Texas prosecutors are taking their ethical duty to disclose evidence. As a profession we may feel under the gun at the moment, but I believe that the public you serve continues to have confidence in you. Keep up the good work. ❇

Endnotes

1 Terry McEachern is a former district attorney in Swisher Counter who was found to have engaged in misconduct during his prosecution of the Tulia drug cases back in 2004. His law license was suspended for two years, but the suspension was probated.

2 See Texas Rule of Disciplinary Procedure 2.15.

3 See Internal Operation Procedure 13, Commission for Lawyer Discipline ("Private reprimands shall not be utilized if: … (H) The misconduct involves the failure of a prosecutor to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense")

4 *Amos v. State*, 819 S.W.2d 156 (Tex. Crim. App. 1991).

5 220 S.W.3rd 494 (Tex. Crim. App. 2007).