The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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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

Six days with Hurricane Harvey

On Friday, August 25, 2017, at 5 o'clock in the evening, a group of Harris County assistant district attorneys (myself included), investigators, and numerous support staff reported for what would normally be a seven-hour intake shift on the second floor of the Harris County Criminal Justice Center (CJC).

By Hans Nielsen
Assistant District Attorney in Harris County

Six days later, some of us were finally able to go home after Hurricane Harvey changed the lives of hundreds of thousands of citizens in Harris County and devastated numerous buildings, including the CJC, which had housed 22 criminal district courts, 16 county criminal courts, the DA's Office, and the Public Defender's Office. The story of what happened and how many Harris County employees kept part of the criminal justice system going during one of the worst national disasters in the United States is one of many untold stories of the storm.

An office that runs 24-7

The Harris County District Attorney's Office has a 24-hour, 365-days-a-year criminal intake system in which assistant district attorneys approve the filing of all class B misdemeanor criminal charges and higher. In addition, ADAs also screen, sign, and file those charges with the district clerk's office, write search and arrest warrants, provide legal advice on criminal matters, and attend a probable cause court docket that also operates 24 hours a day. Anywhere from 200 to 300 charges are accepted every day, and even more than that are rejected or referred for further investigation.

Every intake shift has at least four ADAs working (on some days it can be up to six), and in addition to them, two DA investigators print the computer-generated charges and run the criminal history of every defendant. Furthermore, numerous support staff type up those felony and misdemeanor charges and help officers enter them correctly in Harris County's computer system (the Justice Information Management System, also known as JIMS). In addition to the staff from the DA's office, there are multiple employees from the district clerk's office on the second floor who also work 24-7, and there is a probable cause and bail hearing courtroom on the first floor that has multiple hearings all day and all night, which are conducted by Harris County hearing officer magistrates.

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Help for those hurt by Hurricane Harvey

These last few months have been very hard on some of our members. Not only are many rebuilding their homes, but they are also working in makeshift offices and courtrooms after Hurricane Harvey damaged county buildings.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

It is going to take some time and much effort to get back to normal.

The TDCAF Disaster Relief Fund has collected nearly $30,000 to assist those prosecutors and staff members who have suffered losses. And this is a volunteer project—the Foundation Board and TDCAA staff have taken on the relief effort with a commitment that 100 percent of the money we collect will go to those in need.

I want to thank everyone who has chipped in to the fund to help our fellow prosecutors and staff members. We have had donations from as far away as Staten Island, and there have been great participation by prosecutors in North Carolina, Oklahoma, Louisiana, and Virginia.

We need to take a moment to thank our friends in Louisiana, especially **Roxie Barrios Juneau** at the Louisiana District Attorneys Association, who guided us with where to start to create our disaster fund. In addition, two Louisiana district attorneys, East Baton Rouge Parrish DA **Hillar Moore** and Calcasieu Parrish DA **John DeRosier** showed up with teams to help in the house cleanup. It is great to have friends like those next door!

2017 Texas Prosecutor Society Inductees

In the last edition of *The Texas Prosecutor*, I listed the 2017 inductees into the Texas Prosecutors Society. The danger with a list, of course, is that you can miss someone—and I did. I am happy to report that one of the very first people to accept the invitation to join the society was **Greg Willis**, Criminal District Attorney in Collin County! Greg is a current TDCAA Board member and an enthusiastic supporter of the association and our profession. Sorry, Greg, for my oversight, and welcome! ❇

Recent gifts to the Foundation*

Richard Alpert
M.R. Bostick
Joe Commander
Skip Cornelius
Ramon Echevarria
Tony Fidelie
David Finney
Tad Fowler
Mary Anne Gallagher *in memory of Dolena Westergard*
Gustavo Garcia
Michael Guarino
Chari Kelly
Tom Krampitz
Doug Lowe
Lyn McClellan *in honor of Lucy Davidson and Vanessa Velasquez*
Keith Orsburn
Jack Roady
Randall Coleman Sims
Don Stricklin
Beth Toben *in honor of Bill Rogillio*
Patrick Wilson

* gifts received between August 5 and October 6, 2017 (not including Hurricane Har-

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About *The Texas Prosecutor*

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Post-Hurricane Harvey news

As Hurricane Harvey slowly devastated many of our cities and counties, we worked to keep in touch with our members on the coast.

By Rob Kepple
TDCAA Executive Director in Austin

We were relieved to know that people were safe, even if homes, belongings, and courthouses took a beating. I am gratified that the Foundation Board and so many people from Texas and around the country have pitched in to help through the Foundation's Disaster Relief Fund.

If TDCAA were a construction company, we'd probably be a lot more useful to many of you right now, but we will stick to our strength. Knowing how strapped for resources many of our coastal counties will be in the next year, we will be working on a plan to make sure every prosecutor, investigator, and support staffer gets the training they need this year. Stay tuned!

Annual 2017 recap

The reviews are in, and our first-ever Annual Criminal and Civil Law Update in San Antonio was a hit. We had a few audio problems and some complaints that the coffee cups were too small, but most everyone liked the convention facilities and its location on the Riverwalk. Thanks to our training team of **Brian Klas, Patrick Kinghorn,** and **LaToya Scott**, who did a great job of keeping up with the logistics.

I also want to thank all of you who took the time to turn in the seminar evaluation forms. Those are vital for the Training Committee, this year led by **Kevin Petroff**, First Assistant CDA in Galveston County. The committee members pay close attention to the evaluations when it comes time to develop the next Annual, which in 2018 will be in Galveston at the Moody Gardens Hotel and Convention Center.

Thanks to TDCAA leadership!

As 2017 comes to a close, I want to thank the TDCAA board members who will be ending their service. We have had a great couple of years under their guidance: TDCAA has trained more people than ever before, developed new courses, and helped steer the profession through a legislative session. And although some of these folks will be rotating out of their current board positions, I sure hope that they will stay involved: **Julie Renken**, DA in Burleson and Washington Counties; **Woody Halstead**, First Assistant CDA in Bexar County; **Rebekah Whitworth**, CA in Mason County; **Steve Reis**, DA in Matagorda County; **Kenda Culpepper**, CDA in Rockwall County; and **Dusty Boyd**, DA in Coryell County. Thanks to you all!

Thanks also to Shannon and Sarah

I want to take the time to thank **Shannon Edmonds**, our Governmental Relations Director, and **Sarah Wolf**, our Communications Director, for 15 years of dedicated service to TDCAA and the profession! They say time flies when you are having fun, which must be true because these last 15 years have flown by. Both of these folks do so much more for you than you know—although Shannon's work in the legislative arena and Sarah's second-to-none work as the editor of *The Texas Prosecutor* continue to be nothing short of extraordinary. We are fortunate to have them, as well as the rest of the TDCAA family, working for you every day.

Educating the public about prosecutors

In the May-June edition of *The Texas Prosecutor*, I discussed **John Pfaff**'s book, *Locked In*. It was interesting because Pfaff espouses a theory that prosecutors and their charging decisions are behind "mass incarceration," and Pfaff suggests that focusing on prosecutors is the solution to that problem. He was light on what exactly we

are supposed to be doing, but recently there has been no lack of interest around the nation about prosecutors. It is thought-provoking to be sure.

For instance, take a look at a slick video produced by the Brooklyn Public Defenders Service by clicking here. Its purpose is to impact the Brooklyn DA's race in November. Its tag line? "Prosecutors have the power to end mass incarceration today. Learn what you can do to hold them accountable. Brooklyn votes Tuesday, September 12! Over 1,000 elections nationwide in 2018."

Like Pfaff's work, it is light on solutions to the stated problem of "prosecutor power." One participant simply opines that it is up to prosecutors to "de-f%#k" the criminal justice system. (Not sure where to go with that.) But it is certainly true that prosecutors are an important part of any discussion about changes to the system, and Texas prosecutors are indeed part of that ongoing process. The video is dead on in one respect: It lets the viewers know that elections give the community a chance to make a statement. What the public wants is what the local DA should be doing. Can't argue with that.

Another entry into the recent "focus on prosecutors" movement comes from federal judge **Jed Rakoff**, who makes a concrete proposal: Every prosecutor should spend six months every three years doing indigent defense work. Judge Rakoff believes such an experience will raise prosecutors' awareness of the need to "temper" their powers with greater sensitivity. It's an interesting idea, certainly, as many Texas prosecutors have been defense attorneys in the past, and they generally report that the work has made them better prosecutors.

With all these folks talking about what you do, it might be a good time to consider being part of this education process. You might want to check in with Collin County CDA **Greg Willis**, who runs a Citizen Prosecutor Academy (read about it here), or Brazos County DA **Jarvis Parsons**, who recently conducted his jurisdiction's first Citizens Prosecutor Academy. If someone is going to be educating your public about your work, maybe it should be you!

The parole box

I suppose I can see why advocates and folks aligned with the defense want prosecutors to be more sensitive about the plight of defendants. But I do chafe at the implication that prosecutors somehow are uncaring, especially after reading a letter I got this week from a crime victim I met in Houston long ago.

Four months ago, a Harris County ADA called me about a guy I had sent to prison for a brutal murder in the 1980s. I instantly remembered the case. What I remembered was not so much the facts of the murder, but the sister of the murder victim. I remembered—and I still actually feel—the devastation the murder caused. I was so moved by her pain at the time of sentencing that I even put together a shoebox of copies of evidence from the crime, sealed it up, and gave it to her for the day that parole notice came in the mail.

So when I got a call that the inmate's parole was under consideration, I wrote a letter to the parole board. They had the shoebox to remind them about the crime, but I wanted them to know the pain that the victim's family carries with them even today. It is the kind of pain that comes from great loss that you all see as prosecutors, and it's one of the things that motivates you to answer "ready" for the State every day.

Perhaps that counted for something, because this week I got a letter from the victim's sister that parole had been denied, and it won't be considered again for five years. She thanked me for my protest letter. With the letter, she included a photo of her sister, the murder victim, so that I would always remember her. (Not that I would ever forget!)

For those who encourage prosecutors to be more empathetic with defendants, I say sure, but I will meet you in the middle. I'd like them to appreciate that prosecutors are not unfeeling automatons of prosecution, but that we care deeply about, and are motivated by, victims of crime. And I even have a picture to show them. ❇

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A look back at what happened in 2017

Wow! It is already the end of the year, and what a year it has been. Many things have taken place, some good and some not so good, and I thought this would be the right time to reflect on the year.

By Randall Coleman Sims
TDCAA President and District Attorney in Armstrong and Potter Counties

We started 2017 with a wave of change in elected prosecutors, perhaps the biggest since I began in prosecution over 30 years ago. In my first President's Column, I wrote about a few things I have learned, with or without pain, as a prosecutor: Always do the right thing no matter what the consequences; seek justice; be fair to all by giving them due process; find a mentor; and do not let the job go to your head.

By the time that article came out, the legislature was in session. I have been around for a long time and have been very active in criminal justice issues at the legislature in and out of session. Never, never have I seen a session like the one we had this year. I have never seen such fighting within one of the parties as occurred this time. The good news is that legislators did not pass as many bills, but the bad news is that they failed to pass a very important one, which ensured the governor would have to call a special session.

After the legislature went into a special session, the Department of Public Safety announced, out of nowhere, that it would start charging a fee for lab tests. After lots of push-back from authorities at the county level, plus the work of prosecutors, the governor, and the legislature, DPS Director Steve McCraw had a change of heart and withdrew the new policy. Again, a big thank you to Steve McCraw!

Then came good news regarding Code of Criminal Procedure Art. 39.14 and criminal discovery. *In re Powell v. Hocker* (WR-85,177-01) was a unanimous opinion from the Court of Criminal Appeals holding that a defendant has no right to personal copies of discovery materials. If a defendant is *pro se*, he is entitled to a copy of his own statement and is allowed only to "view" other discovery. The Court also held that these procedures do not violate due process or the right to effective assistance of counsel. Thanks to Lubbock County Criminal District Attorney Matt Powell for following through on this important matter to us all.

Besides good news on the discovery statute, we also got good news regarding eyewitnesses. A report printed by *The Scientific American* shows that if the eyewitness testimony is properly obtained and evaluated, it can be reliable. (TDCAA Executive Director Rob Kepple wrote about this article in his column in the September–October issue of this journal.) Three important components of reliable eyewitness identification are the initial eyewitness identification, a fair line-up, and the witness's confidence level stated in his own words.

Another huge issue to us in Potter County—and I'm sure across the state—is mental health. How do we handle defendants, especially in jail, who are mentally ill? I wrote about our local program where defendants who need help with mental health can get that assistance. The key component was finding counselors and other assistance while saving taxpayer dollars. The best way we found to do this was by using graduate students, who need 300 hours of hands-on counseling to get licensed. These students were the missing piece to the puzzle and allowed us to get all the moving parts together without any additional funding, and we were able to launch our felony mental health diversion program for civilians as well as veterans.

Our program has expanded to 19 participants, and several more have successfully completed the one-year program. By the end of the

year, we will have around 25 participating. Please contact me if you wish to start your own; we have lots of materials that we will gladly share with you. We have already had several takers on this offer, and we will continue to assist anyone who asks.

Annual awards

TDCAA presents awards each year at our Annual Criminal & Civil Law Update, and this year we had five winners in four categories.

The C. Chris Marshall Distinguished Faculty Award is given in recognition of outstanding service as a teacher and trainer for Texas prosecutors and staff. This year there were two very deserving honorees: Melinda Westmoreland, an ACDA in Tarrant County, and Jo Ann Linzer, First Assistant District Attorney in Grimes County.

Ellis County & District Attorney Patrick Wilson received the Oscar Sherrell Award, which recognizes someone for a specific activity or a body of work that has benefited or improved TDCAA or its services. Wilson was recognized for his generosity in purchasing new projectors for the association when funds were scarce, as well as his work during the legislative session. He saw a need, and he provided for it.

The Civil Commitment Division of the Special Prosecution Unit (SPU) received the Lone Star Award. It recognizes significant efforts by prosecutors "in the trenches" who have distinguished themselves. It targets those who may otherwise go unnoticed but nevertheless advance criminal justice in the community.

And finally, 46th Judicial District Attorney Staley Heatly was the recipient of the State Bar Prosecutor of the Year award. It is given to the prosecutor who improves the quality of justice through his leadership and efforts to shape public policy, who has demonstrated a devotion to the profession, and who aspires to be a true example of a minister of justice. Heatly was recognized for his tireless work on the Timothy Cole Exoneration Review Commission and his leadership in domestic violence prosecutions in rural jurisdictions.

Congratulations to each of the award winners for a job well done.

Going forward

I want to encourage all of you to get involved with TDCAA. It is the biggest and best prosecutor association in the world. We have nationally known trainers among us, great speakers, board members, individuals in the leadership ladder, and staff.

As my term as President comes to a close, I leave you in good hands. Comal County Criminal District Attorney Jennifer Tharp will be President in 2018, while Jarvis Parsons, DA in Brazos County, ascends to the position of President-Elect. Both are outstanding leaders in their communities, our state, and our association.

TOP PHOTO: Kevin Petroff, TDCAA Training Committee Chair (center) presented the C. Chris Marshall Award for Distinguished Faculty to Jo Ann Linzer (left), First Assistant County and District Attorney in Grimes County, and Melinda Westmoreland (right), Assistant Criminal District Attorney in Tarrant County. SECOND PHOTO FROM TOP: Patrick Wilson, County and District Attorney in Ellis County (at left), was honored with the Oscar Sherrell Award for outstanding service to TDCAA; he's pictured with Randall Sims, TDCAA Board President. SECOND PHOTO FROM BOTTOM: Jennifer Tharp, TDCAA Board President-Elect (at left), presented the Lone Star Prosecutor Award, which recognizes prosecutors "in the trenches" for work that would otherwise go unnoticed, to the Civil Section of the Special Prosecution Unit. Erin Fassell (center), Section Chief, and Jack Choate, SPU Executive Director (at right), accepted the award on the section's behalf. BOTTOM PHOTO: Jarvis Parsons (left), TDCAA Board Secretary-Treasurer, presented the State Bar Prosecutor of the Year award to Staley Heatly (right), 46th

"How do I get more search and seizure training?"

Back in San Antonio, at TDCAA's Annual Civil & Criminal Law Update, an attendee asked me, "Who should I talk to about getting more search and seizure training?"

By Brian Klas
TDCAA Training Director in Austin

Oh man. I instantly thought of the stapler-high stack of my business cards I left back at TDCAA HQ. As always, they were perched on the edge of the broken glass covering my desk top. (A mystery still surrounds the circumstances that led to the broken glass.) The cards will tell you that I am the Training Director for TDCAA, and they were 100 miles away and not in my pocket. What a perfect moment to have handed the curious attendee my card with a flourish and say, "Why, *I'm* the person to talk to!" We would have laughed together at his question and my immediate answer. Such a missed opportunity.

Then I began to wonder if I'd failed to make enough of an impact at the start of the conference. After all, I'd been the first person to address the crowd, welcome everyone to San Antonio, and introduce the conference. I was sure I had made a joke about the color of the paper evaluations, but this person still was unsure of who to talk to about training. I am fairly certain I never answered his question. During the following nights of sleepless self-reflection, I've come to suspect that some of you may not know how TDCAA develops the bulk of its training. Here, then, is how you get more search and seizure training.

In the last issue of the journal (you can reread it here: https://www.tdcaa.com/journal/long-last-management-training-masses), I discussed our training questionnaires. Remember, those are the forms we collect from attendees at each conference letting us know where their biggest training needs lie. I read the responses and begin to generate a list of ideas. In addition to the data from questionnaires, I collect ideas emailed to me from prosecutor offices around the state. I also comb through our old training materials as well as training events put on by other organizations.

Then what? Enter TDCAA's boards and committees. If you've seen *Office Space*, you know that there needs to be someone to take the information from the customers (you) to the engineers (our board and committee members). I'm that guy! Board members are elected by our membership and represent each of our eight geographic regions. We have three boards: our Board of Directors, an Investigator Board, and a Key Personnel & Victim Services (KP-VS) Board. For the latter two boards, elections are open to members of each group and take place at their dedicated yearly training events (Investigator School in February and the KP-VAC Seminar in November). Those boards typically meet twice a year to plan both their respective conferences and their training track for the Annual Update.

In addition to our three boards, we also have committees made up of members who are recommended to, and ultimately appointed by, the sitting TDCAA Board President. Training is planned by the Civil Committee and Training Committee. Like boards, these committees meet periodically to plan the Civil Law Seminar, two yearly specialty schools, and the remaining portions of the Annual.

As you read this, we will have held fall meetings in Austin with the Civil Committee, Investigator Board, and Training Committee. We will

have developed a working agenda for the 2018 Civil Law Seminar, the 2018 Investigator School and the two 2018 specialty schools. Each member of these Boards and Committees will have put their day job on hold to develop this training. They will have spoken to their colleagues about their training needs, and they will have come ready to Austin ready with ideas for topics and presenters. In many cases, they will have volunteered their time to build a PowerPoint and present the topic themselves. Your peers will have done all of this after sifting through materials I've provided containing your recommendations. I cannot say enough about the time and effort our board and committee members expend in the name of needs-driven training. Without their work, we would be reduced to an organization whose training is dictated entirely by internal navel-gazing or the grant opportunity of the week.

Soooo, how do you get more search and seizure training? Well, it turns out there are lots of ways to go about it. You can tell me you want it—in person or by email. You can write it on a questionnaire after one of TDCAA's many training opportunities. You can tell board or committee members that you need even more search and seizure training than we already provide. Frankly, the absolute best way to spur on your training goals is to be part of the training. Discuss trouble areas with colleagues, and keep lines of communication open with your peers in other

Do you know any of the people in these photos? They're the ones who think up ideas, flesh out topics, and speak at TDCAA's conferences. We couldn't do it without them—and we wouldn't want to anyway. TOP TWO PHOTOS: I am dutifully taking notes as people who know way more about civil law than I do brainstorm topics for the Civil Law Seminar. Notice how far ahead we work: This planning meeting was in mid-October, and the Civil Seminar isn't until May. BOTTOM TWO PHOTOS: The very next day, the Investigator Board gathered to plan February 2018's Investigator School. Slowly but surely, we filled up five big sheets of paper with topics for four days of training. Look how many people from across Texas took a day or two out of their schedules to plan this

Need help with your drugged driving case?

A personal confession: I never tried a marijuana DWI. But after spending hours with prosecutors from Colorado, Oregon, and other "recreational" states, I know that we had better learn how.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

From talking to prosecutors across Texas, I know they need help right now, so let me tell you about some assistance that is available.

DWI Resources page

Go to www.tdcaa.com/dwi for resources galore.

The DWI Resources page at www.tdcaa.com/dwi is a constantly evolving center for prosecutors to help other prosecutors. There, I archive articles on DWI, post documents and written resources made for prosecutors by prosecutors, and keep a huge library of both training videos and videos made for prosecutors to use in their own DWI training.

Please keep an eye on the DWI Resources page for new materials, articles, updated caselaw, and standardized field sobriety test (SFST) reviews. A quick request to go with it: If you invent something great, please share it with me (at Clay.Abbott @tdcaa.com) so I can share it with everyone else. When one of us does well, we all do well—that is one of the coolest things about being a Texas prosecutor.

Proving Drug Intoxication with Experts. Recently, two new training videos have been put up, and you can stream or even download them. The first is titled "Proving Drug Intoxication with Experts." It is a walk-through of how to use forensic scientists from your local lab or the Department of Public Safety (DPS) lab in Austin and Drug Recognition Experts (DREs) as experts in trying a drugged driving case. In my time using toxicologists to prove drug possession cases, I became very complacent in putting a toxicologist on the stand. That's because the toxicologist in a drug case is about the easiest witness to have on the stand. But the same is simply not true of the toxicologist in the drugged driving case. Finding and quantifying drugs in a blood sample is just not as easy as proving the contents of an evidence bag containing a controlled substance and giving its weight. You, like I did, may have picked up some bad habits and gotten complacent with toxicologists in these drugged driving cases.

Secondly, we ask toxicologists a question to which they simply can't give a valid opinion from the blood sample alone. We want to ask our scientist, "Was the defendant intoxicated?" and when we do, we get hit in the face with an answer we don't like ("I cannot give an opinion on that"). This video models a better way to examine the honest and qualified expert and even gives step-by-step instructions on how to question such an expert on direct.

The video goes on to emphasize the need for qualified experts not only on what was in the defendant's blood, but also how it was affecting him. This expert is almost always a Drug Recognition Expert, or DRE, a specially trained and experienced peace officer. To help prosecutors question a DRE, the video models how to put this expert on the stand and walks through, question by question, how to glean information from him.

There is no easy or quick solution to tangling with these difficult cases, but there are methods that work. Please take a look before your next trial with a drugged-driving defendant. Heck, please take a look before you dismiss or make an offer on your next drugged

driving case.

Testing Blood for Drugs in Texas. The other new video on TDCAA's DWI Resources page is Part Two of a training video on breath testing. (If you have an upcoming breath-test case, you need to see Part One; it's here.) This new video is titled "Testing Blood for Drugs in Texas," and it is a walk-through of the Toxicology Section of the DPS Lab in Austin. (Find it at TDCAA's website, and search for Testing Blood for Drugs in Texas.) That is where the great majority of lab reports in our drugged driving cases come from. I received unbelievable help in producing the training from the excellent scientists in that section—every single one of them makes an appearance in the video.

While I echo the advice these forensic scientists give prosecutors (to attend an open house at the lab to see it for themselves), until you can get to Austin for such a field trip, this video is your chance to observe what happens to a blood specimen before you present it at trial. The video will not answer every question you have about labs, toxicology, and drugs we find in impaired drivers, but it is a good start. It will also not be our last effort to provide help in these cases. But the simple truth is I can't bring every expert to a regional training in your jurisdiction for a live presentation; these videos let me put the information on your computer for you to see and review before that difficult trial.

Regional DWI training

Speaking of live training in your jurisdiction, this year's regional DWI training will include two separate courses. The first is a continuation of our "Effective Courtroom Testimony" course for pros- ecutors and officers. New prosecutors and old hands alike should give it a shot—besides lots of great tips, it also provides a day with your local officers discussing this important topic.

The second course is "Rolling Stoned: Investigating and Prosecuting the Drug-Impaired Driver." This course is new, and it is the follow-up to one of the presentations during the general session at September's Annual Criminal & Civil Law Update from my good friends from Colorado and Oregon. They discussed the challenges they've seen since their states legalized the recreational use of marijuana. Many of you commented that the talk gave insight into the challenges of drugged driving cases, but you also noted that it did not offer enough solutions. This

TOP PHOTO: DPS Trooper Brian Washko was just minding his own business in his cruiser when director Kirk Hawkins (to Washko's left) asked Anna Mudd, DPS Forensic Scientist, to knock on his window and ask if he'd like a starring role in our training videos. SECOND PHOTO FROM TOP: Washko was happy to oblige, letting us film him ascend the steps at DPS headquarters and deposit a "specimen" (really an empty box). MIDDLE PHOTO: Hawkins at the DPS Lab framing a shot in the giant refrigerated storage unit for specimens. SECOND PHOTO FROM BOTTOM (from left to right) TDCAA's W. Clay Abbott, director Kirk Hawkins, and producer Bill Conerly confer in a spare Williamson County courtroom about how a shot should look. BOTTOM PHOTO: Don Egdorf of the Houston Police Department (in uniform) got miked for his role as a drug recognition expert (DRE) testifying on the stand. TDCAA Training Director Brian Klas (in the suit) and Stephanie Lloyd, Office Manager in the WilCo County

A roundup of notable quotables

"These intellectual elites, the only thing they know about the human condition they purchased in a college bookstore. They've never been in the arena. They've never seen it. You can earn a Ph.D. in humanity, or inhumanity, by just driving around in the squad car for an entire summer on the South or West Side."

—an unnamed Chicago police officer in an article called "What Cops Know" in *Chicago Magazine*'s July 2017 issue.

Got a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes will get a free TDCAA ball cap!

"Americans are just waking up to the fact that their smart devices are going to snitch on them."

—Andrew Ferguson, a University of the District of Columbia law professor, in an article in the *Fort Worth Star Telegram* newspaper about how Facebook, cell phones, key fobs, household alarm systems, and other data-collecting devices can be used by law enforcement to solve

"I'm here to serve and protect—and I guess today, to walk up some stairs for you folks."

—DPS Trooper Brian Washko when approached by a TDCAA film crew needing footage of officers dropping off evidence at the DPS headquarters in Austin. You'll be able to see Trooper Washko—along with members of the Williamson County Attorney's Office, Houston Police Department, and the DPS forensic lab—in two new videos on the DWI Resources page at www.tdcaa.com/dwi. (Trooper Washko is also pictured on page 11 prepping for his big

"You can't fix stupid, but you can give it a court date."

—Irving police officer Stephen Burres III, in an article in the *Dallas Morning News*. In the 1990s, Burres worked at the Lubbock County Sheriff's Office when he was hit by a drunken driver and his leg was broken in 25 places, ending his dream of becoming a state trooper. These days, he works in the Irving PD's DWI unit investigating intoxicated drivers.

course will, I hope, be the start of doing exactly that, though I will not pretend to have a solution to every challenge. But meeting with local officers investigating these cases and the prosecutors trying them is the right place to start. Please check our training calendar at www.tdcaa.com/training, and come join us in a town near you. Oh, and send your officers.

And finally, big thanks

I would be remiss for not thanking some folks who were instrumental in these video projects. Big thanks to the DPS Toxicology Section for letting me take over the lab for a day and interview them for the camera. More thanks to Dee Hobbs, County Attorney in Williamson County, and his whole talented staff. They all put up with me interrupting their workdays, memorizing lines, repeating those lines over and over for filming, and generally sharing their expertise with the rest of Texas. Thanks also to TDCAA's Brian Klas and Sarah Wolf for appearing on camera and for hours of behind-the-scenes support. (You get bonus points if you can spot Sarah in the video!) Thanks to Bill Conerly, our producer, who has worked with me on three DWI Summits and dozens of video projects, for bringing his skills to bear on making excellent and watchable videos.

And finally, thanks to all of you for trying these difficult cases and for blazing the trail for prosecutors across the country. I know many of you hoped that Colorado and the other recreational drug states would work all these drug-related difficulties out for us. And while I appreciate prosecutors in other states sharing their experiences and solutions to date, there is still much work we will have to do ourselves. The best advice I can give is to help me help you, and I look forward to working on solutions together. ❇

Competency to be executed

Competency to be executed is a complex web of statutory and case law that can be a minefield, but the Court of Criminal Appeals recently gave important guidance on the issue in *Battaglia v. State*.

By Andrea L. Westerfeld
"As The Judges Saw It" Columnist and Assistant Criminal District Attorney in Collin County

The lessons can be applied not only in execution competency cases, but also in broader issues of competency and mental health issues.

The facts

John David Battaglia and his wife, Mary Jean, divorced in 2000.[1] They had two daughters, Liberty and Faith. In 2001, Mary Jean reported Battaglia for violating his probation by leaving a threatening message on her answering machine. The police contacted him and told him to make plans to turn himself in. That day, Battaglia had a scheduled visitation with his daughters, ages 9 and 6. Mary Jean was at a friend's house where she got a call that Battaglia was trying to reach her. She called him, and he put the phone on speaker. Faith asked, "Mommy, why do you want Daddy to go to jail?" Mary Jean then heard Faith scream, "No, Daddy, please don't, don't do it!" followed by gunshots, the girls screaming, and Battaglia shouting, "Merry f—ing Christmas!" When police arrived at the house, they found both girls dead of gunshot wounds near the front door. Battaglia was arrested at a tattoo parlor with his girlfriend.

Battaglia was convicted and sentenced to death. Evidence was presented during punishment that Battaglia suffered from bi-polar disorder and was having a psychotic break during the murders, but his expert agreed that he knew what he was doing when he killed his daughters and that it was wrong. On the day of his execution, the Fifth Circuit granted a stay on the grounds that his counsel had abandoned him and did not raise the issue of his competency to be executed. Battaglia's new counsel filed an Article 46.05 motion raising his competency, and the trial court held a series of hearings, including the testimony of four experts—two court-appointed, one for the defense, and one for the State. The trial court found Battaglia was competent to be executed, and he appealed that decision to the Court of Criminal Appeals.

Incompetency to be executed

A prisoner is incompetent to be executed if his mental illness prevents him from understanding the reasons for the penalty or its implications.[2] But the harder question is what degree of "comprehension" is required. The CCA engaged in an extensive review of federal caselaw to determine what the state of the law truly is. The most recent Supreme Court opinion was *Panetti v. Quarterman*, a Texas case where the Court concluded that a "rational understanding" of the connection between the person's crimes and his execution is required.[3] Thus, he must not only understand that he is going to be put to death but also that that punishment is because of the crime he committed. A person with "gross delusions" may be aware that the State claims to be executing him for a crime but believe that another reason is the true purpose of the execution and thus not have a rational understanding.

However, when *Panetti* was remanded for consideration of these factors, the trial court concluded that he was competent to be executed.[4] Panetti claimed that he was on Death Row to preach the gospel and save souls, not because he committed a crime. Three experts believed he had a genuine delusion, but two others concluded that he was malingering and was "as normal as he wants to be." Although he preached and ranted to fellow inmates, he spoke normally with his parents and had a sophisticated understanding of his case, including blam-

ing political corruption for his conviction rather than a mission to preach the gospel. Giving heavy deference to the trial court's credibility finding in the duel of experts, the higher courts upheld the trial court's finding of competency.

In *Billiot v. Epps*,[5] a federal court in Mississippi concluded that Billiot was convinced he was going to be released rather than executed. Thus, he could not "prepare himself in any spiritual sense for death" and was incompetent to be executed.

In *Wood v. Thaler*, an expert concluded that Wood was incompetent based on "persecutory delusions"—he believed that he was going to be convicted based on corruption in the system and a conspiracy by the trial judge and district attorney against him.[6] But the expert, Dr. Roman, had no experience dealing with criminal defendants. Another expert in the same case, Dr. Conroy, concluded that Wood *was* competent because he had an accurate understanding of the reason for his execution. Dr. Conroy did not believe that he was delusional despite his belief in a conspiracy against him because "his explanation was one that we've heard over and over in this courtroom"—the State of Texas was "out to get him." Dr. Conroy explained that this was a very common belief in the prison system. This was significant because the DSM-IV definition of "delusion" does not include beliefs that are shared by other members of the person's culture or group. The experts who evaluated Wood and who had experience in the prison system concluded that he was not delusional because his only "delusion" was one of corruption in the system, a commonly shared delusion among prison inmates. The court specifically discounted Dr. Roman's diagnosis because he had no experience in the prison population and did not make any reference to the DSM-IV's requirement to consider the patient's subculture or group. Additionally, the beliefs "suspiciously appeared suddenly after the Supreme Court's *Panetti* decision was handed down."[7]

In case out of Florida, Ferguson had delusions that he was the Prince of God and would be resurrected after his execution to sit at the right hand of God.[8] But he still understood the reasons and consequences of his upcoming execution, and some experts believed that he was malingering. The state courts concluded that, despite his mental illness and delusional beliefs, he still understood the connection between his execution and the murders he committed and that he would die when executed. Thus, he was competent to be executed. The federal courts upheld the decision, again deferring to the trial court's decision to credit some experts' testimony over others.

In *Eldridge v. Thaler*,[9] four experts examined Eldridge and again split on whether he was competent. Eldridge reported that his girlfriend (whom he was convicted of murdering in Texas) was not dead and that he had just spoken to her recently. Two experts believed he was truly delusional, but the other two believed he was malingering. One noted that he had never received any psychiatric treatment prior to his arrest and that his symptoms were almost entirely self-reported. The court found Eldridge competent to be executed, and the higher courts upheld the decision.

Finally, in *Madison*, the defendant had several severe strokes and as a result had no memory of committing the murder that resulted in his death sentence.[10] The trial court agreed with the State of Alabama's experts that Madison was competent to be executed because he was able to accurately discuss his legal theories with his attorneys and had a rational understanding of his sentence. However, the 11th Circuit overturned that finding. The experts agreed that Madison was not malingering and genuinely had no memory of the murder. Even though he had been told why he was being executed, his total lack of memory about the event prevented him from truly having a rational understanding. "A person does not rationally understand his punishment if he is simply blindly accepting what he has been told." Thus, he was not competent to be executed.

Texas law

In Texas, competency to be executed is governed by Article 46.05 of the Code of Criminal Procedure. A person is incompetent to be executed if he does not understand 1) that he is to be executed and that the execution is imminent, and 2) the reason he is being executed. After meeting a threshold burden of making a "substantial showing" of execution incompetency, the trial court must conduct an adversarial hearing where the defendant has the burden of proof by a preponderance of the evidence that he is incompetent to be executed.

After Article 46.05 was enacted, the CCA decided *Green v. State*.[11] Dr. Mosnick, a defense

expert who had testified only a few times in criminal cases, concluded that Green was incompetent due to various delusions, including that he had not killed anyone and that "demons" lived inside him and controlled him. But State's expert Dr. Moeller testified that Green was not delusional and understood he was to be executed because he was convicted of capital murder. The trial court found he was competent. On federal habeas, Green submitted more evidence that he believed his body was being controlled and he had conversations with voices in his head. Dr. Mosnik again concluded that he was incompetent. But the Fifth Circuit noted that Green had spent much of his interview discussing flaws in his trial and belief that the police "set him up," and it found he was competent.[12]

In light of findings in *Green*, the CCA concluded that the statutory language of Article 46.05 "must be interpreted in accordance with and consistent with *Panetti*."[13] Thus, the review cannot focus exclusively on the defendant's "awareness of his situation" but must consider whether a delusional thought process prevents him from rationally comprehending a causal link between his offense and his imminent execution. Thus, a person is competent to be executed if he 1) knows the reason he is to be executed, 2) knows the execution is imminent, and 3) despite any delusional beliefs or mental illness he might have or his denial of committing the offense, he understands a causal link between the offense and his imminent execution.

Weighing expert testimony

When the Court actually evaluated Battaglia's case, as in most of the federal cases the CCA examined, the question of competency came down to weighing the credibility of the experts who examined him. Three of the four experts who examined him—defense expert Dr. Mosnik, State's expert Dr. Proctor, and court-appointed expert Dr. Allen—all concluded that Battaglia was delusional and incompetent to be executed.[14] But the trial court credited the opinion of a fourth expert, court- appointed expert Dr. Womack, who believed that Battaglia was competent.

Dr. Mosnik concluded that Battaglia was delusional, citing claims that he was to be executed as part of a cover-up scheme so he would not disclose others' illegal behavior. She admitted he was aware he had a scheduled execution date and would be executed because he was convicted of murdering his daughters, but the doctor claimed Battaglia did not have a rational understanding because he believed the true reason he was being executed was due to a cover-up. Dr. Proctor similarly believed that Battaglia had a "vast and complicated delusional system," though he admitted it was possible for an intelligent person to feign delusions. Dr. Allen noted that Battaglia had no prior psychiatric history and was intelligent and well-read. He observed that Battaglia had delusions of a "complex web of plots against him" and that this delusion prevented him from a rational understanding of the reason for his execution.

However, at the evidentiary hearing, Dr. Allen retreated slightly from his written report—he noted that Battaglia had no psych referrals during his time in prison, and every mental status report showed normal functioning. At the hearing, he concluded that it was possible Battaglia was malingering but that he could not prove it either way. Along those lines, Dr. Womack concluded that Battaglia was competent. His jail mail and media interviews showed that he was aware of why he was going to be executed and showed a clear understanding, even though he denied committing the murder. His explanations were not consistent with a fixed delusion—for example, he wavered about whether he was never present at the crime scene or whether he had been there but had been mind-controlled. Dr. Womack noted that Battaglia was highly intelligent and capable of creating a complex story line to feign delusion. He also observed that complaints about the system being rigged or corrupt were common in the prison system and Battaglia did not show any particular emotion connected to the complaints.

The law library supervisor at Battaglia's unit was familiar with him both from her time as a corrections officer and while working in the law library. Battaglia came to the library as often as three days a week and requested legal materials. Notably, Battaglia requested *Panetti* and other competency cases just 12 days before his scheduled execution date. Dr. Womack pointed out that Battaglia had a "sudden insight" into his disorder despite not receiving any treatment, and reading caselaw about competency could give him enough information to fake delusions.

Ultimately, the trial court determined that Dr. Womack was the most credible of the four witnesses and adopted his conclusions that

Because the belief that one is innocent or being set up by a corrupt system is very commonly espoused in the prison system, it is not in itself proof that a defendant is delusional.

Battaglia was highly intelligent and highly motivated to exaggerate his symptoms, was malingering, and was competent to be executed. After exhaustive review of the testimony and the caselaw, the CCA decided that this conclusion was supported by the record.[15]

One of the experts believed Battaglia was incompetent in his written report, but after being cross-examined more on motivation to malinger and his investigation of caselaw about incompetency, he withdrew that opinion.

Applicability for the future

Battaglia will be important for future practice for a few reasons. First and most importantly, of course, it nails down the test of competency to be executed for future death penalty cases. Its exhaustive discussion of existing execution competency caselaw and resolution of state law with federal requirements should prove useful in any upcoming cases on the issue. But it also discusses some important credibility issues when dealing with mental health experts in all cases.

Specifically, the trial court concluded that one expert was not credible in part because she focused on clinical psychology rather than working with the prison population and testified exclusively for the defense.[16] As in *Wood*, the expert determined most qualified was the one who spent most of his career working directly in the prison system.[17] Because competency cases—and mental illness issues generally—so often turn on which expert the trial court believes, this is important reinforcement of factors that can affect credibility.

The source of opinions was also given attention. The court noted that Battaglia's delusions were all self-reported rather than being observed by others, and his letters, interviews, and phone calls all showed that he appeared to be intelligent and aware.[18] It also pointed out several experts' testimony that Battaglia was both highly intelligent and had a significant motive to malinger.[19] Very importantly, the CCA looked at the suspicious timing of Battaglia's claims—he showed no prior signs of mental illness in prison, but he requested competency caselaw only two weeks before his execution date and *then* started showing symptoms.[20] These three factors are useful to question experts about when they are determining competency. Remember also not to be bound entirely by an expert's written report. One of the experts here believed that Battaglia was incompetent in his written report, but after being cross-examined more on the factors above—including motivation to malinger and his investigation of caselaw about incompetency—he withdrew that opinion.

Finally, one of the most useful pieces of information from *Battaglia* is the reinforcement from *Green* and *Wood* that a defendant is not delusional just because he proclaims his innocence.[21] The DSM-IV requires that an expert consider the subject's particular subculture or group when determining delusion. Because the belief that one is innocent or being set up by a corrupt system is very commonly espoused in the prison system, it is not in itself proof that a defendant is delusional. This is a very important fact that can be used both when cross-examining a defense expert or when arguing which expert's testimony should be credited.

Competency issues are never simple to deal with, especially in the highly charged context of an execution. But *Battaglia* gives important support for dealing with those cases. ❇

Endnotes

[1] *Battaglia v. State*, No. AP-77,069, slip op. at 1 (Tex. Crim. App. Sept. 20, 2017).

[2] *Ford v. Wainwright*, 477 U.S.399 (1986).

[3] *Panetti v. Quarterman*, 551 U.S. 930 (2007).

[4] *Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013).

[5] *Billiot v. Epps*, 671 F.Supp. 2d 840 (S.D. Miss 2009).

[6] *Wood v. Thaler*, 787 F.Supp. 2d 458 (W.D. Tex. 2011).

[7] *Id*. at 499.

[8] *Ferguson v. Secretary, Florida Department of Corrections*, 716 F.3d 1315 (11th Cir. 2013).

[9] *Eldridge v. Thaler*, No. H-05-1847, 2013 WL 416210 (S.D. Tex. Jan. 31, 2013).

[10] *Madison v. Commissioner, Alabama Dept. of Corrections*, 851 F.3d 1173 (11th Cir.).

[11] *Green v. State*, 374 S.W.3d 434 (Tex. Crim. App. 2012).

Six days with Hurricane Harvey (cont'd from front cover)

With a population of over four and a half million people in Harris County, just about every intake shift can be extremely busy. Many times during a shift, we could be writing an arrest or search warrant for an officer who is sitting in the office while at the same time we're answering a call from another officer at the scene of an arrest. Calls from officers rarely slow down, and it's not unusual for one ADA to be on the phone for several hours during a shift. Being able to multitask is a must when you work intake.

At present, the evening and night shifts of intake during the work week and all of the weekend shift hours are worked for overtime pay by ADAs who also work a different position during the workweek. As a result, intake and probable cause court never shut down, even for major holidays like Christmas and Thanksgiving. However, on Sunday, August 27, intake did what it has done on only one prior occasion (during Tropical Storm Allison in 2001): It shut down for several hours when everyone was evacuated from the CJC and relocated to another building.

Prepping for another major storm

As Hurricane Harvey was making landfall in south Texas—and based on forecasts that it would head straight up the coast to Houston—the Bureau Chief of Intake and Grand Jury, Jim Leitner, made plans and assembled a group of intake workers to be ready to work on Friday evening and stay for the weekend if necessary. Among the many things Jim did to prepare was purchase a large amount of coffee, dozens of snacks, peanut butter and jelly, deli meat and bread for sandwiches, canned food, fruit, and numerous breakfast items for the possibility that we would be at intake for the whole weekend. His executive assistant and the intake division manager, Desiree Broadnax, made sure that there was sufficient administrative staff and investigators to work during the hurricane. In the past, the district attorney's office has asked for volunteers to work intake (with pay) before a major storm has arrived and has asked those employees to stay and work for several days until the storm has passed. The employees who volunteered were notified by Jim and Desiree and organized into groups to work in shifts.

As the outer bands of the hurricane started to hit Houston late Friday and early Saturday morning, county maintenance workers closed the building's massive watertight doors in the basement. Those doors lead to an underground pedestrian tunnel system that had flooded during Tropical Storm Allison and caused enormous damage to the CJC's basement. At some point, workers also closed the watertight half-doors on the first floor that rise up about 4 feet from the entrance steps of the courthouse—these half-doors were installed after Allison. When I saw that they were up, I knew that if the courthouse were surrounded by floodwater, we would be stuck in the building. The only way that any of us were getting out of the building once the floodwaters came was by crawling over those doors.

As Hurricane Harvey hit Harris and surrounding counties, it dumped billions and possibly trillions of gallons of water on the many hundreds of creeks, streams, bayous, and rivers in the area. In addition, the many manmade lakes and reservoirs were starting to reach maximum levels, and a lot of that water was now draining into Buffalo Bayou, one of the major watersheds in Houston, and making its way downtown. Just one block away from Buffalo Bayou in downtown Houston lies the CJC.

As the hours went by and the rain intensified, the ADAs who volunteered to work intake—Jim Leitner, Pat Stayton, Eric Bily, Brittney Aaron, Abbie Russell, and myself—worked in shifts of three prosecutors for six hours. We answered numerous phone calls and drafted search and arrest warrants, and one of us attended the probable cause dockets on the first-floor courtroom that the Harris County hearing officers were conducting. Once a six-hour shift ended, we did our best to find a place to nap before our next shift started. The support staff and investigators also worked in shifts, and soon the limited number of couches on the six floors of the district attorney's office were serving as beds and were constantly occupied. Being able to sleep on the floor or in a chair became a vital and necessary skill.

The third day

On Sunday morning, August 27 (our third day), I was sleeping on a couch on the fourth floor when my colleague Pat Stayton woke me up and said we were evacuating the building. I was groggy from a lack of decent sleep and did not understand him at first. A few hours before

TOP PHOTO: DA's Office intake workers lining up on the second-floor hallway of the Criminal Justice Center to evacuate the building on Sunday. MIDDLE PHOTO: Moving to the Juvenile Justice Center. BOTTOM PHOTO: In the stairwell of the CJC evacuating.

when I went to sleep, I noticed water on the streets in front of the building, but there was no standing floodwater. When I looked outside Sunday morning, though, I saw that the building was completely surrounded by water that went into the street and well past the sidewalk on the other side. I was very grateful Pat remembered that I was sleeping on that couch and came up to tell me we were evacuating because otherwise, I might have woken up to an empty building.

When I made my way down to intake on the second floor, I noticed that everyone was being issued large trash bags to put our belongings in because we were likely going to get wet during our evacuation. Before my shift started on Friday, I had gone during my lunch hour to a nearby pharmacy and purchased basic toiletry essentials, and my wife had packed some food for me. My problem was that I forgot to bring extra clothes, and all I had was an extra T-shirt, gym shorts, and tennis shoes that I had had in my office. I quickly realized that what I was wearing—which was already in bad shape—was about to get worse.

As we made our way down the stairwell to evacuate the building, I could see that the water was about a foot and a half from the top of the watertight doors, and no one knew how much higher it would continue to rise. I quickly went over to the probable cause hearing courts on the first floor and walked around. Water was already all over the floor, and it was unclear at first where it was coming from because the rainwater had not flooded over the doors. Unfortunately, I later learned that the toilets had overflowed from the water pressure.

As the evacuation from the building began, we all lined up to stand on a chair and climb over the watertight doors. We then stepped into brown bayou water that was above my knee at one point. I am 6-foot-4 so many people who evacuated had water close to their waists. Harris County Precinct One constables were standing in the water assisting us as we abandoned the building. They had tied a rope from the building to a light pole across the street for us to hold onto because it was nearly impossible to see where we were stepping in the foul brown water.

Everyone in the CJC, including the probable cause hearing officers, moved to the Harris County Juvenile Justice Center (the JJC), which is on higher ground and a block away. The JJC houses all three Harris County juvenile courts along with the Juvenile Probation Department,

the offices of the Juvenile Division of the District Attorney's Office (which included my office), and close to 250 juvenile respondents (inmates) in a detention facility that makes up about a third of the building.

One of the unsung heroes of the Harris County DA's office is the head of our IT division, Gary Zallar. He was with us when we arrived on Friday, and he stayed in the CJC in case there were any computer issues. He evacuated with us to the JJC and proceeded to set up intake on the second-floor offices that housed the DA's Office Juvenile Division. This was not the first time Gary has done this: He also moved intake when Allison flooded the basement of the CJC in June 2001. Within a few hours on Sunday, he had transferred the intake phone numbers to the phones in the juvenile division so we could receive calls from police officers. He also got computers working, and we were almost back in business late on Sunday when the building's power went out. When the emergency generator started, there was limited power available and only a few electrical outlets working on the second floor. We were now forced to find another location for intake.

As the juvenile division chief, I contacted the executive director of the Harris County Juvenile Probation Department, Tom Brooks, when the generator power came on, and I informed him that we did not have adequate power on the second floor. He immediately offered a large training area on the first floor that had multiple electrical plugs powered by the generator. This area was originally designated as an evacuation site for DA intake, but when we had arrived in the building, there were family members of juvenile probation employees sheltering in that space. They ended up moving to another area on the first floor, and once again Gary Zallar moved intake late Sunday evening. He and several DA intake employees and DA Investigators John Lemerond and Andy Lui took numerous phones, computers, and printers from the juvenile division and set them up on the first floor even though they were incredibly tired at this point. In fact, by the time they got things set up a second time, Gary and John had been up for 48 hours straight. Many of our critical administrative personnel, among them Desiree Broadnax, Draishona Sparks, Jason Nerie, Elsa Gonzales, Jean Leija, and Priscilla Barajaz, also worked through their exhaustion for many hours to get things up and running again. Gary

TOP PHOTO: Climbing over the watertight doors at the CJC to evacuate. MIDDLE PHOTO: The water outside the CJC. BOTTOM PHOTO: The front doors of the CJC facing Franklin Street.

and several DA's office employees even helped the district clerks set up their computer equipment because their IT personnel were not present.

Due to the disruption from moving intake and not having phone lines up and running right away, and due to the fact that many officers during the storm were rescuing people, there were only 44 charges filed that Sunday. Some of the outlying jails were flooded, and many officers who called us had arrested defendants but could not get downtown to book them into the jail. In fact, at one point there were several feet of water surrounding the Harris County Sheriff's Office Inmate Processing Center, and officers who *could* get downtown could not book defendants into the Harris County Jail.

To make matters worse, Jim Leitner took a call from a Harris County Sheriff's deputy and was told that they were considering moving several thousand inmates from one of the two massive county jails adjacent to the bayou to the other in waist-deep water due to concerns that the jail was going to flood. (That idea was quickly shelved due to the many obvious problems it would have created.) In addition, because one jail in northwest Harris County flooded, officers had a problem jailing violent offenders they had arrested. One of us obtained help from a Montgomery County ADA who had called us (we found out later it was Philip Harris in the appellate division—thanks, Philip!). He helped those officers book violent offenders in the Montgomery County Jail during the height of the storm.

The fourth day

As the hours went by that Sunday and into Monday, the JJC building started to become very uncomfortable. The generators did not produce enough power for the air conditioners, so by Monday afternoon the building was very warm. In addition to the heat, we were starting to put a significant dent in our food supplies. When we evacuated, we were not able to grab all of the food Jim had purchased, the constables would not allow us to go back into the CJC building, and restaurants were still closed from the storm so we were unable to order food from outside. Finally, though, by Monday the water had subsided and some in our group were able to go back to the CJC and get the food that we had left there.

We were still working six-hour shifts at the JJC, but all of us were quickly running out of energy. Jim Leitner, Brittney Aaron, Eric Bily, Pat Stayton, and Abbie Russell are some of the hardest-working intake ADAs I have ever worked with in all my years at the office. The administrative assistants, paralegals, and investigators who stayed and worked are a credit to the office. One of our paralegals, Patricia Smith, even went above and beyond her duties by creating a spreadsheet of all of the looting charges we had filed after numerous media inquiries had been made about those cases. However, for all of us working intake, the hours and the days were beginning to melt together, and it was hard to remember what day of the week or what time it was. In addition, we had no idea what the future held for the CJC building and the courts that it housed.

Intake workers who weren't in the middle of a shift were sleeping on couches and chairs in the very crowded second-floor offices of the Juvenile Division. Once we finished sleeping, we would "commute" to work by walking downstairs to the first floor and work another shift. The chief prosecutor of the 314th Juvenile District Court even had her yoga mat confiscated and used as a (very thin) mattress on the floor in her room by one exhausted intake worker. The couch in my office was rarely empty during the night or the day. Because the county had so many flooded roads, it was extremely difficult for many prosecutors to get into downtown and relieve us. In addition, many employees or their friends or family had extensive water damage to their homes and were completely preoccupied with demolition work and cleanup. In fact, a county judge asked all county employees who could not get into work to do volunteer work in lieu of their jobs with the county.

It cannot be emphasized enough that the employees of the juvenile probation department in the JJC went above and beyond in helping us adjust to the difficult conditions we were facing. In addition to their normal duties dealing with the safety and security of the juveniles detained in the building, they were able to offer some meals, blankets, towels, and help to a handful of CJC evacuees who had medical conditions that needed treatment. They even offered the use of the employee showers that the detention staff

used. Dr. Olivia McGill, Assistant Deputy Director of Health Services, was instrumental in helping us out in any way that she and her staff could.

Relief at last!

By noon on Wednesday, our much-anticipated relief arrived, and most of us from the original group of CJC evacuees were able to go home after nearly six full days of being away from our families. Unfortunately, Brittney Aaron and Abbie Russell still could not go home due to the floodwaters (Brittney's residence was flooded, and neither one of them could make it home because of flooded roads), so they volunteered to stay and continued working till noon on that Friday. I was lucky enough to go home on Wednesday to a house that had not flooded but that had nearly been struck by a tornado. When I made it home that afternoon, I took a much-needed shower, got a huge hug from my wife and daughter, and then took a two-hour nap. And when I went to bed later that night, I slept for 12 straight hours.

Once it was all over, damage assessments began. The building that we had moved into, the JJC, had water damage from the air conditioning unit on the roof, which had leaked into the floors below and damaged several courtrooms. As of this writing, the estimated time for repairs to the JJC is anywhere from three to six months. One juvenile judge is using a small detention-center courtroom, and another juvenile judge and his associate are using a courtroom that was put together with tables and chairs and occupies a training room of the Juvenile Probation Department. The judge sits at the end of the room behind a desk in what looks like a classroom with multiple whiteboards on the wall.

The CJC—where the DA's Office is—was heavily damaged by floodwaters, and it appears that it will take at least nine months to repair. That building had about 1,500 employees working in it, and everyone has had to move into other county buildings. The jury assembly building, which was built underground, flooded and it will not be repaired or rebuilt. (A county judge made the comment that there is a reason we don't build basements in Houston.) All of the felony district court judges and misdemeanor county court judges have paired up and share courtrooms in the old family law courthouse and in the civil courthouse. In addition, all the civil court judges have been forced to pair up and

TOP PHOTO: A flooded truck in front of the CJC on Franklin Street. BOTTOM PHOTO: The yoga mat pressed into service as a bed in one of the JJC offices.

From delayed outcry to compassion fatigue

One of my biggest fears about being a prosecutor was trying a child sexual assault case. The range of punishment, the typical lack of physical evidence, and especially the child victim weighed on my mind.

By Jeff Hohl
Assistant District Attorney in Montgomery County

When we meet a child victim face-to-face, we realize we are the person who will help tell her story in court, the one responsible for questioning her, and the one under intense pressure while the jury deliberates guilt. Multiply those feelings by a million, and that's how the victim probably feels.

One thing I've discovered in this job is that talking with, listening to, and sharing experiences with other prosecutors is invaluable. Those who try sexual assault of a child cases will experience a great sense of gratification and purpose that is hard to match and describe, but they'll also likely encounter dizziness, exhaustion, anxiety, surprise, fear, and panic because these cases can be fraught with difficulty. In this article, I have tried to address the hardest parts of preparing for these cases and how to handle them.

Delayed outcry

Don't panic. A delayed outcry does not mean that a child is lying. Most of the time it simply means the child was not ready to tell anyone about sexual abuse until that day. Research indicates that a large percentage of children do not outcry right away about sexual abuse.[1] Several studies into disclosure of victims of sexual abuse suggest that "just over one-third of adults who suffered [child sexual abuse] appear to reveal the abuse to anyone during childhood. Furthermore, among children who do disclose during childhood, delay of disclosure is common."[2]

A forensic interviewer and other professionals who provide counseling to sexual abuse victims are good resources for this phenomenon. They'll report that delayed outcries are common, children outcry in a number of different ways, and the time of the outcry differs from child to child. A jury will need to understand this too, so get ahead of it early. Jury panels are generally receptive to the idea that most abused children don't tell someone right away. Of course, there might be that one person or group of people who believe that a child who doesn't tell right away must be lying, but most citizens will understand that delayed outcries are not outrageous. After covering it in voir dire, address it again in opening statement and again with the forensic interviewer or other professional on the stand who can explain the dynamics of an outcry. Forensic interviewers are trained to speak with children, do so almost every day, and can describe the process of disclosure to the jury.

Get to know the forensic interviewers in your area and take the time to sit and talk with them about their experiences. Their insight is invaluable and will assist in understanding child victims and their behavior. In addition, counselors, psychologists, and psychiatrists have a wealth of information about children who are victims of a traumatic event. Unless a juror has some background in understanding how children react to trauma, it will likely be a learning curve for the panel to understand the dynamics of disclosure, and having an expert explain this on the stand can put the disclosure and any delay in the right context. By the time the defense attorney cross-examines the child on why she didn't say anything sooner, the jurors are probably answering in their own heads, "Because of all that stuff that we learned about delayed outcries from the State—duh."

Some children donŐt tell, even when asked

There may be a case where the child was asked about sexual abuse during an investigation and denied it. A study conducted of victims of a sexual perpetrator in Sweden demonstrates how children can be reluctant to disclose abuse, even when the evidence is unambiguous.[3] In this particular case, a pedophile had videotaped abusing his victims. Of the 10 children studied, their ages ranged from 3 to 11 when they were abused and 4 to almost 13 when interviewed.[4] "At least six of the children … experienced abusive incidents which should have been memorable. Some of them refused to admit that sexual abuse had occurred, however. Four children seem to have been unaware of what happened and could not 'remember' or provide specific details about their abuse."[5]

Children do not report sexual abuse for many reasons. Maturity level, minimization, a pact with the perpetrator, fear of punishment, and fear of not being believed are all possible reasons why a child might not disclose sexual abuse.[6]

One of my first sexual abuse cases was an indecency with a child in which the defendant was the victim's father. Based on the evidence, we knew that the abuse occurred; the victim was then interviewed by CPS and later outcried. When my victim talked with CPS, she was asked if anyone had ever touched her inappropriately, and she answered "no." Her response highlights two rules that prosecutors should follow in child sexual assault cases. First, read CPS records (if there are any) for a victim and her family. CPS investigators talk with children and parents and include descriptions of those conversations in the records. This particular CPS investigation, where the victim denied any sexual abuse, happened to be separate from the actual abuse investigation, but it became extremely important to my case. Had I not known about it beforehand, the defense would have certainly used it to surprise my witness on the stand and me as well. Instead, because I knew about it, I spoke with my victim about it and addressed it in voir dire, opening statement, and direct examination. The victim's explanation—that she wasn't comfortable speaking with a stranger about sexual abuse—was completely reasonable. She wasn't ready to disclose, and she wasn't going to disclose to someone with whom she didn't feel comfortable talking about sex. By the time the defense asked about it, it was old news. Which is the second important lesson: Get ahead of bad facts—which you will have. Doing so is essential to the credibility of the State's case.

File notices

All children are different when it comes to coping with sexual abuse. Some children will suffer psychiatric and behavioral problems, and some will not.[7] Researchers have found an array of symptoms in sexually abused children including suicidal ideation, anxiety, depression, substance abuse, aggression, and some level of post-traumatic stress disorder (PTSD).[8] This can make them completely unpredictable on the stand. One child may be articulate and describe the abuse in perfect detail while another cannot say a word. Experts will be essential in explaining all of this to the jury.

One thing prosecutors can control is filing notices. Texas Code of Criminal Procedure Art. 38.37 provides an invaluable tool in child sexual assault cases that allows the introduction of prior bad acts into evidence. If there are prior bad acts that meet the statute's criteria, give notice 30 days before trial. Make sure outcry notice, described by Art. 38.072, is filed 14 days prior to trial, has sufficient detail, and identifies the correct outcry witness. Most of the time you'll get a good sense of who the outcry witness is from the case file. However, when speaking with the child's family, sometimes you'll discover that the victim explained the abuse to Grandma or someone else first. Then you realize Grandma was never interviewed and never wrote a statement and that you've never even spoken with Grandma. Go talk with her. Bring along an investigator or police detective to take a formal statement.

I had a sexual assault case where I reviewed the file and was aware—or thought I was aware—of all witnesses that the victim had spoken to regarding the offense. I filed my outcry notice, and I was ready for trial. Upon review of the victim's medical records for an unrelated hospital visit shortly before the outcry, I found one line in the records saying that the victim told a nurse that the defendant was abusing her. This statement occurred before the victim told anyone else. That particular case ended with a plea and the statement in the medical records probably lacked the specificity necessary to qualify as an outcry statement—the statement must be more than just a "general allusion that something in

the area of child abuse is going on."[9] However, this example demonstrates the importance of talking with the victim's family. Ask about medical visits, and get those records early. Children, for a number of reasons, may tell a medical professional something that they've never told their family. Because a victim may talk to multiple people about the abuse, take time to understand the caselaw on multiple outcry witnesses. As stated by the CCA, "Hearsay testimony from more than one outcry witness may be admissible under Art. 38.072 only if the witnesses testify about different events. There may be only one outcry witness per event."[10]

I always tell children that I have to ask them about their body and about their body parts and that it may be uncomfortable. I tell them that I'm not doing it to make them uncomfortable but to better understand what happened to them.

What do I say to a victim?

As already noted, every child is different. Some will discuss the abuse with the prosecutor openly, while some may never. When prosecutors meet with the child, ask the parent or guardian about counseling or other medical professional visits. These records can provide invaluable insight into how the child is coping.

The important thing is to avoid rushing the child. Every prosecutor differs on how he communicates with a victim. My method is two-fold: Build a rapport, and be honest. I try to meet with victims multiple times. The first time, I avoid any discussion about the facts of the case. I talk about school, hobbies, movies, TV—basically anything that the child would be doing if she didn't have to talk with me. I always try to arrange a courtroom tour to allow a victim to sit in the witness stand, sit in the attorney chair, and generally become more familiar with the courtroom. Once these are complete, I'll discuss the facts of the case with the child. I always tell children that I have to ask them about their body and about their body parts and that it may be uncomfortable. I tell them that I'm not doing it to make them uncomfortable but to better understand what happened to them. I'm usually very direct with children regarding this subject. If they are old enough, I let them know that they are mature enough to understand why I need to talk about these things. But the most important thing I tell the child is that she need not worry about testifying because all she has to do is tell the truth. That's it.

Differing stories

Say you are meeting with a victim, going over the offense, and she tells you that the abuse happened at another time, that it happened differently from what she said before, or that the abuse never happened. Again, don't panic.

First, never meet alone with a child victim. Include a victim-witness coordinator, an investigator, or another prosecutor at every meeting. While there are multiple reasons for this rule, one of the most important is if there is an additional outcry, someone other than the prosecutor can testify about it.

Second, any time a victim recants or gives a new account of what happened, the next step should be a notification to defense. Based on *Brady* and the Michael Morton Act, such information must be disclosed.[11] A written notification that can be confirmed or filed with the clerk is recommended.

Our final step is analyzing whether the information affects how or even whether to proceed on the case. This will depend on your discussions with the child, your review of the case, and discussions with your superior. If dismissal is the just outcome, then dismiss the case as quickly as possible. If the child tells you the abuse didn't happen but dismissal is not appropriate, a new or follow-up forensic interview can be a valuable tool. If you believe from the evidence that the child is recanting out of fear or some other motive, try to establish that fact. A forensic interview can give the child an environment to express those feelings of fear or any other motive to recant. The important thing throughout this process is to understand that children are not perfect. Cases where a child tells the prosecutor something different, gives more information, or doesn't remember something are common. This is a reality.

ŇI still love himÓ

One of the hardest behaviors for juries to understand is why a child would still love, support, or even defend the perpetrator. "It is a misconception that child molesters are somehow different from the rest of us, outside their proclivities to molest. They can be loyal friends, good employees, and responsible members of the community in other ways."[12] It's especially difficult to understand if the perpetrator is someone with a close relationship to the family or a family member. Because a child still loving that person isn't a behavior that is automatically recognized or identified by non-professionals, it needs to be explained to the jury so that if the kiddo gets on

the stand and says, "I still love him," jurors understand why.

Kids in court

Keep in mind that statutes exist to protect children in court. Texas Code of Criminal Procedure Art. 38.074 states that the child's testimony should be limited in duration, the time of day taken into account, and a recess ordered if necessary. It also prevents intimidation by either party.

On motion of any party, the child can bring a support item to the witness stand if the judge makes a finding that the child needs it and it won't prejudice the jury.[13] I've seen children bring up something as simple as a coin to rub while they are testifying. For a child required to talk about intimate sexual acts in front of the perpetrator, attorneys, and 12 strangers, a small comfort item can make a big difference. Anna Salter, who obtained her Ph.D. in Clinical Psychology and Public Practice from Harvard University, earned a Master's Degree in Child Study from Tufts University, has written non-fiction books on sex offenders, and lectures and consults throughout the world on the topics of sex offenders and victims, relates an experience she had on the witness stand:

> I was on the witness stand once against a man who had raped and murdered a 9-year-old neighbor child who came to his door on Halloween night. … He glared at me throughout my testimony as though he would take my throat out with a spoon. … Unfortunately, almost everybody in the courtroom was looking at me [and didn't see his glare]. If it was sobering for me to testify with a predator glaring at me, imagine what it is like for a child. It is easier than you think for offenders to intimidate witnesses in open court and get away with it.[14]

Put it in perspective

When you work these sexual assault cases with child victims, take a look at the statistics. Some of them will shock you. A good resource is the Department of Justice National Sex Offender Public Website. It contains statistics regarding abuse of adults and children as well as information on disclosure of abuse.[15] Reading the statistics will help prosecutors identify common areas that need to be addressed in voir dire and throughout trial. For example, it's important to know how many victims don't speak up, why they don't, where the abuse often occurs, and to whom they often disclose. Armed with this information, you can better prompt a venire panel about common beliefs regarding sexual abuse: Do children outcry right away? Do they tell everything? Whom do they tell? Most cases will involve an issue that is addressed by the statistics on that website.

One Ṭnal tip: Stay healthy!

It's something prosecutors don't like to talk about and don't often admit, but working on cases involving sexual abuse of children can hurt not only the victim and her family but also the victim assistants, investigators, and prosecutors on such cases. It makes sense: We are reading, talking about, thinking about—and then thinking about some more—some of the most heinous things that an adult can do to a child. These cases take a toll on us, and they wear us out.

It's important that prosecutor office staff are mindful of this danger and take steps necessary to stay healthy. No kidding, but I have to remind myself during trial to eat and drink water. Also, I try to work out or do something physical during the week that reduces stress and helps me sleep. Remember, if we aren't healthy, we can't try the case. And if we can't try the case, we can't fight for justice for the victims. ❇

Endnotes

[1] Margaret Ellen Pipe & Michael E. Lamb & Yael Orbach & Ann-Christin Cederborg, *Child Sexual Abuse: Disclosure, Delay, and Denial*, 16 (2007).

[2] *Id.*

[3] *Id.*, 159-160.

[4] *Id.*, 161.

[5] *Id.*, 170.

[6] *Id.*, 171.

[7] *Id.*, 228

[8] *Id.*, 229.

[9] *Garcia v. State*, 792 S.W.2d 88, 91 (Tex.Crim.App.1990).

[10] *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011).

[11] *Brady v. Maryland*, 373 U.S. 83 (1963), Tex. Code Crim. Proc. Art. 39.14.

[12] Anna C. Salter, Ph.D., Predators: Pedophiles, Rapists, & Other Sex Offenders, Who They Are, How They Operate, And How We Can Protect Ourselves and Our Children, 47 (2003).

[13] Tex. Code Crim. Proc. Art. 38.074.

[14] Salter, 50.

[15] https://www.nsopw.gov/en-US/Education/FactsStatistics#reference.

When 'young love' goes south

How to file a protective order against a juvenile respondent

By Wanda Ivicic
Chief Victim Assistance Coordinator in the Williamson County Attorney's Office

Sarah (not her real name) walked in to our office with her mother. Like any other protective-order applicant, she completed the necessary paperwork and was escorted to a room to meet with one of our victim assistance coordinators (VACs). In our county, every person who comes to our office seeking a protective order will first meet with a VAC, who will screen to make sure the minimum requirements for a protective order are met and assist the applicant with completing a sworn affidavit.

During the meeting with Sarah, she disclosed that she and Edward (not his real name) began dating approximately three years earlier. They have an 8-month-old son together. During the relationship Edward had been controlling and jealous, as well as emotionally and physical abusive.

While the two dated, Edward wouldn't allow Sarah to wear makeup and would restrict the type of clothing she could wear. She wasn't allowed to have friends of the opposite sex, and Sarah would have to ask permission before she could hang out with her female friends. Edward would often go through the correspondence on her phone, dictate what apps she could have on her phone, and what she could or could not post on her social media accounts.

Over the course of the three-year relationship, Edward had pushed, kicked, and punched Sarah. On one occasion, he broke into her home. While inside the house, he pulled out a gun he'd hidden in her home during one of his visits. She was able to call police, but he'd fled the scene before they arrived. Edward went so far as to beat up a guy Sarah had begun dating during one of the many times they'd broken up.

This fact scenario is not all that different from what we see daily here in our office. Domestic violence is our primary caseload in the protective order division. What made this case stand out was that Sarah and Edward were only 15 years old. The two began dating while they were in seventh grade. By the young age of 15, they had a child who would be a year old before either would start their junior year of high school.

Ultimately, our protective order prosecutor accepted the case and filed an application for a temporary ex parte order. The judge denied our request largely due to the ages of the parties. At that point, Sarah had two options: She could request a show-cause hearing and proceed without the temporary order, or she could non-suit the case. After many conversations with Sarah and her mother, they made the decision to non-suit. Their fear was that the judge would deny the final order as well, based on her and Edward's ages, and they'd be worse off for having gone through the process.

POs against juveniles

Dating violence amongst juveniles is on the rise. Texas is one of few states that allows protective orders to be filed against a juvenile. I field questions about juvenile protective orders fairly regularly. As I write this article, our protective order prosecutor is again preparing to file another application against a juvenile respondent.

Guiding a victim of crime through the adult criminal justice process is difficult. When we are dealing with a juvenile offender in a protective order case (which means family court), it can be even more confusing to the applicant and cumbersome for the VAC. There are a lot of questions surrounding applications filed against a juvenile. My hope is to provide some clarity on the topic so that VACs can better assist prosecutors and guide applicants through the process.

Let's break this down into two main parts: procedural issues and substantive issues. Procedurally, there isn't much difference between a protective order filed against a juvenile and one

filed against an adult. The age of the respondent matters very little. Substantively, there are a lot of issues to take in to consideration.

Let's begin with paperwork and procedure. When a prosecutor files an application for a PO against a juvenile, the style remains the same (Applicant vs. Respondent) unless the applicant is also a juvenile. In that case, you will need to decide if the parent or guardian intends to file on the applicant's behalf or if the applicant will seek the order on her own behalf. If the parent or guardian files on behalf of the victim, the style will change (Parent or guardian on behalf of the minor child vs. Respondent). Keep in mind that a minor filing on her own behalf can swear out a declaration instead of an affidavit. The contents of the application and orders remain the same except for sensitive data. Texas Rule of Civil Procedure 21c dictates what is sensitive information, and it requires that sensitive information to be redacted prior to filing. For example, when redacting a date of birth, simply use "XX/XX/2002."

Service of the order doesn't change much either. We've found that the best practice in our county is to serve one set of papers directly to the juvenile respondent and another set of papers to his parent or guardian. Our judges prefer this method over serving just the respondent. It's important to remember, though, that the Texas Rules of Civil Procedure make no exceptions for minors with regard to service, so serving the parent or guardian isn't mandatory.

Once the application has been filed, you've received the temporary order along with a court date, and you've served the proper paperwork, it's time to prepare the applicant for court. Seeking a protective order against a juvenile comes with a few unique issues. For example, because the respondent is a juvenile, he has the right to be represented by a "next of friend." Also, even though protective orders aren't criminal cases, the judge hearing the case has discretion to appoint an attorney for the respondent on a case-by-case basis. Although we have yet to have that happen in our county, if the judge feels it is necessary, he can appoint an attorney to ensure there will be someone working to protect the interest of the juvenile respondent.

What the order is likely to prohibit (or not) is subject to debate as well. For example, a protective order often prohibits the respondent from going near the school of the applicant or other protected person. But there are federal issues when prohibiting a juvenile access to his school. Let's talk Title IX for a minute: There are a host of federal statutes within this title, but for the purpose of this article I'm speaking specifically to the fact that it protects all children from discrimination in education on the basis of sex. Title IX further requires school districts to do certain things on campus when they have reason to believe a student is the victim of dating violence, sexual assault, bullying, or harassment on the basis of her sex. Any school that receives federal funding is subject to Title IX. What that means for us is that unless either party is switching schools or they already attend separate schools, you may get a ruling from a judge that continues to allow the respondent access to the applicant's school. It's important to discuss these possibilities with the applicant.

There are alternatives should the respondent be allowed to stay at the school. Title IX requires that schools put other measures in place to protect victims of these types of crimes. In Sarah's case detailed above, we instructed Sarah and her mother to go immediately to the school and speak with the administrative staff to determine what safety plans they could put in place to keep her safe while at school. Ultimately the school worked with all parties involved to ensure that Sarah and Edward had no classes together and that they were not to have contact with one another while on school property.

Each county is different, so considering what your judges are likely to do is paramount. We've filed multiple applications against juveniles, and as stated above, we intend to file another one today. Over time our judges have become more aware of teen dating violence, sexual assault, stalking, and the impact this behavior can have on the victims, the school community, and families. But initially it was an uphill battle that most victims were not willing to go through. For many like Sarah, it was still easier, more convenient, and most of the time more effective to rely on the protective measures put in place by the school. But I can't remember how many times I've told an applicant that only a protective order is criminally enforceable—though I guess I can't blame them for going another route given the difficulties applicants like Sarah faced.

Remember that filing a protective order

The tendency to look for alternatives for juvenile offenders runs deep within the criminal (juvenile) justice system. We walk a fine line between protecting a victim and rehabilitating an offender.

Have you applied for Public Student Loan Forgiveness?

We at TDCAA are looking for people who have applied for the federal government's Public Student Loan Forgiveness (PSLF) program, which started about 10 years ago. If you've applied for this program, have been making payments on your loan for several years, and would be willing to share your story about the process and your experience, please email the editor at Sarah.Wolf@tdcaa.com. ❇

against a juvenile is not much different procedurally, but the outcomes can be very different simply because of the ages of the parties involved. The tendency to look for alternatives for juvenile offenders runs deep within the criminal (juvenile) justice system. We walk a fine line between protecting a victim and rehabilitating an offender. Even though the protective order process is separate from any criminal case, the same school of thought seems to impact the success rate of obtaining a protective order against a juvenile in my area. Despite how you or I feel about this, it's a reality within which we must work. It's important that applicants and their support network are aware of this additional hurdle that cases involving only adults do not have.

Finally, I leave you with this thought. Protective order cases involving juveniles are complex for both the prosecutor and the VAC. From a victim assistant's perspective, we are working with more than just the direct victim. Oftentimes I will have to sit and speak with parents for lengthy periods of time to get them through the emotions associated with not being able to protect their children. It's their duty, after all, right? Sarah's mom hesitated to come to the office to seek help from us because she was ashamed that she'd "allowed" Sarah to get pregnant and "allowed" a boy to batter and abuse her. Add this to the fact that the offender is a juvenile, and it makes the case even more volatile. We know that juveniles are driven by emotions and that they lack an awareness of consequences for their actions. When Sarah told me that Edward had hidden a gun at her house and then pulled it out during an altercation, it struck me that an adult offender may have worked through a very dif-

The leader's role in promoting healthy work-life balance

From time immemorial, good leaders have struggled with a persistent question: Should I focus primarily on pursuing the purpose of my organization, or should I focus on attending to the welfare of the people who accomplish that purpose? Is my focus on our purpose or on our people?

By Mike Holley
First Assistant District Attorney in Montgomery County

This is not an easy question for the thoughtful leader. Sometimes the demands of an office supersede the needs of the individual. At other times, the individual's needs are so significant that the interests of the office must be relegated to second place. The needs of people are important, yes, but the reason for a person's presence in an office is to accomplish a specific purpose. When does one give way to the other? How does a leader reconcile these two competing interests?

Here's a modest proposal.[1] Generally, if we take care of our people, our people will take care of the purpose. What's more, if we fail to take care of our people, we endanger not just the welfare of the individual, but also the purpose of the organization.[2] Aim for the first goal, and we get both thrown in. Aim for only purpose, and we may achieve neither.

Work-life balance

A fundamental framework for taking care of people is found in the concept of a good work-life balance. By "work-life balance" (WLB), I am using the term in its broadest sense. I mean, in essence, finding a rhythm and approach to work that allows for the purposes of the office to be accomplished at a high level while still allowing the people who accomplish that purpose to have a reasonable opportunity to lead healthy, happy, productive lives both within and outside the office.

At the outset, WLB certainly involves the quantity of time people spend at the office. Many people in our profession have experienced the 70-hour-plus workweek. Those grueling workweeks, while sometimes required, are clearly neither healthy nor sustainable. As just one example, people who work 55 hours or more per week have a 33 percent greater risk of stroke.[3] Prosecutors and other employees must put in extensive hours from time to time, but a life spent overwhelmingly at the office is simply not "balance."

But WLB goes beyond simply the amount of time spent at work. The concept of WLB recognizes that the climate and culture within an office can be so detrimental to our lives outside the office that the amount of time we spend in the office is almost immaterial. So there are two sides of the WLB coin: the amount of time we spend at the office and the quality of that time. Both are important to good WLB. When we do not have good WLB in the office, certain problems manifest themselves. (See the sidebar on page 30 for a list.)

Because problems that flow from poor WLB are so common, we are tempted to accept them as normal. This state of affairs is not normal, nor should we accept it as such. Even for those of us who recognize this state of affairs as problematic, we often find ourselves struggling to change an organization. Sometimes this struggle arises from the limitations of our authority or influ-

Problems Associated with Poor WLB*

- Chronic fatigue, headaches, and digestive difficulties
- Increased illness and absenteeism
- Unreasonable or unprovoked anger
- Feelings of pessimism and hopelessness
- Addictions of various sorts
- Depression and other mental health issues
- Broken and damaged personal relationships
- Poor performance generally

Endnote

* Carter, Sherrie "The Tell Tale Signs of Burnout…Do You Have Them?" *Psychology Today*, Sussex Publishers, LLC, 26 November 2013. Web. 2 August 2017. https://www.psychologytoday.com/blog/high-octane-women/201311/the-tell-tale-signs-burnout-do-you-have-them.

Employees with Good WLB are:

- Sharper, more confident, and less likely to make mistakes
- More likely to be productive, creative, and sympathetic[1]
- More likely to get along with others and contribute to their teams
- Less likely to cause division, strife, and frustration in others
- More likely to make good judgment calls[2]
- Less likely to commit significant errors[3]
- Less likely to develop harmful addictions or struggle with mental health issues[4]
- More likely to remain in the profession[5]

Endnotes

[1] Emma Seppala and Kim Cameron, "Proof That Positive Work Cultures are More Productive," *Harvard Business Review*, Harvard Business Review Publishing, 1 December 2015. https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive

[2] Overwork and the resulting stress leads to myriad serious health problems and cause problems for the office, including increased absenteeism and turnover. Overwork can also make "interpersonal communication, *making judgement calls*, reading other people's faces, or managing your own emotion reactions" more difficult (emphasis added). Carmichael, Sarah Green, "The Research is Clear: Long Hours Backfire for People and for Companies." *Harvard Business Review*, Harvard Business Publishing, 19 August 2015. https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies.

[3] Adam M. Gershowitz and Laura R. Killinger, The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants, 105 *Nw. U. L. Rev.* 261,282 (2015).

[4] A study published in the *Journal of Addiction Medicine* found that over 20 percent of attorney respondents in the study suffered from problematic drinking. More specifically, men were more likely to be problem drinkers than women, and younger, newer attorneys were more likely to be problem drinkers than older, more experienced attorneys. The study also found that 61.1 percent of participants reported struggling with anxiety, while nearly half, 45.7 percent, reported struggling with depression. The two most common barriers to seeking treatment reported by participants were not wanting others to find out they needed help and concerns regarding privacy or confidentiality. Patrick R. Krill et al., The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, *J. Addiction Medicine*, Jan.-Feb. 2016, at 46, 48-50.

[5] Royal, Mark, "Everybody Wins with a Healthy Work-Life Balance," CNBC, 8 May 2013. https://www.cnbc.com/id/100720414

ence. Very often, the struggle arises from the natural challenges to WLB in a prosecutor's office, of which there are many.

The leaderŐs role

Despite these real challenges, I urge you, as a leader (that is, someone who can direct or influence others at any level), to do what you can to improve the WLB of your office. Don't be discouraged by an inability to make sweeping changes. Do what you can, when you can. There are a number of benefits to your employees connected to improving WLB. More importantly, as a person, it is the right thing to do!

Nine suggestions for leaders

If you are ready to work toward good WLB, what are some practical suggestions for doing so?

1 **Manage expectations.** Prosecution is a tough job, and it's not for everyone. Help your people understand this reality. Explaining to the young attorney (or other new employees in the office) what is expected regarding the pressures he'll face, the hours he'll work, and the standards to be maintained is the starting point of maintaining WLB. Explain that the profession is a progression: The nature and number of the hours worked early on may be different from those later in a career as the employee develops, becomes more efficient, and handles cases that are different in nature. Explain that excellence is the expectation, and that excellence requires hard work, full stop. To do otherwise is to guarantee that the employee will struggle with WLB as his expectations are incompatible with his experience.

2 **Listen to increase efŢciencies.** Set about reducing or eliminating inefficiencies as much as reasonably possible. Doing so improves WLB both by saving time and effort and by reducing

stress and frustration. Communicate with your people regularly about what changes make sense and what resources are really needed.[4] The benefit of mining the valuable feedback that exists in any organization is two-fold: It intelligently improves the functions of the organization, and it also gives subordinates vital "buy-in" to the process, both of which can significantly improve WLB.

3 Ruthlessly combat Ňmission creep.Ó Otherwise-excellent leaders are often enticed to sign on to interesting and meaningful projects not connected to the core purpose of the office. The quick and easy "yes" by the leader, however, is often followed by a significant cost later—costs generally borne by the subordinate. Those costs take their toll on WLB. The accumulation of many "minor" side missions or the agreement to pursue major objectives outside the office's core purpose is "mission creep."[5] Mission creep is a real and constant threat to WLB and one that must be constantly monitored and mercilessly combated. To avoid mission creep, the leader must indeed be ruthless, often giving the quick "no" and providing only a slow "yes" to any request that strays from the real purpose of the office. (For more on this very important idea, please see Shanna Redwine's review of *Essentialism*.)

4 Intentionally supervise. Leaders too often succumb to this attitude regarding their subordinates: "When I was at his position, I often had to do X. It was even harder to do X back then, and I did it without complaint." While this may have been true, it also may not have been necessary![6] Simply because you struggled mightily at a point in your career does not mean this is a necessary or wise path forward for those you lead.[7] A distinction needs to be made at this point. Sometimes a leader will place a prosecutor in difficult, stressful situations for a specific purpose. For example, a supervisor may choose to have a particular prosecutor first-chair three serious, complicated felony cases in a three-week span to teach the prosecutor that such a thing can be done and to help the prosecutor improve her confidence and time-management skills. To do so in a particular situation might be wise.

Too often, however, the general practice is to allow such an event to happen out of a leader's passivity, not from an intentional decision. The prosecutor who tries three (or more) cases in three weeks usually does so without much help not because there is a specific goal in the leader's mind but because the leader is not paying attention, is indifferent to the challenges the prosecutor is facing, or is reverting back to the "when I was at her position" mentality. This is leadership flowing from negligence and apa-

Challenges to WLB

- Common lawyer personality traits work against WLB.[1]
- Difficult work with serious consequences.[2]
- Conflict driven, complex, high-paced work required.[3]
- Lack of adequate resources including pay.[4]
- The public's negative perceptions of the criminal justice system.[5]
- Lack of leadership training for lawyers and other supervisors.[6]

Endnotes

[1] Latham, Tyger "The Depressed Lawyer." *Psychology Today*, Sussex Publishers, LLC, 2 May 2011. Web. 2 August 2017. https://www.psychologytoday.com/blog/therapy-matters/201105/the-depressed-lawyer. Latham describes the personality types of many lawyers and how these personality types contribute to stressful lifestyles.

[2] For an excellent treatment of this subject, see Miles-Thorpe, Stacy, "Trauma for the tough-minded prosecutor." *The Texas Prosecutor*, July-August 2016, Volume 46, No. 4.

[3] Wil Miller, who spent 10 years as a sex crimes prosecutor, the last six months of which he was addicted to methamphetamines, described it this way: "Being a surgeon is stressful, for instance–but not in the same way. It would be like having another surgeon across the table from you trying to undo your operation. In law, you are financially rewarded for being hostile." Zimmerman, Eilene "The Lawyer, the Addict." *The New York Times*, 15 July 2017. https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html.

[4] Interestingly, the difference in pay between "service lawyers" (i.e., prosecutors) and "prestige lawyers" (i.e., civil lawyers) does not result in less job satisfaction for the service lawyer. Lawrence S. Krieger and Kennon M. Sheldon, "What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success," 83 *Geo. Wash. L. Rev.* 554 (2015). On the other hand, every dedicated prosecutor has, at some point, wished for more resources to prosecute cases, and government service (at least at the state level) is clearly limited in that respect. Additionally, I suspect that the shadow of student-debt impacts the WLB of many prosecutors as they dutifully work long, hard hours at very modest salaries.

[5] Jones, Jeffrey. "In U.S., Confidence in Police Lowest in 22 Years." Gallup, 19 June 2015. http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx I suspect that the real issue is not whether the public has lower confidence in prosecutors than they had before, but whether the individual prosecutor *believes* the public has less respect and appreciation for the prosecutor's work. Anecdotally, at least, this seems to be the case.

[6] For an interesting discussion of why this might be the case, see Furnari, Stephen, "Are Lawyers Horrible Bosses?" *Law Firm Suites*, 2 September 2014. http://lawfirmsuites.com/2014/09/lawyers-horrible-bosses/.

Mission creep is a real and constant threat to WLB and one that must be constantly monitored and mercilessly combated. To avoid mission creep, the leader must indeed be ruthless, often giving the quick "no" and providing only a slow "yes" to any request that strays from the real purpose of the office.

thy. Leadership that leads to good WLB requires intentionality.

5 Know your people and communicate with them regularly. Like members of the military, prosecutors and others who work in a prosecutor's office are often reluctant to admit when they are struggling and will invariably refuse to ask for help, even when they need it. Leaders must, therefore, affirmatively, actively, and consistently keep close tabs on their people and help them when and as needed. The most effective way to do this is for leaders to get to know their people well enough to appreciate when they need a break in the rotation, to recognize signs of stress, and to identify the best approach to dealing with a specific pressure.[8] This may take the form of reminding the employee to get adequate sleep, to eat regularly, and to develop healthy outlets independent of work, all of which requires the leader to know and care about the employee as an individual. (As an aside, the old saying, "People do not care how much you know until they know how much you care," will take leaders a long way in this regard.)

6 **Destigmatize resources.** Not only are people who work in a prosecutor's office disinclined to ask for help when needed, they are reluctant to receive help when offered. This is particularly true if that help is connected to any type of mental health assistance, assistance that prosecutors very often need. It is therefore important for leaders to talk early and often about resources that can be helpful and to legitimize these resources. The Texas Lawyers' Assistance Program (TLAP) is an example.[9] Employee assistance programs are another. There is help for lawyers who struggle with depression, anxiety, and addictions, all problems that are an occupational hazard for prosecutors.[10]

The leader cannot simply relay the existence of these resources in a rote or dismissive manner and consider the job done. Instead, the leader should sincerely and regularly communicate the value these resources and encourage their use whenever appropriate. Speaking about TLAP or similar resources, for example, with a mocking tone or even a light joke does far more harm that one might guess. The message from the leader in that situation is clear—you would be weak to avail yourself of this help. On the other hand, the leader who can sincerely communicate the value of these programs and destigmatize their use will greatly advance the effort to obtain and maintain good WLB.[11]

7 **Create organizational safeguards.** Maintaining good WLB is difficult partly because it's a constant struggle to deal with many different types of problems. Good leaders can help themselves in this effort by setting up systems and procedures to acts as fences and gates to deal with differing problems. As an example of an organizational fence (meaning, a boundary), the leader can require prior approval for employees to work on holidays. The leader who observes an employee working every holiday might then inquire further into that person's work habits, schedule, and general well-being. Another example of an organizational fence is the insistence that leaders at all levels honor, both in letter and in spirit, the Family and Medical Leave Act (FMLA), vacations, time off, etc. Still another safeguard is to either completely sever or strictly control the use of after-hours electronic tethers, such as email and texts, except in legitimate emergencies.[12]

Examples of organizational gates (meaning, openings, as opposed to fences, which are obstacles) for WLB are psychological assessments and monitoring of individuals in particularly sensitive positions in the office by trained mental health care professionals. This is particularly important for individuals who are more likely to experience secondary trauma based on the nature of their work.[13]

8 **Create a positive work environment.** A critical part of the leader's role in obtaining good WLB is to make work enjoyable whenever possible. The leader who creates a safe, positive, professional environment can contribute greatly in this regard. Set aside time and resources for breaks from the pressures of work. The leader can encourage the celebration (within reason) of major life milestones like holidays, birthdays, births, engagements, awards, etc.[14] Training events—particularly those where staff members can get out of the office—can be made to be fun and enjoyable.[15] Encouraging staff members to eat lunch together and to spend time together outside of the office can be helpful.[16]

Even more important than these planned activities, however, is the leader's role in creating

a positive office culture. Praise publicly whenever possible and criticize privately. Leaders should endeavor to inspire instead of leading solely by fear. Consistently demonstrate that you trust your employees.[17] Foster an environment where the individual is valued and developed as an individual, not simply as a cog in the machine. Focus first on fixing problems rather than rushing to affix blame. Concentrate on, as my District Attorney Brett Ligon says, "preparation and presentation" rather than specific results at trial, and inspire subordinates to the higher call of seeing that justice is done in all circumstances. Use humor to help ease pressure and express genuine gratitude to those who do the hard work of the office. Don't reward abusive behavior by others; take actions to eliminate this behavior whenever it occurs.[18]

9 **Be self-aware.** Last but certainly not least, self-awareness is arguably the foundation for effective leadership. Recognizing your own strengths and weaknesses is the starting point for leading others. Leaders often struggle with WLB themselves, and sometimes these struggles need to be acknowledged and addressed. If a leader has a significant problem in this regard, she has a responsibility to get help for herself and make the necessary changes for the sake of the people she leads. Leaders must be careful not to assume that what is "balance" for them ought to be balance for those they lead. For example, a leader may prefer to consistently work 60 hours a week, but the leader should not presume that their subordinates feel the same way. Similarly, a leader may not be emotionally overwhelmed in dealing with a case involving say, the murder of a child, but she may need to recognize that another prosecutor trying the same type of case might be deeply burdened by such work.

Final thought

Employees of a DA's office are in many ways similar to those Americans who serve in the Armed Forces. Like many members of the military, DA employees are talented, dedicated, selfless, tough-minded, brave, and incredibly resilient. Our leadership challenges, though difficult, are tremendously benefited by these characteristics. Our cause, too, is noble. Our people want to do well, and with a little skill and intentionality on our part, they will. Creating a good WLB is not an obstacle to excellence—it is the path to excellence. Take care of your people, and enjoy watching them take care of the purpose in ways that will make us all proud to work in a prosecutor office! ❇

Endnotes

[1] I served on active duty in the United States Army from 1993 to 2006. I was initially a Military Police officer, then went to law school at the Army's direction. I served as a prosecutor, defense attorney, and instructor at the Army Judge Advocate General's Legal Center and School and deployed as part of Operation Iraqi Freedom. I subsequently spent six years at plaintiff's firm in Houston before joining the Montgomery County District Attorney's Office. I have been married for 26 years and have four children.

[2] A basic example of this point is the prosecutor who becomes so overburdened with personal or professional problems that he fails to attend to a discovery matter, which in turn results in a case being reversed or dismissed.

[3] Kivimaki, Miki et al. "Long working hours and risk of coronary heart disease and stroke: a systematic review and meta-analysis of published and unpublished data for 603,838 individuals." *The Lancet*, Volume 386, Issue 10005, 1739-1746.

[4] We have had some success with the use of "sensing sessions." The term "sensing session" comes from the practice in the military of obtaining feedback from subordinates. The commander attempts to get a "sense" of the how well things are working in a particular military unit. Generally, this is done by assembling a relatively small group of individuals who are similarly situated (in our example, all court legal assistants or all misdemeanor prosecutors). Someone with good discretion and good judgment and who is not in the supervisory chain of command then facilitates a series of guided questions and records the results. Generally, these results are reported without attribution unless the individual providing the feedback specifically agrees. Typical questions might be, "In your opinion what is working well?"; "In your opinion, what is not working well?"; and "What would help you to do your job better?"

[5] The Oxford Dictionary defines mission creep as "a gradual shift in objectives during the course of a military campaign, often resulting in unplanned long-term commitment."

[6] My friend and colleague Lisa Stewart cleverly characterizes this attitude in the following: "We always hear the stories about how so and so went up hill both ways in the snow carrying firewood in both hands. My question is, 'Why didn't you get around to building a sled?'"

[7] There is an interesting mental error we are all subject to, a specific variant of the "availability bias" called "the headwind/tailwind asymmetry." In essence, we tend to remember the challenges we had in a particular endeavor, but we forget the benefits we had at the same time (when running, we are very aware of the headwind, but once we make the turn, we quickly forget the tailwind). For example, the prosecutor who remembers preparing for five trials on a given Monday may not remember that, say, the discovery obligations for those cases were much different from what they are today. For more on this interesting concept, see Davidai, S., & Gilovich, T. "The headwinds/tailwinds asymmetry: An availability bias in assessments of barriers and blessings." *Journal of Personality and Social Psychology*, 111(6), 835-851 (2016).

[8] For a helpful list of behaviors to look for, See Hughes, Rick, "10 Signs Your Employees are Suffering from Stress and Anxiety." *HRZone*, Sift Media, 21 May 2013. https://www.hrzone.com/perform/people/10-signs-your-employees-are-suffering-from-stress-and-anxiety.

[9] Texas Lawyers' Assistance Program can be found at https://www.tlaphelps.org/.

[10] Lawyers With Depression is a very helpful website that can be accessed at http://www.lawyerswithdepression.com/.

[11] When appropriate and in the right setting, sharing the leader's personal experiences with these types of programs can be extremely helpful in convincing others of their value.

[12] As a general rule, there is a direct correlation between the frequency of checking email and stress generally. Kushlev, Kostadin and Dunn, Elizabeth. Checking Email Less Frequently Reduces Stress. Elsevier, *Computers in Human Behavior* 43 (2015) 220-228. I'm confident that this would apply to checking email while off work. https://happylabubc.files.wordpress.com/2010/11/kushlev-dunn-email-and-stress-in-press1.pdf.

[13] For those personnel in select assignments, such as in our Internet Crimes Against Children Division, we have a psychologist do initial, interim, and exit interviews to assess mental and emotional health issues. The screening includes anxiety, depression, and secondary trauma assessments, with a follow-up interview by the psychologist.

[14] Two of the highlights of our year occur at Thanksgiving when we shut the office down for two hours and enjoy a pot-luck meal together, and then again at Christmas when we again eat with one another and do a Secret Santa gift exchange. Throughout the year, we also gather together to commemorate arrivals and departures and significant achievements in the office.

[15] Our chief prosecutors recently underwent training using submunitions with one of our police agencies. The prosecutors cleared rooms and conducted traffic stops. The training was enjoyable and very effective in communicating the realities and limitations of using deadly force in citizen interactions.

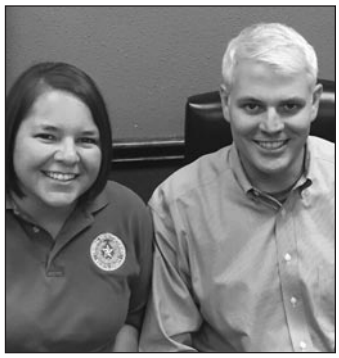
[16] Be careful about centering these events primarily on alcohol or glamorizing excessive drinking generally. In a profession where addictions claim so many of us, a little caution and common sense should be exercised.

[17] "High-trust organizations have been shown to outperform low-trust organizations by 286 percent in total return to shareholders." James M. Kouzes and Barry Z. Posner, *The Truth About Leadership*. p. 75. John Wiley & Sons, Inc., 2010.

[18] Few things are as disheartening to good employees as leaders who fail to affirmatively deal with a substandard performer or mean-spirited employee. The "jerk" in the office, in particular, is an obstacle to good WBL. For more on this subject and at the risk of a purveying a mild obscenity, I point you to Robert Sutton's

A case of child torture

How prosecutors held a stepmother accountable for mentally and physically torturing her two stepsons when the abuse did not rise above simple bodily injury



By Misty King and John Gillespie
Assistant Criminal District Attorneys in Wichita County

With a massive busted lip that was turning green and two raccoon-like black eyes, 12-year-old Kevin (not his real name) showed up at the emergency room with his father, Jonathan, on March 30, 2016. Kevin claimed he busted his lip from a fall while rough-housing with his brothers.

The ER doctor, however, found no signs of a bracing injury to Kevin's wrists, as would be expected with a fall. Additionally, he noticed that Kevin had no nasal trauma. For a child to injure his eyes and lip but miss his nose in a fall is nearly impossible. When the doctor examined Kevin's body, he found a hand-shaped bruise on his chest and various bruises of different ages all over his torso and shoulders.

The doctor reported Kevin's injuries as child abuse to police and rescued the boy from an ongoing pattern of torture at the hands of his stepmother, Sara Woody.

The family situation

Sara Hankins met Jonathan Woody online. Jonathan had two boys at the time, Kevin, age 9, and Curtis, 5. Sara also had two children, Hope, age 4, and Carter, 2. Sara testified that Kevin and Curtis called her "Mom" the first time they met her.

After dating a while, she promptly got pregnant, she and Jonathan married in September 2013, and the blended family lived in Fort Worth. At Sara's request, Jonathan pulled his two children out of public school, and Sara began homeschooling them.

Sara and Jonathan had their baby, Cade, in 2014. In September 2015 at Sara's request, Jonathan quit his job and moved the family to Burkburnett, Sara's hometown. She did not work but homeschooled all of the children.

She was pregnant for most of the time that she and Jonathan were together. Sara had a miscarriage in 2013, and Cassidy, their youngest child, was born while Sara was in jail for this case in the summer of 2016.

The initial forensic interview

Nine days after the ER doctor reported Kevin's injuries to police, Kevin was interviewed at Patsy's House, our child advocacy center. The boy did not disclose any abuse, nervously apologizing at one point for deviating from what he meant to say. Kevin did make a strange statement that when he ate food without permission, it was "stealing" and that he would have to go to jail, mow lawns, or clean someone's house to earn money to pay for that stolen food.

Fortunately, at the same interview session, Kevin's 7-year-old brother, Curtis, and 5-year-old stepsister, Hope, made disclosures. Curtis said that when Kevin got in trouble for stealing Sara's honey buns and chocolate chips, he had to stay in the closet buck-naked. Further, when Kevin and Curtis "stole food" from their family, their stepmother Sara made them drink apple-cider vinegar to throw it up.

Similarly, Hope disclosed that her mother made Kevin sleep in a closet when he was in trouble and that she made Kevin drink something to throw up the snacks he stole.

Another forensic interview

After being placed with their maternal grandparents for a month, Kevin and Curtis began opening up about their abuse at Sara's hands, so they were interviewed a second time.

Kevin apologized for not being willing to talk about it the first time. He told the forensic

interviewer he didn't want to be mad and sad, and to talk about the abuse made him mad and sad. Kevin disclosed that Sara busted his lip by repeatedly striking it with a metal spoon. Kevin also said that Sara struck him all over the body for stealing food, and she would make him strip and sit in his room naked as punishment. Kevin said he ate food without permission because Sara wouldn't feed him. He also disclosed that Sara would give him rice and beans to eat as punishment, which was different from the food for the rest of the family. Sara would make him do exercises such as wall-squats and push-ups as punishment, and she would strike him with a tent-pole (a fiberglass rod from a baby tent) when he stopped. Sara would make him drink apple cider vinegar and cayenne pepper to "give back" (throw up) the food he stole. His stepmother also made him lick the toilet as punishment for lying. Finally, he disclosed that when his younger brother Curtis wet the bed, Sara would hit Curtis on the genitals as punishment.

Curtis also disclosed having to lick the toilet as punishment for lying and said that Sara struck his genitals with a belt as punishment for wetting the bed. The boy described how bruised his genitals would be after Sara hit him. Finally, Curtis said the defendant put a lighter under his tongue for lying.

As I processed the case, three major themes of abuse emerged: parentification, scapegoating, and child torture. Sara looked to Kevin, as the oldest child, to serve in a parental role for the younger children: making their meals, cleaning the house, and doing extreme chores. This dynamic is called parentification: asking a child to take on a parental role for which he is not equipped. With Kevin's significant intellectual delays, he was simply not able to do all the chores and his homeschool assignments. His failures led to Sara—and the rest of the family—scapegoating Kevin. When Kevin could not carry out his "parental" duties, Sara blamed him for everything that went wrong with the family and signaled to the rest of the children that Kevin was to blame. This is classic scapegoating, which is common in abusive families. Child torture was also occurring in this household. Child torture is a combination of physical abuse and humiliation or terror. It involves depriving the child of the essentials for life such as food, drink, and the bathroom, as well as humiliating or terrorizing the child. The goal with child torture is to break the child's will.

The charging decision

After the boys' disclosures, John, a co-author of this article, knew we were dealing with serious abuse and wanted to find the appropriate charge. While Sara Woody's actions were horrific, the physical abuse merely constituted simple bodily injury, which would be only a third-degree felony (with a 10-year maximum prison sentence) under the Injury to a Child statute.[1] That did not seem sufficient for her crimes against these children.

In looking through the offense, we discovered that causing serious *mental* injury, deficiency, or impairment was a first-degree felony.[2] While there was not much caselaw on the subject, I found a Court of Criminal Appeals case that seemed to accept (without deciding) that post-traumatic stress disorder (PTSD) qualified as a serious mental injury.[3]

After the boys' full disclosures of the abuse and reports from their caregivers about their behavior (extreme fear, checking to make sure the doors and windows were locked, jumpiness, etc.), Child Protective Services (CPS) decided to have the children re-evaluated for mental injury. (The initial psychological testing conducted before the trauma was revealed had some interesting findings about Kevin—including that he identified with the statement "I want to kill myself" and he finished the statement "I suffer" with "… to die for my family," which fit his scapegoating and parentification roles—but did not diagnose any PTSD.)

The second set of psychologicals, however, found that Kevin, Curtis, Hope, and Hope's younger brother, Carter, age 4, all had PTSD; Dr. Brandon Bates, who later testified for the State as an expert witness, found that the older three also had a serious mental injury too.

Before we started this case, we thought of PTSD as a thinking issue, but we learned it is actually a psycho-biological issue. Thus, while counseling for child trauma can help alleviate some of the symptoms, a child with PTSD will have a host of neuropsychiatric problems that last a lifetime. Dr. Bruce Perry, a leading psychiatrist and expert in child trauma, wrote in an article on his website, www.childtrauma.org:

"Indeed the residual emotional, behavioral, cognitive, and social sequelae of childhood trauma persist and appear to contribute to a host of neuropsychiatric problems throughout life."

PTSD in children changes how the brain develops and how it is biologically wired. A child exposed to abuse severe enough to cause PTSD will never be the same. Our psychologist, Dr. Bates, later testified that there was no simple cure for PTSD and that the traumatic injury can impact a child's entire future, including friendships, schoolwork, and romantic relationships.

Finally, the literature indicates that adult-onset PTSD is very different from PTSD in children. The brain of, say, a soldier with PTSD from the battlefield will be altered, but that soldier's brain was already developed when he was traumatized. PTSD in children, on the other hand, is even more long-lasting because it impacts how a child's brain develops. Children may appear more resilient to the trauma, but Dr. Perry's work shows they are instead malleable—that is, they are forever changed by the trauma. Additionally, children are less able to express the trauma than adults, so they are less able to process and deal with what has happened to them.

Based upon those exams, the grand jury indicted Sara Woody on three first-degree counts of causing serious mental injury for Kevin, Curtis, and Hope. I held back on charging her for injuring Carter because, at his young age, I didn't think he would be able to testify. The grand jury also indicted Sara for multiple counts of physical abuse.

Building the case

Jury selection began on August 21, 2017, the date of the solar eclipse. We hoped the strange sights in the sky portended impending doom for Sara Woody.

Our first witness was the ER doctor, Dr. Jeremy Sautner. In addition to Kevin's physical injuries and how they were red flags for abuse, the doctor also explained that because Kevin weighed only 61 pounds at age 12, he was below the 3rd percentile on the growth chart. Being under the 15th percentile signaled failure to thrive. We believed this was strong corroboration of Sara starving Kevin and forcing him to throw up food.

Next, we called the detectives, who met with Kevin at the ER and then executed multiple search warrants on Sara's house. They cataloged the items that the boys described in their interviews: bottles of apple cider vinegar, a cowboy belt with an eagle on it (Curtis described that his stepmother used this belt to strike his genitals), a 2x4, fiberglass tent poles, and a fireplace lighter.

Hope's great aunt, with whom she had lived for the past year, testified to Hope's lack of empathy for her siblings. For instance, she would torment her baby sister by holding a toy just out of her reach and then giggle. The aunt also related a shopping trip on the second day Hope was with her. Hope was telling her aunt about her day, but then her mood suddenly changed to hate: "Kevin is bad. He said my name is different than his. I want to hit him with a hammer and nails." The jury seemed to react in shock to that testimony.

The boysŐ testimony

On our second day of trial, Curtis and Kevin testified. Because of his age (just 8 by this time), Curtis testified by closed-circuit TV from a room across the hall.[4] Curtis described all the horrible abuse but managed to completely charm the jury. ("You're the one doing all the work here," he quipped to the court reporter.) The boy testified to a dream he had before he came to court: "Nobody was watching Sara and she got a knife and stabbed everybody in the courtroom." We felt this dream was important to show his ongoing fear of Sara, as nightmares about the source of trauma are a key sign of PTSD.

On cross, the defense attorney took Curtis through a list of foods the defendant cooked and offered photo after photo of the family doing fun things and looking happy. During one exchange, when the defense attorney handed Curtis a photo of the kitchen, the boy exclaimed, "That's where I hid the paddle from Sara when she was hitting everybody. She never found it, either."

Now 13 years old, Kevin had to testify in the courtroom with the defendant. He was not quite as verbal as Curtis and had been subjected to greater abuse. Kevin acknowledged on direct examination that his dad knew about some of the abuse and never did anything to stop Sara from hurting him. When I asked him what he thought about that, Kevin broke down crying and said, "I thought he didn't love me anymore." (The grand jury indicted Jonathan for

Child torture is a combination of physical abuse and humiliation or terror. It involves depriving the child of the essentials for life such as food, drink, and the bathroom, as well as humiliating or terrorizing the child with the goal of breaking his will.

endangering and for perjury at the CPS adversary hearing where he denied telling Kevin to lie about Sara busting his lip.)

On cross, the defense kept Kevin on the stand for several hours, discussing how he didn't know who his father was until he was 4, asking him about various men he thought were his dad, and going over his tumultuous life before he met his real dad. Jonathan had gotten Kevin's biological mother pregnant, but she had many boyfriends so Kevin did not know until he was 4 that Jonathan was his father. Until then, he had been subjected to a series of men in his (and his mother's) life whom he thought were his dad. Once Kevin was exhausted from the questions and answers, the defense attorney started with rapid-fire, leading questions:

"Sara was the only one who was like a mom to you?"

"Yes, sir."

"Sara did nice things for you?"

"Yes, sir."

"Sara couldn't make you do anything you didn't want to do, could she?"

"No, sir."

"You got with your brother and decided to tell lies on Sara?"

"Yes, sir."

It was clear to me that Kevin had shut down and was just agreeing with anything to make the questions stop, but we weren't sure how the jury would react to Kevin's collapse. On redirect, I had Kevin explain that everything he had said on direct about Sara was true. For us, watching the boys testify was the longest day of the entire trial.

We started the third day with Hope, also by closed-circuit television. Six-year-old Hope testified that she would be awakened in the middle of the night by Kevin stealing food from the kitchen and Sara yelling at him. Our main goal in having her testify was to make her available so her outcry would be admissible.

The battle of the experts

After the children had testified, our psychologist, Dr. Brandon Bates, testified regarding the tests that he performed on each of them and his conclusions that they had PTSD and had each suffered a serious mental injury.

We agreed to let Dr. Joann Murphey, the defense psychologist, testify out of order since she was coming from San Antonio and was entitled to hear Dr. Bates' testimony. On direct, Dr. Murphey criticized some of Dr. Bates' procedures and claimed that Kevin and Curtis did not have trauma scores in the clinical range. But on cross, Dr. Murphey had to admit that Kevin and Curtis did, in fact, have scores in the clinical range, the most severe range for trauma.

Dr. Murphey also helpfully explained to the jury how PTSD is a biological injury to the brain, not just a thinking issue, and that in young children, exposure to trauma impacts how their brains are organized. Dr. Murphey agreed PTSD can be missed if a psychologist doesn't know that a child has experienced trauma. She further explained that there is no easy fix for a child with PTSD and that PTSD can spawn a host of neuro-psychiatric problems over a child's lifetime.

In preparing to cross Dr. Murphey, I examined her website, which included a link to Dr. Bruce Perry's Child Trauma Academy at www.childtrauma.org. This link was the equivalent to us of the winning Powerball numbers, as Dr. Perry's website had many articles about how debilitating PTSD is in children. While Dr. Murphey claimed not to know about the link to Dr. Perry's Stress Academy on her website ("I have no idea what's on my website. I haven't been on it in probably 20 years"), she was very forthcoming about the science behind PTSD and how damaging it is to children.

I also took Dr. Murphey through an article on child torture[5] and how the markers of torture include physical abuse, humiliation, terrorization, isolation (often in the name of homeschooling), confinement, and starvation. I then gave her hypotheticals based on Kevin and Curtis's disclosures and asked if those hypothetical situations would fit the definition of child torture. She testified that both boys' disclosures qualified as torture.

Finally, I asked Dr. Murphey about the dangers of suggestibility in forensic interviews. My intention was to ask her about the defense's attorney's aggressive questioning of Kevin on the stand, but she thought I was asking about the forensic interviewer at the children's advocacy center. In her answer, Dr. Murphey said that leading questions like that were very inappropriate for a child and that a child torture victim could easily be put back in the "obedience" position by an adult taking an authoritarian tone with him. In the obedience position, the child

If you have a child torture case, Dr. Barbara Knox's article, "Child Torture as a Form of Child Abuse," is so helpful and enlightening. ***Click here to download a PDF of it.***

would just agree with everything the authority figure asked. Thus, Dr. Murphey neatly set up my closing argument that the defense attorney's bullying tactics with Kevin would likely lead to unreliable answers from a child torture victim. This effectively diffused Kevin's collapse on cross.

The forensic interviewer

For the final day of the State's case, we called the forensic interviewer, Mary Royal. She went through the disclosures of Hope, Curtis, and Kevin. Because Hope was Sara's biological child (and so young), we felt like her disclosures of the defendant forcing Kevin to eat different food from the rest of the family and punishing him for stealing food was very important. The defense had suggested that the boys wanted to lie to go back to their biological mother (even though we didn't see any evidence of that), but what was Hope's motive for her disclosures?

Finally, the boys' step-grandma, Sharon, with whom they had been placed for over a year, testified. When the boys came to live with her, Sharon said she kept finding pudding cups in their pillowcases, cookies under the mattresses, and snacks hoarded all over their room. Sharon and the boys' grandpa promised them they could have as much food as they wanted, but they had to eat it in the kitchen because Sharon didn't want mice or roaches in the house. The boys, however, continued to hoard food in their bedroom.

"We finally brought the boys into the kitchen and showed them a bunch of snacks," she testified. "We told them, 'We have put all your favorite snacks on the counter. You can have them day or night and as much as you want. We promise we will keep them stocked. But the only rule is you have to eat them at the kitchen bar.'" Finally, the boys accepted they had plenty of food and stopped hoarding it.

Sharon also testified that one day, she had left a bottle of vinegar on the counter (she used vinegar in their water well). When Kevin saw it, he panicked and asked, "Grandma, why do you have that out?" She also testified to the nightmares the boys had and the extreme stress they were under any time Sara came up in conversation. For example, when the attorney ad litem went to see them, Kevin flunked all of his tests the next day and Curtis plucked out all of his eyebrows. The boys' terror of Burkburnett and Sara Woody was so strong that simply being reminded about the case triggered intense fear they might be sent back to live with Sara and prompted these extreme manifestations of stress.

Sharon also testified that the boys frequently brought up the abuse at mealtimes. We thought this was telling because so much of Sara's abuse centered on food and starvation.

The defendant testiȚes

For over four hours, Sara testified on direct. Her demeanor seemed off. She tried to make jokes with the jury, but the jurors just stared back at her, stone-faced. When the defense attorney asked her if she ever made Kevin and Curtis lick the toilet, she giggled and said no.

She reminded us a lot of Jack Nicholson's character at the end of *A Few Good Men* when he bragged about ordering the Code Red. It felt like she wanted to tell us that she did everything the boys said and that they deserved it, but she held back because she would go to prison if she did.

For example, she testified that her miscarriage was caused by stress and that "a few of the children were more stressful at that time." On cross, she had to admit that Kevin, whom she was homeschooling with his significant intellectual needs (he had an IQ of 77) was the most stressful child. With those admissions, it was easy to believe Kevin when he said that Sara had called him a murderer for killing the baby in her belly. She also cried only for herself: the stress she had been under, the trauma of the miscarriage, etc. She claimed she had starved herself for the family to have food, but she omitted the fact she was getting $700 a month in food stamps.

Because she homeschooled all the children, she testified that she used a technique where you don't read about a bug but you show the kids a bug. This was interesting to us because in crossing Kevin, the defense attorney got him to say that Sara read Chapter 3 of the Book of James to them, the passage about the tongue being a world of evil and set on fire by hell. (Remembering Curtis' second interview, I later argued in closing that Sara used a cigarette lighter let her stepson feel the "fire of hell" on his tongue.)

Finally, on direct, she said, "I stick to my rules. Rules in a large house are important. If you don't stick to them, you get chaos."

On cross, she turned super-cagey with us. She claimed that she saw Kevin's busted lip (the

injury that first brought the family to authorities' attention with the boy's visit to the emergency room) but that she never saw his black eyes. When John approached to have her demonstrate how close she would have to be to Kevin to inspect his lip, she flipped out. "Don't get close to me!" she exclaimed. Misty, John's co-counsel, then demonstrated. Sara claimed she couldn't see the black eyes because they used natural lighting, then she switched and said it was because she was sitting in the recliner.

Sara also claimed that she almost never saw the boys without their shirts on and that Kevin often "slapped himself" all over, so that was probably where his bruises came from. She also claimed he was thriving in her care and that "he just has a small stature" when we confronted her with his weight (he was 61 pounds as a 12-year-old). She had no answer as to why he would gain nine pounds the first three weeks being out of her care and 35 pounds in the first year.

Finally, Sara, for all her rehearsed answers, was not expecting to be questioned about a trip to Six Flags. Her husband Jonathan's employer rented out Six Flags for employees and their families, and Sara wouldn't let Kevin ride any rides with his siblings because he was in trouble. At first Sara said she didn't remember that happening, and then she claimed the punishment was a mutual decision between her and her husband and that it lasted for only 30 minutes. In rebuttal, we called Kevin's uncle, who had also been at Six Flags, and he testified that Kevin's restriction lasted all day, that it was all Sara's idea, and that he and Jonathan had conspired to get Kevin away from Sara so the poor kid could ride something at Six Flags.

Closing themes

Our themes in closing were scapegoating, parentification, and child torture. Kevin clearly was a scapegoat. Sara taught the other children he wasn't worthy of respect, blamed problems on him (for example, telling his siblings they couldn't have chocolate chip pancakes because Kevin stole the chocolate chips), and held him so the little ones could physically abuse him.

Kevin was also subject to parentification. Sara gave him a list of chores: vacuuming, sweeping, mopping, keeping house, taking care of his siblings, and fixing their breakfast. With Kevin's intellectual shortcomings, he wasn't able to keep up with his homeschool work while also taking care of the house. He constantly failed and constantly felt Sara's wrath.

Finally, we explained child torture to the jury and asked how two kids with IQs of 77 and 82 make up a story that exactly fits the pattern of child torture? I doubt Gillian Flynn, author of such crime novels as *Gone Girl*, could make up these facts, much less these poor kids. The jury convicted on all three counts of serious mental injury and 13 counts of physical abuse and sentenced Sara Woody to 45 years.

While we were pleased with the sentence, the victory was bittersweet as the words of Dr. Bruce Perry were hard to forget: "Children are not resilient; children are malleable. In the process of 'getting over it,' elements of their true emotional, behavioral, cognitive, and social potential are diminished—some percentage of capacity is lost, a piece of the child is lost forever."

The hope we took from the trial is that the children are in safe, loving placements with plenty of food, kindness, and compassion, and Sara is locked up where she can never harm them again. ❇

Help for having *Crucial Conversations*

Have you ever been drawn into a CLE presentation by a fascinating subject and a well-credentialed presenter, only to find yourself struggling to pay attention well before the midway point? Welcome to *Crucial Conversations*.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

The book's authors promise you the tools you will need for talking when the stakes are high, but their book is a largely hit-and-miss affair. The book contains plenty of good lessons for those who are looking to improve their communication with coworkers, law enforcement, and court staff; however, readers should prepare themselves to wade through a lot of filler to get to the book's scattered kernels of helpful information.

What is a Ôcrucial conversation?Ő And who cares?

This is the very first question the authors ask and, in answering the question, they do a pretty good job selling you on the idea of dedicating several hours of your life to reading the 200 pages or so that follow.[1] From the start, crucial conversations are defined as conversations where 1) opinions vary, 2) stakes are high, and 3) emotions run strong. (Sounds like a lot of the conversations you've had with defense attorneys, doesn't it?) Unfortunately, the aim of the book isn't to increase your skill in adversarial communications. The authors' primary goal is to help with communicating with those people whose goals and interest are aligned with yours. On more than one occasion, the reader is encouraged to avoid advocating his individual opinion.

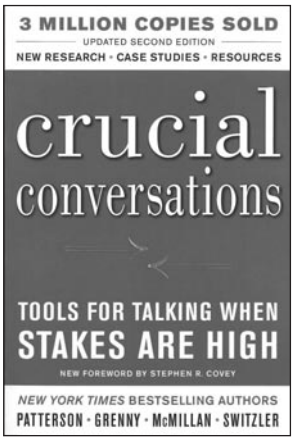
Getting it right, not getting what you want

Crucial Conversations isn't too concerned with you getting what you want. The book wants you (and the members of your team) to have all the information needed to make the best decision. In fact, it is clear that the central tenant of the authors' program is that the higher the group IQ, the better the results.

With each chapter, the authors lay out techniques for fostering an environment where everyone involved in the crucial conversation feels safe providing honest and complete information to raise the group IQ. To this end, readers are given a number of different techniques for expressing their own opinions in a way that doesn't intimidate other parties into silence or push them into an argument.

Throughout the book, the authors use a series of hypothetical situations and testimonials to illustrate the various failures in communication that they have set out to help you overcome. If you are like me, you will see many of your own failings in the book's various examples. Each individual chapter builds off the chapters that precede it as the authors lay out their program for becoming a better communicator.

While I have no doubt that practicing what the book preaches will be easier said than done, I expect to engage in more open, productive discussions with my coworkers, law enforcement, and courthouse staff in the future. One of the most helpful tips *Crucial Conversations* contains is incredibly simple yet painfully difficult to practice in a profession built on advocacy. The book's authors repeatedly emphasize the need to set aside the desire to be "right" all the time. When we are working in a team-oriented environment, the authors say that aggressive personalities or strong advocacy of one's position stifles



Crucial Conversations: Tools for Talking When Stakes Are High
By Kerry Patterson, Joseph Grenny, Ron McMillan, and Al Switzler, McGraw-Hill Education, 2011, $20.

communication and limits the free flow of information between people. Instead, the authors encourage team members to remember why they are having a conversation: For example, "Let's devise a trial strategy." Then we're to use reflective language that encourages team members to share their own opinions. I'm hopeful that a conscious effort on my part to spend less time convincing my co-counsel why my trial strategy or theme is right and to spend more time listening to his thoughts and ideas will result in a more effective trial presentation.

Readability and the art of the up-sale

For the most part, *Crucial Conversations* avoids using too many "10-dollar words." It's written to appeal to as broad a group of people as possible. For that reason, the vocabulary used by the authors never gets too far beyond a middle-school reading level.[2]

In this regard, the book suffers when its language becomes esoteric.[3] *Crucial Conversations* is but one book in a whole business/communication training program. In developing the program, the authors create phrases like "encourage testing" and "Ask, Mirror, Paraphrase, and Prime," and they use these phrases *a lot*. On more than one occasion, I found myself having to go back and look up what exactly the authors meant when they would use one of these phrases. Most chapters in the book end with what should be a helpful summary of the lessons in that chapter, but even the summaries are not free from these specialized phrases and, without meticulous notes, you may have a difficult time making use of the summaries.

The frequent use of these phrases, coupled with consistent mentions of the publisher's website and other books, made *Crucial Conversations* feel as much like an advertisement for the larger program as a book.

Conclusion

Crucial Conversations has some good lessons for those who are seeking to improve their communications with the many people and many agencies that are stakeholders in the mission of a county or district attorney's office. It is by no means flawless, though, and it likely won't appeal to someone who doesn't have a genuine desire to improve his skills in this area. ❇

Endnotes

[1] It took me about eight hours to read the book from cover to cover. In general, I consider myself a pretty fast reader but in this case, my reading was slowed by having to take excessive notes and the never-ending wave of destruction that is my 10-month-old son.

[2] I have no scientific basis for this assertion. The reading level is a blind guess on my part.

[3] #10DollarWord

In court, *The Best Story Wins*

The Best Story Wins is a collection of lessons, war stories, and cautionary tales for prosecutors by veteran Tennessee prosecutor John Bobo.

By Tommy Ashworth
Assistant Criminal District Attorney in Collin County

Although subtitled "and other advice to new prosecutors," Bobo's wisdom will speak volumes to prosecutors at every level. The book touches on nearly every aspect of a prosecutor's job, from negotiating with defense attorneys and working with judges, to managing relationships with law enforcement.

I was first introduced to this book by a well-respected prosecutor who hailed it as the single most important book for anyone in our profession. At the time, I was seven years into my career as a prosecutor and beginning to feel burned out. I found Bobo's book to be inspiring, funny, and relatable as it reminded me that the problems I faced were ubiquitous in our profession. This is the kind of book that should be kept on all of our shelves to be revisited when we need inspiration or a simple reminder of what a privilege it is to be a prosecutor. Beyond that, Bobo gives us textbook-style advice and practical tips to use in trials and dockets.

The Best Story Wins is broken down into sections that can be read independently, almost like a reference book for handling the myriad challenges that any prosecutor faces. In an early chapter titled "Being a Prosecutor," Bobo puts the profession in perspective: "Being a prosecutor is heady stuff. Mention your job title and everyone's posture suddenly improves. All your phone calls are returned. People's lives are affected by your decisions and actions. For any normal person, it would be hard not to believe it had something to do with himself. But the truth is your position causes those things—not you." Had I been lucky enough to be exposed to this and other pearls of wisdom as a baby prosecutor, there's at least a chance I might have toned down the hubris that plagues so many of us early in our careers. Experienced prosecutors reading this book will often find themselves saying, "If I'd only known that when I started."

Bobo draws on experience from a wide array of sources, including other long-time prosecutors, the United States Supreme Court, and Abraham Lincoln, who tells us, "I have always found that mercy bears richer fruits than strict justice." Quotes like these are peppered throughout the work—a reader prone to highlighting will find himself with entire pages covered in yellow. Bobo shifts seamlessly from those points that should be (but are often not) obvious to each of us ("You are the person who chooses what cases go to trial") to deeper reflections on who we are as people ("The greatest trap of a trial lawyer is not to be themselves and become a slave to the judgments of how others believe they should try a case").

As the head of our office's misdemeanor division, much of my time is dedicated to training our new lawyers. *The Best Story Wins* is overflowing with little lessons that can be expanded into broader training topics. For example, Bobo tells us to "set victims' expectations early and often." I'll use something simple like that to draw upon my own successes and failures, and before I know it I have got an extremely beneficial training segment on working with crime victims.

It goes without saying that any prosecutor worth his salt knows that he is better served to borrow from others rather than to re-invent the wheel. There's almost no problem out there that hasn't already been solved by those who came before us. To the knowledge thieves among us, *The Best Story Wins* is absolutely invaluable. ❇

The Best Story Wins (And Other Advice for New Prosecutors)
By John Bobo, Tower Publishing, 2010, $30.

My wrongful conviction

I recently discovered that I had a wrongful conviction in my past. But this wrongful conviction was not that of an innocent person sent to prison for a crime he didn't commit.

By Bill Wirskye
First Assistant District Attorney in Collin County

The conviction I'm talking about was a belief—a very strongly held belief I had about prosecution. I now believe I was wrong in this conviction, and I was wrong about wrongful convictions.

As a newly minted prosecutor in the Dallas County Criminal District Attorney's Office in the mid-1990s, it never occurred to me that I could wrongfully convict someone. After all, I had been taught that I was one of the good guys. I worked in the best criminal justice system in the world. We had checks and balances built in to the system to prevent just such a miscarriage of justice. I genuinely believed that if I was an honest and hardworking prosecutor, I would always get the right guy. Everyone I worked with shared these same fundamental beliefs. We all knew our duty under *Brady*, and we tried our best to comply. That was our office culture. We were proud to be prosecutors and considered ourselves "crime fighters" in the courtroom. Although I'd heard vague stories about wrongful convictions in other states, frankly they didn't seem very real to me, and I certainly didn't consider these stories to be any sort of a cautionary tale for me in my daily work.

But beginning in the early 2000s, Dallas became the epicenter of the DNA exoneration movement. As the number of DNA exonerations began to climb, I was forced to confront both the fallibility of the criminal justice system and the fallibility of my personal beliefs and convictions. From what I could tell, we didn't prosecute any differently in Dallas than prosecutors did in the rest of the state, but the media's narrative of that era was that a "win-at-all-costs, convict-them-all" culture in the Dallas DA's Office was to blame for the wrongful convictions. Dallas County prosecutors so valued convictions, this reasoning went, that we would routinely cut ethical corners without regard for whether we actually had the right guy.

This, of course, was utter nonsense. That was not the office culture I knew. The prosecutors involved in the exonerations were good, honest people, genuinely trying to get the right guy the right way. While I can never be sure that some Dallas prosecutor didn't intentionally cut corners in one of those cases, even one or two of these "bad apples" wouldn't explain the sheer number of wrongful convictions. The Innocence Project lists a total of 24 DNA exonerations in Dallas County.[1] So, exoneration by exoneration, I became increasingly aware of the limitations of our system and my own limitations as a prosecutor. It certainly seemed that our shared belief in honesty and hard work, while good, was not enough to prevent all the wrongful convictions occurring in Dallas. And even as I redoubled my efforts to avoid convicting an innocent person, I really had no new strategies or tactics to employ. In truth, I guess I just worried about it more because I was scared it could happen to me.

Probably because of these experiences in Dallas early in my career, I became intrigued with how we as prosecutors could do better. How can we convict the right guy, the right way, the first time? When I returned to prosecution in 2015 after eight years as a defense lawyer, I made a very conscious decision to study wrongful convictions and immersed myself in the world of conviction integrity and actual innocence. Fortunately, my elected DA, Greg Willis,

shared my curiosity on the subject, and he encouraged me to follow my interest. I began to attend every seminar and training I could find that dealt with this topic. Oftentimes I was treated as somewhat of a curiosity—a former Dallas County death penalty prosecutor who claimed to have an interest in getting it right and making the criminal justice system better. I'd frequently find myself as the only prosecutor in the room, surrounded by defense lawyers, law professors, and other prosecutorial skeptics who seemed somewhat puzzled I had managed to infiltrate their midst. I learned quickly, however, that despite our differences, we shared a common interest—namely, a strong desire to improve our criminal justice system.

This realization gives me hope that moving forward we can undertake any necessary prosecutorial reforms in a collaborative manner, engaging all the stakeholders in the system. I've met so many defense lawyers and academics of good will and good conscience that I can no longer reflexively ignore their criticism. Instead, I want to leverage their input as we undertake an exhaustive and collective re-examination of our profession to help find new and better ways to see that justice is done.

While I realize that other actors in the criminal justice system also have a responsibility to prevent wrongful convictions, I think prosecutors should lead the way because justice is our business. Some exciting work in this area has already been done, and some promising themes and solutions are starting to emerge for me. While these may not be entirely satisfying or comprehensive, I do believe they can make us better prosecutors and reduce the chances of obtaining a wrongful conviction.

Brady sometimes isnŐt enough, so embrace the Michael Morton Act.

I had always assumed that our honest adherence to *Brady* was the ultimate safeguard for prosecutors against widespread wrongful convictions. The Dallas DNA exonerations proved me wrong. *Brady* was never meant to be a pre-trial test employed by trial prosecutors to decide what to turn over to the defense. Rather, *Brady* is a post-conviction harm-analysis test to be used by appellate courts. Applying the *Brady* test pretrial requires a prosecutor to make a prospective guess about what is favorable evidence for the defense and whether it will ultimately be material. This can be a trap for unwary or unlucky trial prosecutors. This seems ridiculously clear with the benefit of hindsight, but I know it never occurred to me until the 2014 legislative changes gave me some valuable and overdue perspective on the inherent limitations of *Brady*.

So now we prosecute in the post-*Brady* world of the Michael Morton Act. An open file and complete transparency is the law of the land in Texas. This new approach certainly takes the guesswork out of discovery for prosecutors, and for that reason alone, I'm in favor of the Morton approach to discovery, even if I have to burn a few dozen disks in even the simplest of cases. While there's no guarantee that Morton will be a better safeguard, it appears to be an improvement over *Brady* in preventing wrongful convictions. I guess only time will tell.[2]

Eyewitness evidence is not the Ňgold standardÓ we once thought, so corroboration is the key.

Like so many prosecutors who came before me, I had always considered eyewitness testimony to be the gold standard of reliable evidence. Eyewitnesses have the power to persuade detectives, prosecutors, and juries, but the DNA exonerations and continued research into eyewitnesses and the process of memory have challenged our understanding of the reliability of this type of testimony. The human eye is no longer compared to a camera and the human memory is no longer analogized to a DVR. It turns out that eyewitness testimony is a far more complicated matter than we initially thought.

Independent corroborative evidence is now the key for investigators and prosecutors to shore up eyewitness identifications. It has helped me to think of eyewitness evidence as trace evidence—that is, memory is malleable and can be contaminated much like the more traditional types of trace evidence. I now believe that an eyewitness's memory should be treated as the "unseen crime scene"—kept secure from improperly suggestive outside influences. Although the research in this area often seems contradictory, two key takeaways have emerged: Prosecutors must be more cautious of this type of evidence, and we must increasingly rely on corroboration. But because eyewitnesses will continue to play an important role in the investigation and prosecution of crime, it will be incumbent on us to learn the latest research and employ the latest best practices.[3]

The human eye is no longer compared to a camera and the human memory is no longer analogized to a DVR. It turns out that eyewitness testimony is a far more complicated matter than we initially thought.

We as prosecutors are not immune to cognitive bias, so beware.

Cognitive bias[4] is a term for certain subconscious and predictable thinking errors that all humans make. These pose a real threat to prosecutors, and they can take many forms. The well-known bias of "tunnel vision" can infect an investigation or prosecution by blinding police and prosecutors to other alternative suspects or explanations. The related concept of "confirmation bias" is the tendency to search for, interpret, favor, and recall information in such a way that confirms one's pre-existing beliefs. Consider the common scenario where the police file a case with the local prosecutor's office and vouch that their investigation has revealed that the defendant is the right guy. How hard is it for us to completely distance ourselves from their conclusion and take a look at the evidence with truly objective eyes? I know I struggle daily with this task, so I frequently try to read the file a second time with a "devil's advocate" frame of mind to try to control for any bias on my part.

Many prosecutors will "pitch" their case to a group of other experienced prosecutors and investigators to make sure they are not missing some important fact or angle due to bias or tunnel vision. The goal here is to seek creativity and not necessarily consensus.

Many prosecutors will "pitch" their case to a group of other experienced prosecutors and investigators to make sure they are not missing some important fact or angle due to bias or tunnel vision. The theory is that the more eyes on the case and the more brains thinking about it, the less chance something will be missed. The goal here is to seek creativity and not necessarily consensus. Every assumption and piece of evidence should be challenged in this meeting while never assuming the defendant's guilt. While this is often done informally in many offices, I like the organized "pitch session" best because it forces attendees to deliberately change their perspective while considering the case.

Although there is no simple fix for the threat of cognitive bias creeping into our decision making, a simple technique like the pitch session can help counteract any potential tunnel vision or confirmation bias.[5]

Our job has grown increasingly complex, so we must be committed to continual learning.

Basic advocacy skills and some on-the-job training in the forensic sciences are no longer good enough to be a conscientious prosecutor in today's world. A prosecutor must be a perpetual student, systematically developing a working expertise in the increasingly complex[6] and changing fields of forensic science and technology. We must now be at the very cutting edge of knowledge, all the time, to both exonerate the innocent and convict the guilty.

But is this realistic considering how busy we all are and how tight our training budgets are? The answer is an emphatic "yes" if a prosecutor is motivated, interested, and intentional. In addition to the wealth of free information available on the internet, most traditional training providers for Texas prosecutors are offering specific courses to address the new need for us to become near-experts in a diverse array of forensic and technological disciplines.[7] Many of these courses are low-cost or no-cost to Texas prosecutors. We must be very intentional in how we plan our own continuing education. What are the areas in which we are lacking knowledge? What are the dynamic or contested areas?[8] How can we be systematic and comprehensive in learning a desired topic? This type of commitment to continual learning is a sure sign of a professional prosecutor.

We must study our mistakes so we can learn from them.

When mistakes are made in the fields of aviation or medicine, the mistake itself is studied for potential lessons to help avoid another error and strengthen the process and system.[9] We must adopt this mindset in criminal justice. Each mistake is an opportunity to prevent a future mistake and improve the system. As prosecutors, we no longer have the luxury of ignoring our mistakes. We must confront them and then aggressively mine them for lessons learned and best practices. This is equally true of both the intentional bad-apple, misconduct-type mistake, as well as the more common unintentional or negligent mistake.

A method like "root-cause analysis"[10] (also called a "sentinel event review"[11]) is a proven way to investigate an erroneous outcome that may signal a weakness in a complex system. This type of analysis brings together stakeholders to determine, in an objective and blame-free environment, why a mistake occurred. This analysis can also be used to investigate a "near miss"—a situation where a mistake is narrowly averted.

Root-cause analysis is being increasingly used in the criminal justice system to examine events such as wrongful convictions, forensic lab errors, or even officer-involved shootings, and the lessons learned thus far show great promise.[12]

Parting thoughts

I will forever be grateful to our crime lab in Dallas for saving all the evidence for future DNA testing. Only because of the forethought of those authorities could such wrongs of the past be righted.

While many things have changed about our profession since I started, some of my fundamental convictions about what it takes to be an effective prosecutor have not. For instance, I still believe that being an honest and hardworking prosecutor is a prerequisite for success. But one of my early convictions about prosecution was wrong: I thought then that honesty, hard work, and *Brady* were enough to guard against a wrongful conviction. As it turns out, this mistaken belief was a wrongful conviction on my part. I now have a new and hard-earned humility about the potential fallibility of both the system and myself. I hope this humility makes me a better prosecutor. I think it does. ❇

Endnotes

[1] https://www.innocenceproject.org.

[2] I believe that anyone who works in the criminal justice system should study the Michael Morton case for lessons learned. I recommend his book *Getting Life: An Innocent Man's 25-Year Journey from Prison to Peace*. Simon & Schuster, 2014. The *Texas Monthly* archives also contains a wealth of information on the case, and they can be accessed at https://www.texasmonthly.com/category/topics/michael-morton/.

[3] Two eyewitness evidence must-reads for prosecutors are *Eyewitness Evidence: A Guide for Law Enforcement*, National Institute of Justice, 1999, found at https://www.ncjrs.gov/pdffiles1/nij/178240.pdf and *Identifying the Culprit: Assessing Eyewitness Identification*, National Research Council, 2014, found at https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

[4] For an overview of cognitive bias and decision-making, read Daniel Kahneman's *Thinking Fast and Slow*, Farrar, Straus, and Giroux, 2011, and *The Invisible Gorilla: How Our Intuitions Deceive Us*, Crown Publishing, 2010. D, by Christopher Chabris and Daniel Simons. Kim Rossmo's excellent *Criminal Investigative Failures*, CRC Press, 2009, covers the dangers of cognitive bias in criminal investigations.

[5] For more information on the concept of an organized "devil's advocate" approach to combat cognitive biases, see Bryce G. Hoffman's *Red Teaming: How Your Business Can Conquer the Competition by Challenging Everything*, Crown Business, 2017.

[6] Read Atul Gawande's book *The Checklist Manifesto: How to Get Things Right*, Metropolitan Books, 2009, to explore how failures can result from complexity and volume of knowledge.

[7] In addition to the great training provided by TDCAA (https://www.tdcaa.com/training), the National District Attorneys Association (http://www.ndaa.org/upcoming_courses.html) and the Association of Prosecuting Attorneys (http://www.apainc.org/upcoming-events) also offer training specifically for prosecutors. The Center for American and International Law (www.cailaw.org/Criminal-Justice/index.html), too, provides criminal justice practitioners training in actual innocence.

[8] For an idea of the latest criticisms in the dynamic world of forensic science, see *Strengthening Forensic Science in the United States*, National Research Council, 2009, found at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf and *Report to the President Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, the "PCAST Report," President's Council of Advisors on Science and Technology, 2016, found at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

[9] Matthew Syed's *Black Box Thinking: Why Most People Never Learn From Their Mistakes–But Some Do*, Portfolio/Penguin, 2015, and Gawande's *Checklist Manifesto* both explore this process.

[10] See National Commission on Forensic Science, *Directive Recommendation: Root Cause Analysis (RCA) in Forensic Science* found at https://www.justice.gov/archives/ncfs/page/file/641621/download for an explanation of the principles of root cause analysis in the forensic science context.

[11] See the National Institute of Justice's Sentinel Event Initiative web page at https://www.nij.gov/topics/justice-system/Pages/sentinel-events.aspx for further study.

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