
THE TEXAS PROSECUTOR

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*Attendees at April's Intoxication Manslaughter School took sobriety tests, such as the horizontal gaze nystagmus test, above. For more photos from the seminar, turn to page 33.*

# Cold case investigations

## How a few cheese-cracker crumbs helped solve five 15-year-old rape-and-murder cases

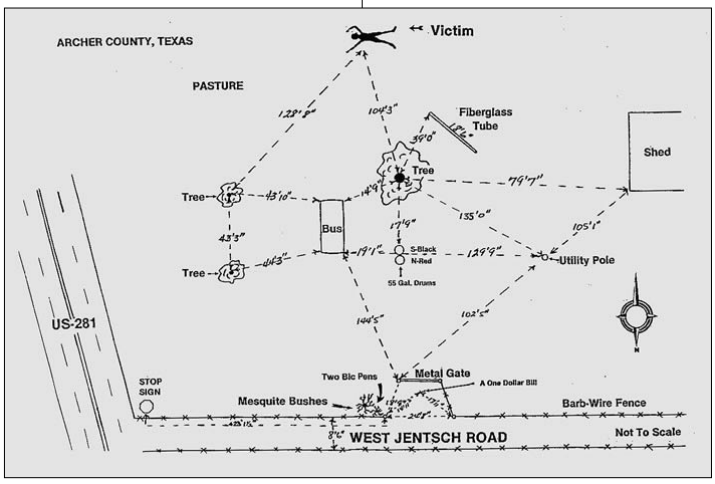
***By Diane Burch Beckham***
TDCAA Senior Counsel

Fifteen years and few leads later, justice came to the families of five murdered women because of a paper coffee cup with cheese cracker crumbs.

Or more precisely, because the retrieved cup with a saliva sample provided DNA evidence thanks to the patience, ingenuity, and hard work spearheaded by a district attorney's investigator in Wichita Falls.

Cold case investigation isn't a science, but science certainly plays a part in solving old crimes—along with the right combination of luck and deliberation. John Little, DA's investigator at the Wichita County Criminal DA's Office, credits his fresh perspective on the existing case files for helping solve five murders committed by Faryion Wardrip.

With television shows such as "CSI"(starring George Eads, son of retired Bell County District Attorney Arthur C. "Cappy" Eads) gaining in popularity, investigation of cold criminal cases is a hot topic. The story of Little solving the Wardrip murders has been featured on three cable networks (A&E's "Cold Cases," Court TV's "Forensic Files," and the Discovery Channel's "New Detectives") and is the subject of two books: *Scream at the Sky* by Carlton Stowers and *Body Hunter* by Patricia Hunter. A&E's look at the Wardrip case is riddled with references to Little's work experience as a bricklayer before he joined the DA's office as an investigator.




*A sketch of the crime scene, reprinted with permission from A&E TV.*

## Serial murderer

Between December 1984 and May 1986, Wardrip raped and killed five women in north Texas: Terry Sims, Toni Gibbs, Tina Kimbrew, Debra Taylor, and Ellen Blau. Until 1999, all but one of the murders went unsolved.

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*Sarah Wolf, Editor/Photographer*
*Diane Beckham, Senior Staff Counsel*



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# President's Report

*By Jaime Esparza*
District Attorney in El Paso

# Tap TDCAA for support

For more than 10 years, the association has been a great resource for me, and I appreciate the support and camaraderie of the staff and leadership. It may be redundant to heap another wave of accolades on Tom Krampitz, but I would say that the association, even one year after his departure, misses him and appreciates the leadership and vision he provided. Under his direction, we educated and served Texas prosecutors in ways we could never have dreamed. His legacy continues through the excellent team he left behind. Rob and gang continue doing a fabulous job providing timely support and keeping abreast of the issues that are important to all of us!

For now, I spend most of my time on legislative issues, and I am happy to report TDCAA is well-represented with staff support and many volunteers from offices across the state. While most of us are thinking legislation, TDCAA is also busy working on publications, training, seminars, and the other important issues that make the train run on time.

The *Prosecutor* in particular is ever-evolving into a greater resource to provide up-to-date information for prosecutors, investigators, and key personnel alike, focusing on a wide range of issues relevant to our field. In the feel-good department, we appreciate Dr. John Kramptiz for providing valuable information regarding health and wellness. I encourage you to check out his column this month on page 53. You will also want to read Irene Odom's story on page 48 regarding the unique concerns illegal aliens face when they are crime victims.

## Crime Victims' Rights Week

Last month, communities across this nation celebrated Crime Victims' Rights Week. In El Paso, we honored victims with our annual noncompetitive 2-mile walk and ceremony. Photos and memorials were displayed. Crime victims, members of law enforcement, victim advocates, families, friends, and neighbors all joined together to remember those in our community who have suffered from crime. Fourteen-hundred El Pasoans were present to show their support. It is a reminder to the community as a whole the important role victims have in insuring that justice is served. As prosecutors, we know all too well the difficult and sometimes tragic journey victims and survivors must travel. The role of our victim assistance programs can and should help them obtain some measure of control by providing information, assistance, and support during their most difficult times.

## Death penalty legislation

Recently, you may have noticed Texas prosecutors speaking out on pending legislation regarding mental retardation and the death penalty. I was glad that DAs across the state made the effort to educate their communities on these important issues.

I am hoping it will become commonplace for prosecutors statewide to speak up on the issues they face. Better-informed constituents make better citizens and better jurors. I believe our communities want to know where we, as leaders in the criminal justice system, stand on issues regarding public safety and law and order. I look forward to

additional commentaries on relevant justice issues.

Finally, I hope that you have had some good times with friends and loved ones this spring and Easter season. During spring break, my family and I had a great time traveling to Santa Fe, which is just a few hours north of El Paso. While in Los Alamos, New Mexico, home of our National Nuclear Laboratory, I saw a bumper sticker that read, "186,000 miles per sec—it is not just a good idea, it's the law." The reference, of course, is to the speed of light, and it is reassuring to know that some good ideas and laws have nothing to do with the legislative process.

My thoughts and prayers continue to be with our troops and their families.

# Newsworthy

*By The Prosecutor Staff*

## *Apply now for TDCAA's scholarship*

The TDCAA scholarship program was started last year by the Investigator Section Board of Directors to encourage our future through the support of our present. At least one $750 scholarship will be awarded annually; funding is provided through sales of TDCAA merchandise at training conferences.

Eligible applicants include children under legal guardianship of a current TDCAA member who are younger than 25 years old; who are currently enrolled in an accredited U.S. college, university, or vocational-technical school at the time of award; and who have a cumulative high school or college grade point average of at least 3.0 (or equivalent). Find applications on www.tdcaa.com in Legal Resources.

Submit completed applications to the scholarship committee (at 1210 Nueces St., Austin, TX 78705) by July 1, 2003. A typed, double-spaced essay, no longer than two pages and using a font size no smaller than 10 points, must accompany the application; its topic is "Patriotism: What it means to me."

A representative from each TDCAA section board—attorney, investigator, and key personnel—comprises the scholarship committee, which will review each application. Scholarships will be awarded based on scholastic achievement; school, civic, and community activities; and the essay. The scholarship will be presented at the Criminal and Civil Law Update Conference in September. All awards are final and contingent on the availability of funds. Awards will be paid to the recipient or school registrar (or equivalent). Past recipients are not eligible. Award recipient(s) will be notified by certified mail and are encouraged to attend the award ceremony. For additional information, contact TDCAA at 512/474-2436.

## APRI, NITA training courses

The American Prosecutors Research Institute (APRI) offers one Texas course this year. Held in Austin, it's called "JumpStart Training for Newly Assigned Juvenile Prosecutors," organized by the National Juvenile Justice Prosecution Center (NJJPC; 703/518-4398); the course runs June 12–14. Find information on this and other courses and registration forms at www.ndaa-apri.org. Also, the National Institute for Trial Advocacy (NITA) is holding an intensive training course June 7–14 at Southern Methodist University's Dedman School of Law. It focuses on building trial skills and provides about 50 hours of CLE credit, including two hours of ethics. Contact NITA at 800/225-6482 or www.nita.org for info.

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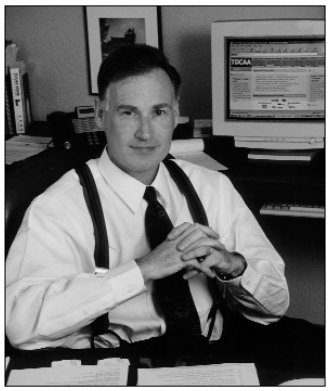
## the Executive Director's Report

*By Rob Kepple*
TDCAA Executive Director

# Who is the State's chief criminal lawyer?

Many of you instantly recognize this is a trick question. Technically, there is no single chief criminal prosecutor for the state. That, by the way, is deliberate: Ever since Reconstruction, Texans have long believed that local control of criminal prosecution is preferable to a "federalized" system by which all criminal prosecution is directed and controlled by a state governmental body in Austin. A good discussion of this principle can be found in *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002).



I mention this because in the last few months we have seen a wave of federalism at the Capitol. Now, it's not coming from the Office of the Attorney General. Our current AG appears to have a keen understanding of the limitations of the AG's authority in this area and has developed an excellent working relationship with the state's district and county attorneys.

Instead, it is coming from a wide variety of legislators who for many different reasons don't appear satisfied with local prosecutors. In some instances, prosecutors are accused of prosecuting some crimes *too much*. In other instances, prosecutors are accused of prosecuting certain offenses *too little*. In even others, we have been labeled *too unsophisticated* to prosecute certain offenses.

The simplistic solution: Let's give criminal prosecution to the Attorney General. Once again, this isn't coming from the AG. But it is amazing that more and more of our legislators are taken by the notion that the best way to solve a criminal prosecution problem is to give it to the state's chief civil lawyer.

As an association, we are going to need to address this issue in the near future. We have the justifiable conceit that the state is best served by a core of committed professional criminal prosecutors who are answerable to the public at the local level. Giving criminal prosecution authority to a statewide office or agency certainly adds a new level of centralized "control" to all criminal prosecutions, but is it in the best interest of the public?

## Texas Lone Star

Last year the Association awarded the first annual Lone Star Prosecutor award. That award is dedicated to those trial and appellate, criminal and civil, folks in the trenches—those who distinguish themselves on a daily basis in quality representation of the people of Texas. The first award went to Toby Shook of Dallas.

It's time for everyone to be thinking about nominations for the 2003 award, which will be announced at the 2003 annual conference in September. Log onto www.tdcaa.com for a downloadable form in PDF format, or call 512/474-2436 for a faxed copy. They're due to TDCAA by May 25.

## Watch out for this motion …

… you may end up in an uncomfortable chair. Opposition research is always fun.

If you check in the April 2003 issue of the criminal defense attorney newsletter, the *Voice for the Defense*, you will find a dangerous "Motion of the Month." Its title: "Request That Defense Be Allowed to Occupy Counsel Table Nearest To Jury Box."

The motion argues that any local custom that the prosecutor gets the closest table to the jury box is outweighed by the defendant's right to a fair trial, and it ain't fair if the victims and cops who tend to sit behind the prosecutors crowd up against the jury box.

We here at the Association have gotten our crack legal research team, led by Alison Holland, working on a good response to this pressing issue. We think that a "We got here first!" response may be legally defensible and constitutionally permitted. We are a little worried about a judicially imposed coin flip, if only for the possible illegal gambling repercussions and abuse of discretion potential. At the very least, we think you should certainly be able to claim the most comfortable chair if you ultimately lose the table. We will get back to you, and when we come up with a good response we will get it on the web site.

*Continued from front cover*

# *Cold case investigations (cont'd)*

Wardrip had confessed to the murder of Kimbrew shortly after her death on May 6, 1986. He later pleaded guilty to murder and was sentenced to 35 years in prison. He was released on parole in 1997 after participating in a high-profile victim-offender mediation (which "20/20" had wanted to film) with Kimbrew's family and begging them for forgiveness. Wardrip's story was that Kimbrew, who was new to Wichita Falls, was his friend, but that he had snapped and killed her. Nothing about that case made police suspect Wardrip had killed any victims other than Kimbrew.

**Information linking Wardrip to the victims was in the existing case files, "but nobody from the different departments was talking to each other," Little says.**

The body of one of the other four victims, Gibbs, was found in Archer County, a short distance from the Wichita County line. So officers from multiple counties and multiple agencies were investigating the murders separately. In 1996, Wichita County Criminal District Attorney Barry Macha and Montague/Archer County District Attorney Tim Cole put their heads together to attempt to solve the cases. Cole's investigator, Paul Smith, was one of the first to take a look at the file.

When Macha assigned the unsolved murder cases to Little January 12, 1999, Wardrip was living in Olney, where he was active in his church and was a youth group leader. By February 13 that year, Wardrip was under arrest, and in December 1999, he was tried for capital murder and received the death penalty.

Little took the case files to read but deliberately did not talk to any investigators from the police or sheriff's department who had previously looked into the murders. "I didn't want to be clouded by the judgment of previous investigators," Little says.

As he read all the case files, Little recorded names and common places. Because different counties and law enforcement agencies had taken the lead on the different murder investigations, "I don't think one person had ever sat down and had all the files in front of him," Little says.

Mapping out the geography of the murders and where each victim lived and worked, Little realized that one victim's car was found abandoned in the same neighborhood where another victim was killed. This information—and the connection to Wardrip—was in the existing case files, "but nobody from the different departments was talking to each other," Little says.

From there, Little turned to utility and employment records to find out that Wardrip lived in that neighborhood and was employed at the same hospital where

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another victim worked. In fact, Wardrip was fired four days after Terry Sims was killed for not showing up to work. "Everywhere I looked to eliminate him as a suspect only confirmed him," Little says.

Wardrip had little criminal history—one charge of illegally walking on the turnpike and the murder of Kimbrew, which didn't seem like part of a serial killing spree. But one month after getting the case files, Little believed he had found the killer.

"It's hard to verbalize what a great job he did," Macha says. "It was incredible that all these other investigators from three other agencies had looked at the case, and John sits down and comes up with a name in two weeks."

They had hit dead ends with the CODIS database and an FBI profiler. CODIS was relatively new in 1999, and the statutes governing the database did not include murder defendants. The legislature's rationale was that murder was more likely to be a one-time event, unlike rape.

Little also hit a dead end in trying to get a sample from the Kimbrew case, for which Wardrip was on parole in 1999. All physical evidence had been destroyed since the case had been disposed of.

Little thought they had enough evidence on Wardrip to get a search warrant, but Macha disagreed and sent Little to do surveillance in Olney and try to get a DNA sample to match to one of the two semen samples obtained from the victims. One of the conditions of Wardrip's parole was ankle monitoring, so he was allowed to go only to work and church.

Little tried to blend in, driving an old truck and dressing like the citizens of Olney. He filled up the bed of the truck to make it look like he was hauling things. The first day, he just tried to figure out Wardrip's routine. Little quickly figured out he wouldn't be able to get a saliva sample from a cigarette butt—Wardrip didn't smoke.

So Little took up a post at the laundromat across the street from the warehouse. He actually washed clothes, joined by mostly oilfield hands who didn't want to use their home washers and dryers on their dirty work clothes.

That same week, Little got his break. Wardrip came out from the warehouse and met his wife, who had driven up to the closed front gate. Wardrip had a paper coffee cup in his hand, the kind of cup that comes from a vending machine that dispenses coffee, and a package of cheese crackers. Wardrip sat the cup on top of the car and talked to his wife outside the gate to the warehouse.

Adding to the drama, another patron came into the laundromat at that moment. "And this guy wants to strike up a conversation," Little says. "He asked me, 'Hey buddy, where do you get change around here?' I couldn't get rid of him fast enough."

Little saw his chance when the work break apparently ended and the gates to the warehouse opened to let another truck inside. Wardrip threw his cup into a trashcan near the gate.

"I just knew I had to get it," Little says. "I was trying to think of a reason while I was walking across the street. I put in a big old dip [of snuff], walked up to Wardrip and says, 'Hey, you got a spit cup I can get?'"

Wardrip pointed at the barrel and says, "Sure, help yourself."

"So I walked over to the barrel and he came with me," Little says. "The barrel was full of coffee cups. It seemed like an eternity to me, but I see this cup with a little bit of coffee and cheese crackers around the rim of it, and I bagged it up and took it to Dallas."

Judy Floyd from GeneScreen tested the saliva on the cup, comparing it to the semen samples, and gave the preliminary opinion that she couldn't eliminate Wardrip as a suspect. Two days later, based on Wardrip's unique DNA, she told the DA's office, "This is your guy."

Little contacted Wardrip's parole officer and asked him to call Wardrip in to the parole office on a Saturday. Wardrip had been asking to have his ankle monitor removed and probably presumed that was the reason for the unscheduled visit.

When Wardrip arrived at the parole office, he was met by Little and Montague County DA's investigator Paul Smith, who told him they wanted to talk with him about Ellen Blau's case. Little and Smith asked Wardrip for a blood sample, but he says he wanted an attorney. They then placed Wardrip under arrest with a warrant they had brought to the meeting and executed the search warrant to get a sample of Wardrip's blood.

That night, Wardrip's family blasted

the prosecutors on TV news. They claimed prosecutors were picking on Wardrip because he had a criminal record.

Two days later, Little took the blood to GeneScreen in Dallas. After he filed his return on the warrant, the court released the affidavit to the public, and details of the murders in the affidavit were publicized by the press.

Shortly after that, Wardrip's brother—who had been publicly defending him—called the DA's office and asked to talk to Little. Wardrip's brother, thrown by the information contained in the affidavit, confronted his brother about the murders and told Little that he knew Wardrip had committed them because he wouldn't respond when the brother asked him about them.

The following day, a jailer called Little, telling him that Wardrip had asked him to "tell that John guy from the DA's office I want to talk to him, and he'd better get here before I change my mind."

Little and Smith asked about the murder cases in order. Smith asked Wardrip about Gibbs, and Little talked to him about the other murders. To Little's relief, Wardrip confessed to the murder for which they had the least physical evidence, Ellen Blau.

"And there was no doubt. He was talking about details only the perpetrator would have known," Little says. "Paul and I gave little sighs of relief after he confessed to the three murders. Then he says, 'There's one other that you need to know about, but it's not here.' And I about fell on the floor."

At that point, Wardrip also confessed to the unsolved murder of Debra Taylor in Fort Worth, and he later took Little and Smith to the scenes in Wichita and Archer Counties and gave them more detail about the crimes there.

By the end of that year, Wardrip pleaded guilty to the murder of Terry Sims. On a change of venue to Denton, the trial on punishment resulted in a death sentence. Prosecutors presented evidence of the four other murders as punishment evidence. The Court of Criminal Appeals affirmed the conviction in 2001 on direct appeal.[1] His state habeas application has also been disposed of, and the conviction is now before a federal district court on a federal writ of habeas corpus application.

Wichita County DA Barry Macha knew Little's family when he hired him away from his job as a bricklayer six years before the Wardrip investigation. Even though Little's experience wasn't in law enforcement, Macha says he respected his work ethic and motivation and knew that he was good with people, "which is oftentimes more important than anything." Ironically, Little had been part of a search party for one of the

*Continued on back cover*

## Keys to the investigation

**Communication cooperation.** "We're all bad about thinking, 'Hey, that's my case. Why do I need to be telling you about my case?' But when you have three or four girls who end up dying and three different agencies investigating those deaths, cooperation is essential," investigator John Little says.

**Check the records.** Look at municipal records, employment records, and utility records. Little obtained Wardrip's address from speeding tickets and vehicle registrations.

**Investigate your victim first.** From there, begin looking for everyone who has access to the victim.

**Keep track of your evidence and get DNA.** "If this were still the 1980s, we might still be at a dead end," Little says. But with DNA techniques advancing every year, it's important to retain all the physical evidence you can "because you never know when it's going to come up again," he says.

**Never assume that things aren't connected.** Look for common characteristics. Map out the victim's home, place of employment, and places frequented. Match this with other similar crimes to see if connections emerge.

"(DA) Barry (Macha) gave me an opportunity that I never thought I'd ever have. To be able to do these things, it's just far exceeded anything I've ever expected. The rewards that you get out of it—we all know we don't do it for the money. To be able to tell those families that we found the man who killed their daughters. … I can't tell that family member, 'I know how you feel,' because I don't. But the bonds that have been made from that and the lasting friendships that emerged between the victims' families, it's incredible to be a small part of that," Little says.

# FOCUS ON ... DRUGGED DRIVING

*By Sarah Wolf*
TDCAA communications director
With information reprinted with permission from the Department of Transportation's "Prosecuting the Drugged Driver" manual

# Driving under a different kind of influence

How drug recognition experts (DREs) determine whether drivers are drugged

Drunk driving gets all of the attention these days. After all, research shows that 10–14 percent of drivers on the road between 9 p.m. and 2 a.m. on Fridays and Saturdays are driving under the influence.[1]

But drugged driving deserves attention too. Drugs are woven into our national fabric, with an estimated 94 million Americans age 12 and older—35 percent of the population—having used an illicit drug at least once in their lifetime.[2] National studies show that 10–22 percent of impaired drivers have one or more drugs other than alcohol in their system. This trend appears to be increasing.

For many years, law enforcement did not have the training or scientific support to detect drivers impaired by drugs other than alcohol. Drivers arrested for DWI showed low levels of blood-alcohol concentration (BAC), and their cases were often dismissed by prosecutors or the courts. This started to change when the Drug Recognition Expert (DRE) program was founded in the late 1970s. With this program, officers now have a scientifically valid method of determining whether someone is under the influence of a category or categories of drugs.

## Testing a driver for drug use

Once a police officer makes a DWI arrest, she should request a DRE conduct an evaluation for drug influence when the suspect's signs of impairment are not consistent with her BAC. The arrestee may appear more impaired than his alcohol level alone accounts for. Some agencies, including the Los Angeles Police Department, mandate a drug influence evaluation by a DRE whenever an individual arrested for DWI produces a BAC below the legal limit (0.08 percent). An evaluation is also mandated whenever the arrestee's degree and/or type of impairment is not consistent with his BAC.

The drug recognition expert must make three determinations:

1. The arrestee's impairment is not consistent with the BAC;
2. The individual is under the influence of drugs and not suffering from a medical condition that requires immediate attention; and
3. The individual is under the influence of a specific category or categories of drugs.

Ruling out medical conditions is critical. Many conditions, such as stroke, epilepsy, multiple sclerosis, uncontrolled diabetes, and others produce effects that mimic drug impairment. The DRE must quickly and accurately assess the arrestee for the presence of these conditions; only after ruling them out does a DRE proceed with an evaluation to determine what category of drug the person has taken.

DREs utilize a systematic, standardized, 12-step process, which logically proceeds from a BAC, through an assessment of signs of impairment, to toxicological analysis for the presence of

drugs. This procedure is rooted in standard medical procedures used to diagnose illness or injury.

## The 12-step process

**1 Breath or blood alcohol concentration.** This step usually precedes the DRE's involvement. If the arresting officer determines that the suspect's BAC is consistent with the type and degree of impairment, no DRE is called. On the other hand, if the BAC is not consistent with the degree and type of impairment, a DRE should be requested.

**2 Interview of the arresting officer.** The DRE inquires of the arresting officer the suspect's condition at arrest, whether he had been involved in a traffic collision, whether he made any statements, whether he had drugs in his possession, and any other relevant matters. This step is analogous to the interview an emergency-room physician conducts when an unconscious individual is brought by ambulance to the hospital.

**3 Preliminary examination.** Commonly referred to as a fork in the road, this step determines if there is sufficient reason to suspect drug influence. As serious medical conditions may mimic drug influence, an extremely important part of this step is determining that a drug, not a medical condition, is inducing the observed impairment. To make this critical determination, the DRE will make general observations of the arrestee's condition, inquire of him as to any health problems, and conduct a pupil size and eye-tracking examination. Pupils of different size and or differences in the eyes' tracking movements often provide evidence of serious, life-threatening medical conditions. In addition, the DRE takes the first of three pulses during this step.

Based on what the drug recognition expert detects in this phase, a number of outcomes are possible. The DRE may find no signs of drug influence and may return him to the arresting officer for routine processing. The DRE may see evidence of a medical condition and may obtain a medical assessment. Or the DRE may proceed with a full DRE evaluation. Choosing the last option, it should be noted, still allows the DRE to cease the evaluation at any time if she finds evidence of a serious medical condition and obtain a medical assessment.

**4 Eye examinations.** The DRE conducts three separate eye-movement examinations: horizontal gaze nystagmus, vertical gaze nystagmus, and an eye convergence examination.

Standardized Field Sobriety Testing (SFST) research finds that horizontal gaze nystagmus (HGN) was the best predictor of an individual's alcohol level. Although there are many different types of nystagmus—some of which are caused by pathology—the HGN that DREs examine for is rarely confused with nystagmus caused by physiological conditions.

Nystagmus is an involuntary but visible jerking of the eyeballs. Horizontal gaze nystagmus is the visible jerking of the eyeballs as the eyes move side-to-side while gazing at an object. Central nervous system depressants, inhalants, and PCP (along with alcohol) induce this visible jerking. To conduct the test, the DRE holds a pencil or pen in front of the individual while the individual moves his eyes to follow the object.

During the vertical gaze nystagmus (VGN) test, the suspect is directed to follow an object moved up and down. Any drug that induces HGN may also cause VGN, given a sufficient dose. No drugs, however, cause VGN without first causing HGN. Certain medical conditions, such as brain stem damage, may cause VGN but not HGN.

During convergence examination, the DRE, again using a pencil or pen, directs the suspect to look at the object while the DRE places the object at the bridge of the suspect's nose. The suspect will attempt to cross his eyes while looking at the pencil. Depressants, inhalants, PCP, and cannabis impair an individual's ability to converge (cross) his eyes.

**5 Divided attention tests.** To a degree, this step repeats some tests given to the suspect at his arrest. The setting now, however, is a police station—a controlled environment—rather than at roadside.

The DRE administers the following tests in the following order: Romberg balance test; walk-and-turn test; one-leg stand; and finger-to-nose test.[3] These are all divided-attention tests, requiring the individual to balance and coordinate body movements, remember instruc-

*Continued on page 12*

*Continued from page 11*

tions, and perform more than one task at once. Frequently, a person's performance during DRE evaluation will be markedly different from his performance in the field because the drug(s) may have worn off during the interim;

**6 Vital signs examinations.** The DRE takes three vital signs: blood pressure with a sphygmomanometer and stethoscope, body temperature with an oral thermometer, and pulse. (This is the second of three pulses.) If the arrestee's vital signs are dangerously high or low, the DRE will immediately obtain a medical assessment. DREs are trained to accurately take these vital signs and to compare the results with medically-accepted normal ranges.[4] Certain drugs elevate specific vital signs, others depress the vitals, and still others may have no effect.

**7 Darkroom examinations of pupil size.** The eyes are a window to the inner body. Pupils enlarge in response to darkness, fear, and excitement, as well as in response to certain drugs. (Normal pupil size range in all light levels is 3.0–6.5 mm.) They also constrict in bright light as well as in response to certain drugs. The DRE uses a pupillometer to estimate the arrestee's pupil sizes in four light levels: room light, near total darkness, indirect artificial light, and direct light. The DRE also examines the individual's nasal and oral cavities for evidence of drug use.

**8 Muscle tone.** Certain drugs cause the skeletal muscles to become rigid, whereas other types of drugs (such as alcohol) cause muscle flaccidity. The arrestee's muscle tone is evaluated throughout the examination through observations of his movements. During this step, however, the DRE gently moves the arrestee's arms to determine muscle tone.

**9 Examination of injection sites.** Many drug users inject drugs intravenously. Rarely, however, do medical procedures involve injecting drugs into an artery or vein. For example, insulin-dependent diabetics do not inject into blood vessels.

During this step, the DRE examines the individual for injection sites. Although drug users may inject anywhere on the body, the more frequently used areas are the arms, neck, and ankles. The presence of injection marks, even recent ones, is an indicator of use rather than drug influence; however, their presence may provide evidence of the frequency of use and the type of drug abused. A third pulse is also taken.

**10 Statements and interrogation.** The DRE now conducts a structured interrogation of the suspect. If he has not been given his *Miranda* warnings already, the DRE will do so at this point. The drug recognition expert will question the suspect about his use of specific drugs. Frequently, the arrestee will make self-serving denials of drug use but may admit or even confess drug use and impairment by drugs while driving. Arrestees often state that they were using a prescribed drug. The DRE may ask the arrestee about any warnings given by the prescribing physician or pharmacist regarding the operation of a motor vehicle while taking the drug.

**11 Opinion.** At this point, the DRE forms an opinion as to drug influence and the category or categories of drug(s) causing the impairment. This opinion is not a guess or hunch; rather, it is an informed opinion based on the evaluation's totality. Although opinions by nature are subjective, the DRE opinion is based, in part, on objective criteria.

DRE training teaches that when in doubt, the DRE shall always find "in favor of freedom" of the suspect. As written, a typical DRE opinion is: "In my opinion, the arrestee is under the influence of a central nervous system stimulant and cannot safely operate a vehicle."

**12 Toxicology: Obtaining a specimen and subsequent analysis.** Toxicological corroboration of drug use is usually necessary for successful prosecution. During this step, the DRE obtains a urine and/or blood specimen from the suspect; it is analyzed for the presence of certain drugs by a toxicological laboratory. Under the implied consent laws in DRE states, an individual is required to provide blood or urine to the police when requested. This blood or urine test is required even though the suspect may have already provided a breath test.

Typically, lab reports take a week. The decision to prosecute the individual will usually be delayed until results are ready.

**The eyes are a window to the soul—as well as the inner body. Pupils enlarge or constrict in response to certain conditions and drugs.**

It is critical to understand the laboratory's role in a nonalcohol drug case. It is not to determine if the individual was impaired but rather to determine use of a specific substance. For example: The DRE has determined the arrestee is under the influence of a central nervous system stimulant. The laboratory analyzes for specific drugs, such as cocaine, amphetamines, and others. The lab report, assuming it corroborates the DRE's opinion, will identify a specific stimulant the person used. In court, the consistency between the DRE's opinion and the laboratory's analysis is critical in demonstrating the DRE's accuracy.

*Editor's note: This is the first of two stories on prosecuting the drugged driver. See the next* Prosecutor *to learn about common challenges and defenses at trial and how to combat them.*

## Endnotes

1 National Highway Traffic Safety Administration (NHTSA), (1976), Connecticut study of drivers leaving bars between 9:00 p.m. and 2:00 a.m.; Gallup (1991), survey of 9,028 drivers; Alcohol Safety Action Project (1991), drivers stopped late night or early morning

2 Substance Abuse and Mental Health Services Administration's National Household Survey on Drug Abuse (1996)

3 Although the Romberg balance and finger-to-nose tests are not part of the Standardized Field Sobriety Test battery, experience has shown these tests provide valuable clues of drug impairment.

4 Normal ranges are as follows: pulse: 60–90 beats per minute; blood pressure: 120–140 mm Hg systolic over 70–90 diastolic; temperature: 98.6 degrees Fahrenheit, plus or minus one degree.

*Continued from page 5*

# Newsworthy

## David Escamilla sworn in as Travis County Attorney

David Escamilla, a longtime Travis County resident, was sworn in as Travis County Attorney March 11. Mr. Escamilla was unanimously chosen to serve the remainder of Ken Oden's term of county attorney by the county commissioners court. (Mr. Oden retired to enter private practice after 17 years as CA.) Escamilla started working in the county attorney's office in 1985 and had served as Oden's first assistant since 1989, supervising the office's day-to-day operations. Escamilla says his priorities will be "to operate the office of the Travis County Attorney with efficiency, accountability, and transparency, while continuing to concentrate on lessening the incidence of DWI, family violence, and crimes against the environment."

## Farewell, Frances!

*Frances Muzquiz, whose friendly voice you heard when you call TDCAA's offices (pictured above with Lara Brumen and Diane Beckham), has left us. We wish her well with her future endeavor, working as a massage therapist.*

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## FOCUS ON ... EOCA

*By Doug Arnold*
Assistant District Attorney in Georgetown

# Charging issues related to the offense of engaging in organized criminal activity

Some of the challenges in charging and prosecuting EOCA and how to overcome them

The offense of engaging in organized criminal activity (hereinafter referred to as EOCA) is a wonderful tool for prosecutors to use. But, as is often the case, the usefulness of the tool is determined primarily by the skill and knowledge of the craftsman. Charging and prosecuting the crime of EOCA presents many challenges. The purpose of this article is to identify some of those challenges and to help avoid the potential pitfalls that lie within the realm of EOCA prosecution, namely the charging process.

## Why charge EOCA?

As complicated and convoluted as the offense of EOCA can be, why should the prosecutor bother with it? Why not just charge the defendant with what he did and avoid the issues that inevitably arise from an EOCA charge before, during, and after trial?

**Higher punishment range.** First of all, if a defendant is charged with EOCA by committing the underlying offense, the range of punishment available is usually one category higher than that of the underlying offense. For example, if the underlying offense is robbery (a second degree felony), then the charge of EOCA would bring with it a first-degree felony punishment range. Similarly, if the underlying offense is burglary of a motor vehicle (a class A misdemeanor), the charge of EOCA would be a state jail felony. The exception to this general rule involves underlying offenses that are first-degree felonies. In those cases,he punishment range stays the same.

If the charge is EOCA by conspiring to commit an offense, then the punishment range is the same as for commission of the underlying offense. For example, if a defendant is charged with EOCA by conspiring to manufacture methamphetamine in the amount of four grams or more (commission of that offense is a first-degree felony), the punishment range for that offense is that of a first-degree felony. By contrast, the usual punishment range for an attempt or conspiracy to commit a criminal offense is one category lower than for outright commission of the offense.

**More evidence admitted at guilt.** When the charge is EOCA, for reasons that will be discussed later, the State must prove more than the defendant's mere commission of the underlying offense. The State must prove the defendant's membership in a criminal street gang or the existence of a criminal combination (a group of three or more persons) and that combination's continuity of criminal activity. One implication of these additional requirements of proof is that the State is allowed—if not required—to bring in at the guilt phase of trial evidence of what would otherwise be extraneous criminal activity.

For example, if a defendant is charged with EOCA by delivering cocaine as a member of a criminal combination, the State is allowed to offer at the guilt phase evidence of all the drug deliveries committed by the defendant and others in furtherance of the combination. Likewise, if a defendant is charged with EOCA for an offense committed as a member of a criminal

street gang, the trier of fact is entitled to hear, during the guilt phase of trial, about the organizational structure of the gang and all of its criminal activities and enterprises. In this sense, the State is permitted to malign the defendant at guilt with evidence of his other crimes and bad acts, and those of his associates, when the charge is EOCA.

## When to charge EOCA

First of all, the EOCA charge is only available if the crime the defendant has committed (or conspired to commit) is one of the types of crimes specifically enumerated in §71.02 of the Texas Penal Code. The list of crimes eligible for EOCA prosecution includes:

- murder;
- arson;
- robbery;
- aggravated robbery;
- burglary;
- theft;
- kidnapping;
- aggravated kidnapping;
- sexual assault;
- aggravated sexual assault;
- forgery;
- deadly conduct;
- assault;
- aggravated assault;
- burglary of a motor vehicle;
- unauthorized use of a motor vehicle;
- gambling offense punishable as a class A misdemeanor;
- promoting or compelling prostitution;
- manufacture, transportation, or sale of prohibited weapons;
- manufacture or delivery of a controlled substance;
- possession of a controlled substance or dangerous drug by fraud;
- promotion or possession with intent to promote obscene material or device;
- possession or promotion of child pornography;
- credit card abuse;
- fraudulent possession or use of identifying information;
- money laundering;
- bribery;
- witness tampering;
- obstruction or retaliation; and
- impersonating a public servant.

The temptation is often to use the EOCA charge whenever you have three or more defendants committing one of those specific crimes. That approach, however, is overly simplistic and can lead to trouble down the line, either at trial or on appeal. Before charging a defendant with EOCA, one must determine whether the defendant committed the underlying offense as part of a "combination" within the meaning of §71.01. A combination, according to the statute, is "three or more persons who collaborate in carrying on criminal activities." But what does that mean?

According to Texas courts, it certainly means something more than a single crime committed by three or more people. The seminal case on this issue is *Nguyen v. State*.[1] In *Nguyen*, the defendant and two cohorts were involved in a verbal altercation with another group of males, including the victim, at a restaurant. The defendant's group left the restaurant, armed themselves, and returned to the scene where the defendant then shot and killed the victim. One of the defendant's cohorts drove the vehicle out of which the defendant fired the fatal shot and the other handed the defendant the weapon immediately before he fired it.

The Court of Criminal Appeals found these facts insufficient to support a finding that Nguyen and his cohorts had acted as a combination. The court held that the phrase "collaborate in carrying on criminal activities" implies a continuity of criminal activity, not a series of acts related to a single crime or criminal episode.

"Continuity," however, does not necessarily mean the commission or conspiracy to commit multiple crimes.[2] The continuity inherent within the term combination may be shown by the commission of otherwise noncriminal acts, if those acts from their context, are related to the criminal aims of the group. For example, proof of otherwise legitimate activities related to the transport and storage of oil would be sufficient to show the requisite continuity aspect of a combination, if the activities relate to the acquisition and sale of large quantities of stolen oil.[3]

In order to prosecute an individual for the offense of EOCA, it is not necessary to show that the individual was a long-standing member of the combination. All that is required is proof of the existence of a combination, that the defendant was aware of its existence, and

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that the defendant committed the crime in furtherance of the combination.[4] In a different *Nguyen* case (not to be confused with shooting *Nguyen* case discussed earlier), the defendant was the ultimate purchaser of stolen computer chips that were brokered through members of a criminal combination who had purchased the chips from an undercover officer. There was no evidence that the defendant purchased stolen chips through the combination on more than one occasion. Nonetheless, the court found sufficient evidence for the defendant's EOCA conviction because the defendant was aware of the ongoing nature of the combination when he purchased the stolen chips.

The ongoing nature of the criminal activities committed or planned by the members of the combination must be committed or planned to be committed by the members as a group. It is not sufficient to establish a combination if three or more persons participate in a crime and each of them commit or plan on committing a similar crime or activity individually in the future. For instance, if three or more persons collaborate in buying cases of stolen cigarettes in a single shipment, and the proof establishes that only one of them intends to participate in similar purchases of stolen goods in the future, there is insufficient evidence to charge the participants in the original purchase of stolen cigarettes with engaging in organized criminal activity.[5]

Certain types of crimes are more conducive to an EOCA charge than others. Theft offenses, by their very nature, often lead to combinations established for the purpose of acquiring and selling stolen property. For instance, in *Mast v. State*,[6] the defendant lived in a house where stolen tools were stored. An undercover officer came to the house on two occasions and negotiated purchases of stolen tools. On the first such occasion, the defendant, along with several others, participated in the negotiations. The court of appeals affirmed the defendant's conviction for EOCA, finding the existence of a combination established to acquire, store, and sell the stolen tools.

**The temptation is to charge EOCA whenever three or more defendants commit an EOCA-eligible crime. That approach, however, is overly simplistic.**

Similarly, the crime of manufacturing methamphetamine is often conducive to the establishment of a criminal combination.[7] The efforts inherent in that endeavor, namely acquiring the components of the laboratory, setting them up, acquiring the necessary chemicals, and producing the finished product, are such that frequently three or more persons take part. It is also unusual for a methamphetamine lab to be established for the sole purpose of manufacturing a single batch of methamphetamine.

Texas courts also approved combinations of street-level drug dealers selling their drugs at street "markets,"[8] a night club where the management and employees cooperated to sell sex dates with minors,[9] and a political organization whose design was to thwart federal authority by means of violence.[10]

However, violent crimes and crimes against persons are less likely to produce a criminal combination formed for the purpose of the collaborating in carrying on criminal activities. More often, a group of three or more people who commit a crime against a person only come together as a group for the purpose of that single crime or criminal episode. For example, in *Ross v. State*,[11] a group of young males, including the defendant, became involved in a road rage incident. Angered by the fact that the victim cut them off on the highway, they attempted to run her off the road, threw beer cans at her, and eventually beat her viciously once she was forced to a stop. Even though they committed a series of individual crimes, the Austin court of appeals found the facts to be insufficient to establish the presence of a combination, because the sole aim of the defendant's group was a single criminal episode directed at one victim.

Likewise, in *Adams v. State*,[12] a group of men, including the defendant, decided to commit a robbery. They bought a gun and then drove to a restau-

rant where they waited for a potential victim to appear. At some point, they left the restaurant and went to a gas station, where they eventually encountered the victim and shot him. There was no evidence that the defendant's group had committed a robbery or any other type of crime in the past, or that they intended to do so in the future. The court of appeals held those facts insufficient to establish a combination, since the group was not established for the purpose of carrying on criminal activities but rather came together to commit a single robbery and thereafter disbanded after fulfilling its purpose.

As you can see, charging EOCA can sometimes be tricky. Theft offenses most likely lead to combinations, while violent offenses and offenses against persons committed by a group are often one-time crimes.

## EOCA by commission or by conspiring to commit

It is necessary to distinguish the distinct crimes of EOCA by commission and EOCA by conspiring to commit. In the former type of case, what must be proved is the commission of the underlying offense by the defendant with the intent to establish, maintain, or participate in a combination or its profits. The defendant may be guilty of the underlying offense as a principal or as a party.[13]

Things get a bit trickier with a case of EOCA by conspiring to commit one of the offenses enumerated in §71.02. In a "conspiring to commit" case, one must prove the existence of a combination; an agreement between the defendant and one or more members of the combination to commit an offense enumerated in §71.02 with the intent to establish, maintain, or participate in the combination or its profits; and the commission of an overt act by the defendant and one or more of the other members of the combination. The agreement does not have to be established by direct evidence; it may be inferred from the conduct of the defendant and others.[14] The overt act need not be a criminal act in and of itself.[15]

## EOCA as a member of a criminal street gang

Another scenario in which a defendant may be charged with and convicted of EOCA is when the defendant commits an offense enumerated in §71.02, the defendant is a member of a criminal street gang, and the defendant commits the offense as a member of the gang.[16] "Criminal street gang" means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.[17]

How can one determine whether a defendant is a member of a gang? And if he is, whether the defendant's gang fits the statutory definition of criminal street gang? Local law enforcement agencies are authorized under article 61.02 of the Texas Code of Criminal Procedure to collect information related to criminal street gangs and their membership. Talk with local police to find out if defendants have gang connections. In addition, the AG's office maintains information on specific gangs but not individual gang members, on its Gangs Resource System web page.[18] TDCAA also offers *Texas Gangs*, a legal handbook that you can order at www.tdcaa .com or by calling 512/474-2436.

## How to charge EOCA

**General concerns**

One should always remember to charge separate counts for each underlying offense committed within the jurisdiction. If a defendant, as a member of a combination or criminal street gang, commits four robberies, then the indictment should contain four separate counts of EOCA.

If a deadly weapon was used during the commission of the offense, a separate deadly weapon allegation should be included in the indictment, even if the underlying offense is one listed in article 42.12, §3g of the Texas Code of Criminal Procedure. The reason for this is that the crime of EOCA is not one of those listed in §3g. In order to prevent judge-ordered probation and ensure that the defendant serves at least half of his prison sentence, there must be an affirmative finding as to the use/exhibition of a deadly weapon during the commission of the offense.

In EOCA cases in which the defendant conspired to commit one of the enumerated offenses, there is an additional requirement that an overt act by

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the defendant be alleged and proved.[19] The overt act(s) alleged to have been committed must be alleged in the indictment.[20]

## Other specific issues

Numerous other issues may arise during the charging process of an EOCA case. Here are some of the issues and questions which frequently come up in this context:

**Must the other members of the combination be named?**

No, if the charge is EOCA by committing the underlying offense.[21] Yes, if the charge is EOCA by conspiring to commit the underlying offense.[22]

**Must the criminal street gang be identified?**

Probably not. There do not appear to be any Texas cases that squarely address this issue. Generally, an indictment which tracks the statutory language setting forth the elements of the offense is sufficient and evidentiary facts need not be alleged.[23] However, it may be prudent to err on the side of caution and identify the gang in the charging instrument. Identifying the gang in the indictment would help defeat any challenges by the defendant to the indictment based on insufficient notice and/or inability to prepare his defense.[24]

**Must the nature of the continuing criminal activity by the combination be alleged?**

No. An indictment for the offense of EOCA by commission need not allege any crime or bad act aside from the underlying offense as ongoing criminal activity.[25]

**Must the elements of the underlying offense be alleged specifically?**

No.[26] However, it may be the better practice to do so for notice reasons. Another reason to do so is that it is always a good idea at trial to request a lesser-included jury instruction on the underlying offense.[27] Alleging the elements of the underlying offense in the indictment increases your awareness of and focus on those elements prior to and during trial.

## Defending the charging instrument

The inherent complexity of the EOCA charge and the requisite detail of an EOCA indictment give rise to a high level of frequency of pretrial motions to quash cases. A common form of the motion to quash in an EOCA case is that of a challenge to the evidence supporting the charge. Such a challenge is improper, however. An indictment that is valid on its face and returned by a properly constituted grand jury is sufficient to mandate trial of the charge on the merits.[28] If an indictment for EOCA contains all of the necessary elements of the crime of EOCA and alleges them with sufficient particularity to put the defendant on notice of the offense with which he has been charged, then the defendant may not seek to defeat the accusation by means of a pretrial motion to quash.[29]

## Conclusion

The prospect of charging the crime of EOCA can be intimidating. The current version of the statute is fairly new and the case law is scant. However, the potential upside of these cases is high. Also, if charged properly and planned effectively, they can be a lot of fun.

## Endnotes

1 1 S.W.3d 694 (Tex. Crim. App. 1999)

2 *Nguyen* at 697

3 See *Barber v. State*, 764 S.W.2d 232 (Tex. Crim. App. 1988)

4 *Nguyen v. State*, 21 S.W.3d 609, 614 (Tex. App.—Houston [1st Dist.] 2000, pet. ref.)

5 See *Smith v. State*, 36 S.W.2d 908 (Tex. App.—Houston [1st Dist.] 2001)

6 8 S.W.3d 366 (Tex. App.—El Paso 1999, no pet.)

7 See *Shores v. State*, 54 S.W.3d 456 (Tex. App.—Texarkana 2001, pet. ref.)

8 *McGee v. State*, 909 S.W.2d 516 (Tex. App.—Tyler 1995, pet. ref.)

9 *McIntosh v. State*, S.W.3d 196 (Tex. Crim. App. 2001)

10 *Otto & McLaren v. State*, No. 1801-99 (Tex. Crim. App. 1/15/03)

11 9 S.W.3d 878 (Tex. App.—Austin 2000, no pet.)

12 40 S.W.3d 142 (Tex. App.—Houston [14th] 2000, pet. ref.)

13 *Otto & McLaren v. State*, No. 1801-99 (Tex. Crim. App. 1/15/03); *McIntosh v. State*, 52 S.W.3d 196 (Tex. Crim. App. 2001)

14 *Mayfield v. State*, 906 S.W.2d 46 (Tex. App.—Tyler 1995, pet. ref.)

**Engaging in Organized Criminal Activity** | **Tex. Pen. Code sec. 71.02** | **F1**

Indictment in the **26th** Judicial District Court of Williamson County, Texas

NO. _____

SID: TX-

**STATE OF TEXAS**
**V.**
**TONY SOPRANO**

**IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:**

The Grand Jury for the **January 2003** term of the **26th** Judicial District Court of Williamson County, Texas, having been duly selected, empaneled, sworn, charged and organized, presents that before the presentment of this indictment,

on or about **April 1, 2003**, in Williamson County, Texas, **Tony Soprano**, hereinafter "defendant", with intent to establish, maintain, or participate in a combination or in the profits of a combination, committed the offense of **aggravated assault**, namely, intentionally, knowingly, or recklessly caused bodily injury to **Johnny Sack**, by **striking Johnny Sack with a bat or club**, and used or exhibited a deadly weapon, namely, **a bat or club**, during the commission of the assault,

**Deadly Weapon Notice**

And the State further gives notice that the defendant used or exhibited a deadly weapon, namely, **a bat or club**, during the commission of a felony offense or during immediate flight therefrom, or was a party to the offense and knew that a deadly weapon would be used or exhibited,

**AGAINST THE PEACE AND DIGNITY OF THE STATE.**

_____
Foreman of the Grand Jury

Witnesses: Assistant District Attorney

**Engaging in Organized Criminal Activity** | **Tex. Pen. Code sec. 71.02** | **F1**

Indictment in the **26th** Judicial District Court of Williamson County, Texas

NO. _____

SID: TX-

**STATE OF TEXAS**
**V.**
**BRUTUS**

**IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:**

The Grand Jury for the **January 2003** term of the **26th** Judicial District Court of Williamson County, Texas, having been duly selected, empaneled, sworn, charged and organized, presents that before the presentment of this indictment,

on or about **March 15, 44 B.C.**, in Williamson County, Texas, **Brutus**, hereinafter "defendant", with intent to establish, maintain, or participate in a combination or the profits of a combination, which combination included the defendant and at least two of the following individuals: **Cassius, Portia, Casca, Decius, Cimber, or an individual or individuals unknown to the grand jury**, conspired to commit the offense of **murder**, and the defendant and at least one other member of the combination performed at least one overt act in pursuance of said agreement, namely: **acquired daggers, distributed the daggers to the other members of the combination, stabbed Julius Caesar with a dagger, or any combination of these acts,**

**Deadly Weapon Notice**

And the State further gives notice that the defendant used or exhibited a deadly weapon, namely, **a dagger**, during the commission of a felony offense or during immediate flight therefrom, or was a party to the offense and knew that a deadly weapon would be used or exhibited,

**AGAINST THE PEACE AND DIGNITY OF THE STATE.**

_____
Foreman of the Grand Jury

Witnesses: Assistant District Attorney

*Two examples of indictments charging EOCA*

15 *Garcia v. State*, 46 S.W.3d 323, 327 (Tex. App.—Austin 2001, no pet.)

16 See *Roy v. State*, 997 S.W.2d 863 (Tex. App.—Fort Worth 1999, pet. ref.)

17 TPC §71.01(d)

18 For further information concerning the AG gang resource site, contact Christian Hubner at the Office of the Attorney General of the State of Texas, Juvenile Crime Intervention Division.

19 *Chambless v. State*, 748 S.W.2d 251, 253 (Tex. App.—Tyler 1988, no pet.)

20 Id.

21 *State v. Duke*, 865 S.W.2d 466, 468 (Tex. Crim. App. 1993)

22 *Id.*

23 *Bynum v. State,* 767 S.W.2d 769 (Tex. Crim. App. 1989)

24 See *State v. Draper*, 940 S.W.2d 824 (Tex. App.—Austin 1997, no pet.)

25 *State v. Duke*, 865 S.W.2d at 468.

26 *Smith v. State*, 781 S.W.2d 418, 420 (Tex. App.—Houston [1st Dist.] 1989, no pet.); *Lucario v. State*, 677 S.W.2d 693, 696 (Tex. App—Houston [1st Dist.], 1984, no pet.)

27 See *Collier v. State*, 999 S.W.2d 779, 782 (Tex. Crim. App. 1999)

28 *State v. Rosenbaum*, 910 S.W.2d 934, 947 (Tex. Crim. App. 1994) (op. on reh'g)

29 *State v. Mauldin*, 63 S.W.3d 485, 490 (Tex. App.—Tyler 2001, pet. ref.)

# CIVIL LAW UPDATE

*By Barbara Baruch*
Assistant County Attorney in Houston

# What kind of employee are you?

Long a part of U.S. law, the FLSA determines how many hours you work per week and the minimum wage. Does the FLSA apply to you?

The Fair Labor Standards Act of 1938 (as amended) (FLSA) is found at 29 U.S.C. §201 et seq. This act requires covered employers (including certain supervisors[1]) to pay covered employees a minimum wage[2] and overtime pay for hours worked in excess of 40 hours each week. In 1974, Congress amended the original act to extend FLSA coverage to virtually all state and local government employees.[3] This amendment was quickly held unconstitutional in *National League of Cities v. Usery*,[4] when the Supreme Court held, by a sharply divided vote, that the Commerce Clause did not empower Congress to enforce the minimum-wage and overtime provisions of the act against the states "in areas of traditional governmental functions."

Ultimately the Supreme Court held that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts. Thus today, the states are not subject to claims under the FLSA.

## Who is covered?

Although not all workers are covered by the FLSA, coverage of employees is very broad. With limited exception the term "employee" means any individual employed by an employer.[5] Volunteers are excluded from that definition if they are not also paid employees doing the same type of services for the same public agency, or if they volunteer for a different government agency.[6]

Provided they have no civil service protection, the following persons are not covered under the act: elected officials, their personal staff, their appointees on a policymaking level, their legal advisors, or an employee in the legislative bench of that agency.[7] The act also does not apply to "non-covered" employees.

FLSA does apply to exempt employees who are exempt from overtime requirements, which are explained in the next paragraph, but covered under other provisions of the act;[8] exempt employees are those who meet the professional, administrative, or executive exemptions. (See page 23 for explanation of these three exemptions.)

Regarding overtime requirements: The FLSA requires employers to pay nonexempt employees time-and-a-half for every hour over 40 they work in one week. Thus, a regular 8-to-5 employee who works 8-to-6 everyday for a week, is paid for 40 hours at her regular rate and five hours at her regular rate times 1.5. But the same 8-to-5 employee who takes eight hours of vacation on Monday, then works 10-hour days Tuesday through Friday, has not earned any overtime; she has simply worked her regular 40-hour week.

## Exempt or nonexempt?

See the checklists on page 23 to determine whether you are or are not exempt from FLSA guidelines.

If employees are covered by a policy that allows deductions in pay for disciplinary reasons or other deductions in pay as a practical matter, they cannot be considered exempt.[9] This prohibition applies "if there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions."[10] An employer may, however, make deductions from a salaried employee's wages for absences of a full day or more for personal reasons (including sickness if the employee has a sick pay plan in effect for which the employee qualifies) and for major safety violations such as prevention of serious danger to the

plant or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.[11]

The Supreme Court clarified the effect of an employer's policy manual providing for deductions in an exempt employee's salary in *Auer*.[12] Where an employee is covered by a policy that permits disciplinary or other deductions in pay "as a practical matter," then the employee is not exempt. The "as a practical matter" standard means either the employer has an actual practice of making such deductions or policy creates significant likelihood that deductions will occur. "Significant likelihood" requires a clear and particularized policy which "effectively communicates" that deductions will be made in specified circumstances. Thus, even if policy on its face applies to both exempt and nonexempt employees, it does not necessarily "effectively communicate" that the disciplinary deductions will apply to exempt employees.

29 C.F.R. §541.103 lists five factors to weigh in determining an employee's primary duty: (1) time spent in the performance of managerial duties; (2) relative importance of managerial and nonmanagerial duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and the wages paid employees doing similar nonexempt work.

## Salary requirements

Executive, professional, and administrative employees ("white collar employees") other than doctors, lawyers, teachers,[13] and those exempt employees in certain computer-related occupations[14] must be paid a salary. 29 C.F.R. §118 refers to "salary" as the receipt of a "predetermined amount" that is not subject to reduction due to the quality or quantity of work.[15]

In *Cowart v. Ingalls Shipbuilding, Inc.*,[16] the Fifth Circuit held that an exempt employee is considered to be on a salary basis even if he is required to make up personal time off, holding that although the salary basis regulation prohibits deductions from an employee's salary for personal absences of less than a day, the regulation does not prohibit an employer from requiring an employee to make up the time he misses. In that case, it is undisputed that there was never a deduction from the plaintiff employees' weekly salary for any reason.

For exempt employees, the employer cannot make deductions when there is no work available.[17] This provision became a hot topic in Houston during the flood in June 2001. The public and the media did not like the fact that Harris County exempt employees were paid and nonexempt employees were not paid because there was no work available. If the county had paid nonexempt employees even though there was no work available, the county would have opened itself up to potential liabil-

*Continued on page 22*

# Changes to FLSA in store?

For the first time in half a century, federal regulations were proposed in late February that would overhaul the Fair Labor Standards Act and drastically change which workers qualify for overtime wages.

Nearly 22 million Americans could be affected by new definitions of blue- and white-collar workers. (Almost 110 million workers are covered by the law.) The last revision to job descriptions was 54 years ago; many jobs, such as key punch operators, straw bosses, leg men, and gang leaders, no longer exist. Salary levels in the wage and hour rules haven't been updated for 28 years.

The changes could cost businesses $870 million to $1.57 billion. Lower-income workers and highly paid, professional employees would feel the most economic impact.

Under the proposal, any worker earning less than $22,100 a year would automatically be entitled to overtime pay, regardless of whether they are paid hourly or by salary. Employers would be required to pay overtime to as many as 1.3 million lower-income workers who put in more than 40 hours a week, such as assistant managers of stores, restaurants, and bars. (However, companies could opt to boost salaries above the cap to avoid paying overtime.) Current law exempts workers from overtime pay if they earn more than $155 a week or $8,060 a year but meet other job criteria (see the checklists on page 23 for more details).

On the other hand, about 640,000 white-collar professionals now required to receive overtime pay, including some engineers and pharmacists, would lose it. Business groups have long complained that the FLSA requires overtime pay for already well-compensated and highly skilled professionals.

Generally, workers would be exempt in the new rules if they manage more than two employees and have the authority to hire and fire; if they have an advanced degree or similar training and work in a specialized field; or work in a company's operations, finance, or auditing areas.

# 'White-collar employee' checklists

There are two methods of qualifying an employee as exempt white collar (executive, administrative, or professional) employees. Under the long test, employees earning less than $250 per week must satisfy certain detailed criteria.[1] If the employee is paid more than $250 per week, the employee must satisfy only the short test criteria to qualify for the executive, administrative, or professional exemption.[2] Besides requiring that the employee be salaried, each of the short tests for white collar exemptions requires the employer to determine the employee's primary duty. Primary duty is generally defined in 29 CFR 541.103 and 541.206.[3]

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*Continued from page 21*

ity by arguably manifesting some intent to pay these employees impermissibly on a salary basis.

## Endnotes

1 29 USC 203(d) defines employer. It states that: "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

2 The federal minimum wage is set out in 29 USC §206, which provides (with certain exceptions) that the minimum wage became not less than $5.15 an hour beginning September 1, 1997[.]

3 §§6(a)(1) and (6), 88 Stat. 58, 60, 29 U. S. C. §§203(d) and (x).

4 426 U.S. 833, 852 (1976).

5 29 USC 203 (e)(1).

6 29 203 (e)(4).

7 29 USC 203 e (1) and (3).

8 29 U.S.C. 211(c)(see, for example, record keeping requirements set out in 29 CFR Part 516).

9 *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 911(1997).

10 *Auer*, 117 S. Ct. at 911.

11 29 C.F.R. §541.118(a)(2)(3)(5).

12 519 U.S. at 461-462, 117 S.Ct. at 911-912 (1997).

13 See 29 CFR §541.314 Exception for physicians, lawyers, and teachers.

14 29 U.S.C. 213(a)(17) (enacted August 20, 1996). See 29 C.F.R. §§541.3(a)(4) and 541.303 for the primary duties of computer related occupations exemption.

15 §541.118 Salary basis.

16 213 F.3d 261 (5th Cir. 2000).

17 29 C.F.R. §541.118(a)(6).

## Administrative Long Test

✓salary of $155 per week ($8,060 per year); and
✓primary duty consists of:
✗ performance of office or nonmanual work directly related to management policies or general business operations; [next point omitted]
✗ customarily and regularly exercises discretion and independent judgment;
✗ regularly and directly assists a proprietor or an employee in a bona fide executive or administrative job; or
✗ performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or
✗ performs special assignments and tasks under only general supervision; and
✓does not spend more than 20 percent of his time on work not described above.

## Administrative Short Test

✓salary of $250 per week ($13,000 per year);
✓primary duty consists of either:
✗ the performance of office or nonmanual work directly related to management policies; or
✗ general business operations of the employer or the employer's customers; and
✓where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment.

## Professional Long Test

✓salary of $170 per week ($8,840 per year) but a computer professional can be paid an hourly wage; and
✓primary duty consists of:
✗ work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education; or
✗ work that is original and creative in character in a recognized field of artistic endeavor and the result of which depends primarily on the invention, imagination, or talent of the employee; or
✗ work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities; and
✗ work requires consistent exercise of discretion and judgment; and
✗ work is predominantly intellectual and varied (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time; and
✓does not devote more than 20 percent of work time to activities not described above

## Professional Short Test

✓salary of $250 per week ($13,000 per year);
✓whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning;
✓which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

## Executive Long Test

✓salary of $155/week ($8,060 per year);
✓primary duty consists of management of the enterprise or a customarily recognized department or subdivision thereof;
✓customarily and regularly directs the work of two or more employees;
✓has authority to hire/fire or whose suggestions and recommendations on hiring/firing are given particular weight;
✓customarily and regularly exercises discretionary power; and
✓devotes no more than 20 percent of work to activities not directly and closely related to executive duties

## Executive Short Test

✓salary of $250 per week ($13,000 per year);
✓primary duty consists of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof; and
✓customarily and regularly directs the work of two or more other employees

# Endnotes

1 See 29 C.F.R. §§541.1, 541.2, and 541.3.

2 See 29 CFR §§541.119, 541.214, and 541.315.

3 29 CFR §541.10

**To read more about the Fair Labor Standards Act, visit www. tdcaa.com.**

# CIVIL LAW UPDATE

*By Thao La*
Assistant Criminal District Attorney
(Civil Section) in Dallas County

# Compliance requirements under HIPAA's Privacy Rule

Must your county comply? What other entities are covered by HIPAA? Here's what you need to know about the Health Insurance Portability and Accountability Act.

HIPAA, Pub. L. No. 104-191, was passed to reform health insurance in the United States.[1] HIPAA is divided into five titles that address unique aspects of the health insurance reform: Title I, Health Care Access, Portability, and Renewability; Title II, Preventing Health Care Fraud and Abuse, Administrative Simplification, and Medical Liability Reform; Title III, Tax-Related Health Provision; Title IV, Application and Enforcement of Group Health Plan Requirements; and Title V, Revenue Offsets. The purpose, as stated in the HIPAA law, is "to improve portability and continuity of health insurance coverage in the group and individual markets; to combat waste, fraud, and abuse in health insurance and health care delivery; to promote the use of medical savings accounts; to improve access to long-term care services and coverage; to simplify the administration of health insurance; and for other purposes."[2]

Title II's Administrative Simplification portion is of most relevance to many entities, including local governmental health care and health insurance entities. The Administrative Simplification provisions require a lot of covered entities' energy, time, and resources to protect the privacy of individually identifiable health information under the Privacy Rule,[3] to meet strict security requirements under the Security Rule,[4] as well as to adopt national standards for conducting electronic health care transactions according to the provisions for Transactions and Code Sets[5] and for Unique Identifiers.[6] The United States Department of Health and Human Services (HHS) is responsible for regulating HIPAA compliance.

The Administrative Simplification requirements have a few applicable deadlines that should be noted.

- April 14, 2003 is the deadline for compliance with the Privacy Rule; that is the topic of this article.
- If you are a small health plan that generates $5 million or less in revenue, then the health plan has an additional 12 months from the regular Privacy due date (until April 14, 2004) to comply. The Office for Civil Rights (OCR), one of HHS' divisions, has the power to enforce compliance with the Privacy Rule.
- April 16, 2003 is the deadline to test whether your system can collect the necessary data to electronically transmit a transaction using the HIPAA-created standards for code.
- October 16, 2003 is the deadline for the system that transmits standardized transactions to be in perfect working order. The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), is charged with the enforcement of compliance with the final Transaction Rule and the final Security Rule.
- April 21, 2005 is the deadline for the covered entity to comply with the Security Rule.

## Why covered entities should comply

Covered entities should comply with the requirements of HIPAA to avoid untold legal and financial costs. A covered entity that fails to comply with the HIPAA Privacy Rule, for instance, opens itself up to OCR's enforcement powers. The civil penalty for an unintentional Privacy Rule violation or noncompliance is $100 per violation, up to $25,000 per person, per year for each requirement or prohibition violated.[7] The criminal penalties for knowingly violating a patient's privacy can be up to $50,000 and one year in prison for obtaining or disclosing protected information, $100,000 and up to five years in prison for obtaining or disclosing protected information under false pretenses, or $250,000 and up to 10 years in prison for obtaining and disclosing protected information with the intent to sell, transfer, or use it for commercial advantage, personal gain, or malicious harm.[8]

While OCR may not, as of this date, have the full resources to enforce every single violation, one should keep in mind other enforcement measures. A first point to take into consideration is the fact that the Federal Bureau of Investigation has increased the number of agents whose sole responsibility is to investigate health care fraud.[9] A second concern is that HIPAA may have already produced a fertile ground for potentially large private plaintiff suits. While there is no independent right to sue a covered entity alleging a HIPAA violation, a plaintiff might claim that the federal statute sets the floor of industry standard and that under Texas common law rights to sue, the covered entity is violating the minimum standard of care. Violation of a Texas statute may allow an individual an independent right to sue.

A third consideration should be from a business practice standpoint. Countless covered entities, including area hospitals and certain public health entities across the United States, have already spent billions of dollars[10] and/or incalculable human resources to get their entities into compliance. They will expect no less from those who do business with them and have access to their confidential information. A fourth concern is the possibility of local or national news media's attention focusing on your organization's violation of an individual privacy right.

Finally, a fifth point to add to the equation is the existence of watchdog groups such as the Health Privacy Project that recently launched the Privacy Complaint Monitoring Initiative to monitor HHS enforcement of the HIPAA Privacy Rule.[11] The prudent course of action for a covered entity is to fully comply with the HIPAA requirements.

## Compliance with the Privacy Rule

The key to HIPAA compliance is to develop and document, document, document your covered organizations' internal privacy policies and procedures as well as other compliance efforts. Compliance strategies and approaches are not standard because agencies are not standard. Thus the challenge throughout the process is to maintain a flexible, scaleable, and reasonable approach, yet at the same time interpret the regulations' loose legal structure stringently enough to minimize your exposure to potential violations. Be sure the policies and procedures you outline are reasonable and that your organization can ensure compliance. To avoid creating liabilities for your organization, be careful of adopting policies and procedures that your staff cannot or will not follow. (Note: By the time this article is printed, the deadline for compliance with the Privacy Rule would have passed. I strongly encourage entities that have not complied to continue their best efforts and document their compliance steps.)

I have compiled a personal list of the compliance requirements under the Privacy Rule as published at 45 C.F.R. Parts 160 and 164 (2002) for discussion purposes. For a more complete and accurate list of requirements, please read

*Continued on page 26*

*Continued from page 25*

the Privacy Rule as well as OCR's guidance comments.[12] Please refer to the Resources section of this article for a discussion on how you can get additional practical and helpful information on HIPAA compliance. You can access the complete version of this paper on TDCAA's website.

**Covered Entity and Hybrid Entity.**[13] Because the privacy rule applies to a "covered entity," the first question the organization must ask is whether the organization or part of the organization is covered under HIPAA. HHS has created a tool that your organization can quickly use to help determine whether your organization is a covered entity that must comply with HIPAA. Access it at **www.cms.hhs.gov/hipaa/hipaa2/support/tools/decisionsupport/default.asp.**

A covered entity is a single legal entity that is one or more of the following three: (a) a health plan that includes an individual and/or group plan that pays for or funds the cost of medical care; (b) a health-care clearinghouse, which is an entity that translates different health transaction codes; or (c) a health care provider that transmits health information in electronic form in connection with one of the specified financial and administrative transactions. A transaction as defined in §160.103 of the Privacy Rule includes one of the following: (i) health care claims information; (ii) health care payment and remittance advice; (iii) coordination of benefits; (iv) health care claim status; (v) enrollment and dis-enrollment in health plan; (vi) eligibility for health plan; (vii) health plan premium payments; (viii) referral certification and authorization; (ix) first report of injury (has not been defined yet by HHS); (x) health claims attachments; and (xi) other transactions that the HHS Secretary may prescribe by regulation. Thus, if a health care provider does not transmit one of the specified transactions electronically, then the provider has not met the definition of a covered entity and does not have to comply with HIPAA.[14]

A covered entity that performs some functions not related to health care may be designated as a hybrid entity. Hybrid entities must designate (by documenting) health care components that have to comply with the Privacy Rule. One factor to consider when designating covered components and noncovered components is that the designated covered component cannot disclose protected health information to the noncovered component in any way that would be prohibited by the Privacy Rule as if the two components were separate legal entities.[15]

**The key to HIPAA compliance is to document, document, document your organization's internal policies and procedures.**

An example of how to determine whether a program is a covered function or designated health care component is in the following example: The County Employee Health Service provides not only medical check-ups to county employees, but it also transmits via a regular fax machine and telephone some of the transactions specified in §160.103 of the Privacy Rule. The County Employee Health Service in this scenario is not a covered function and is therefore a nonhealth-care component that does not have to comply with HIPAA. Unless the faxes were conducted via computer or an Internet-based e-fax product, the stand-alone fax machines and the telephones have not met the requirements of "electronic"[16] under HIPAA.

**Covered Information or Protected Health Information.**[17] Similarly, the Privacy Rule only applies to protected health information, which is defined as individually identifiable health information transmitted by electronic media and maintained in any medium described in the definition of electronic media at §162.103 or transmitted or maintained in any other form or medium. Protected health information excludes individually

*Continued on page 31*

# Capital Murder Conference at the OMNI San Antonio

**Please note: Unlike most seminars, Capital Murder begins Wednesday at 10 a.m., not 1 p.m.**

## Wednesday, June 25th

**8:00 a.m.** **Registration opens.**
**10:00 a.m.** **Welcome & Course Introduction**
**10:10 a.m.** **Investigation of Capital Murder Cases: Crime Scene through Grand Jury**
Lisa Tanner, Prosecutor Assistance Division, Attorney General's Office in Austin
**11:10 a.m.** **The Charging Decision**
Shane Phelps, ADA in Brazos Co.
**Noon** **Lunch**
**1:15 p.m.** **Death Penalty Jury Selection: Black Letter Law**
Matthew Paul, State's Prosecuting Attorney in Austin

### Trial Track

**2:30 p.m.** **Protecting Prospective Jurors**
Paul McWilliams, ADA in Bell Co.
Bill Turner, DA in Brazos Co.
**4:00 p.m.** **Challenging Prospective Jurors**
Kelly Siegler, ADA in Harris Co.
Greg Davis, ACDA in Collin Co.
**5:15 p.m.** **Adjourn**

### Post-Conviction Track

**2:30 p.m.** **Handling Post-Conviction DNA Claims**
Libby Lange, ACDA in Dallas Co.
Lori Ordiway, ACDA in Dallas Co.
**4:00 p.m.** **Preserving Evidence Containing Biological Material**
Lynne Parsons, ADA in Harris Co.
**4:45 p.m.** **Adjourn**

**5:45 p.m.** **Opening Reception**

## Thursday, June 26th

**9:00 a.m.** **Recent Legislative Changes Affecting Capital Litigation**
TDCAA Staff
**10:00 a.m.** **State Habeas for Trial Lawyers**
Roe Wilson, ADA in Harris Co.
**11:10 a.m.** **Future Dangerousness & Mitigation: Black Letter Law**
John Davis, ADA in El Paso Co.
**Noon** **Lunch (provided by TDCAA)**

### Trial Track

**1:30 p.m.** **Challenging Experts on "Future Dangerousness"**
Alan Levy, ACDA in Tarrant Co.
**2:45 p.m.** **Rebutting the Defendant's Use of a TDCJ-ID Video**
Chuck Noll, ADA in Harris Co.
**3:45 p.m.** **Confronting Mitigation Experts**
Lyn McClellan, ADA in Harris Co.
**5:00 p.m.** **Adjourn**

### Post-Conviction Track

**1:30 p.m.** **Hot Topics on Direct Appeals & Writs**
Sue Korioth, Attorney at Law in Dallas
**2:45 p.m.** **Setting Execution Dates & Responding to Clemency Petitions**
Roe Wilson, ADA in Harris Co.
**3:45 p.m.** **Hot Topics in Federal Habeas**
Gena Bunn, Ass't Attorney General, Capital Litigation Division in Austin
**5:00 p.m.** **Adjourn**

## Friday, June 27th

**9:00 a.m.** **Mental Retardation and the Death Penalty: Understanding Diagnostic Features & Assessment**
Dr. George C. Denkowski, Ph.D., Fort Worth
**10:45 a.m.** **Effectively Investigating & Handling Claims of Mental Retardation**
Panel Discussion
**Noon** **Adjourn**

# TDCAA Registration Form

**Capital Murder Conference at the OMNI San Antonio**
**June 25–27, 2003**

## REGISTRATION

Registration before June 3, 2003 is $225 for TDCAA members and $300 for nonmembers. After June 3, the registration fee is $250 for members and $325 for nonmembers. Advanced registration is required, and your registration fee must accompany your registration form. This registration fee is charged to defray the costs of training and other related association expenses for the production of this seminar that cannot be paid by the Court of Criminal Appeals training grant. Registrants are entitled to attend the grant-sponsored portions of the course and, if qualified, to grant-authorized reimbursement independent of payment of the full registration fee.

## CANCELLATION

Registrants canceling prior to June 3, 2003, will receive a refund of half the registration fee and copies of course materials. Registrants canceling after June 3, 2003, will not receive a refund but will be sent copies of the course materials.

## REIMBURSEMENT FOR ELIGIBLE PROSECUTORS

Under our grant, the Association can reimburse only eligible prosecutors and prosecutor office employees up to $40 per night for two nights' stay at a hotel, up to $6 a day for breakfast, $10 a day for lunch, and $14 a day for dinner for meals not provided at the conference. The registration fee is nonreimbursable. TDCAA cannot reimburse for travel, hotel tax, parking, taxi costs, or other extraordinary expenses. Associate members are not eligible for reimbursement.

## CLE CREDIT

TDCAA has applied for a total of 18 hours of State Bar CLE credit, including 2 hours of ethics, for course participation.

## PERSONAL INFORMATION

**Name** _____ **Name preferred on badge** _____

**Office** _____ **Title** _____

**State Bar card #** _____ **County** _____

**Office address** _____ **City** _____ **ZIP** _____

**Phone** _____ **Fax** _____

**Years in prosecutor's office** _____ **# of attorneys in your office** _____

**E-mail address** _____

**[ ] Please check here if we do not have your permission to distribute your e-mail address to course attendees.**

## FEES (please check one)

[ ] $225 for TDCAA members (before June 3)
[ ] $250 for TDCAA members (after June 3)
[ ] $300 for nonmembers (before June 3)
[ ] $325 for nonmembers (after June 3)

## CURRICULUM (please check one)

[ ] Trial Track
[ ] Post-Conviction Track

**To register, fill out this page and fax it to TDCAA at 512/478-4112 or send it to us at 1210 Neuces, Austin, TX 78701; or fill it out online at www.tdcaa.com.**

**The 2003 Trial Skills Course** is designed to give recently hired attorneys and investigators the knowledge and skills necessary for the efficient and effective prosecution of Texas criminal cases. This intensive program consists of lectures from experienced prosecutors, investigators, experts, and judges on all aspects of the criminal investigation and trial, combined with faculty demonstrations, practice drills, and faculty-directed roundtable discussions. The course will not simply present the law but emphasize practical pointers and advice to give all new hires a competitive edge in court.

As in years past, each participant receives a comprehensive course binder, as well as a TDCAA *Predicate Questions Manual*. In addition, all Investigators will receive a copy of the recently revised TDCAA *Investigators Desk Reference Manual*.

**Date and Time: The course begins at 4:30 p.m. Sunday, July 13th. The Investigators' Track ends Wednesday at noon, and the Prosecutors' Track ends Friday at noon.**

## Sunday, July 13th

| | |
|---|---|
| **2:00 p.m.** | **Registration opens.** |
| **4:30 p.m.** | **Welcome & Course Introduction** |
| **4:45 p.m.** | **What Jurors Want** |
| **6:00 p.m.** | **Opening Reception** |

## Monday, July 14th

### Prosecutors' Track

| | |
|---|---|
| **9:00 a.m.** | **Case Preparation and Discovery** |
| **9:30 a.m.** | **Effective Jury Selection** |
| **10:45 a.m.** | **Nuts and Bolts of DWI Jury Selection** |
| **Noon** | **Lunch (provided by TDCAA)** |
| **1:30 p.m.** | **Challenges For Cause & *Batson* Issues** |
| **2:45 p.m.** | **Jury Selection Roundtable** |

### New Investigators' Track

| | |
|---|---|
| **9:00 a.m.** | **Goals of a DA/CA Investigator** |
| **9:30 a.m.** | **Intake & Grand Jury** |
| **10:45 a.m.** | **Criminal Law 101** |
| **Noon** | **Lunch (provided by TDCAA)** |
| **1:30 p.m.** | **Locating and Handling Witnesses** |
| **2:45 p.m.** | **Records, Records, Records** |

| | |
|---|---|
| **3:45 p.m.** | **Effectively Using Demonstrative Evidence** |
| **5:00 p.m.** | **Adjourn** |

## Tuesday, July 15th

| | |
|---|---|
| **9:00 a.m.** | **Arrest, Search, and Seizure** |
| **10:45 a.m.** | **Motions to Suppress: Identification Hearings and Confessions** |
| **Noon** | **Lunch (provided by TDCAA)** |
| **1:15 p.m.** | **Motions to Suppress: Case Scenarios** |

## Tuesday afternoon

### Prosecutors' Track

| | |
|---|---|
| **2:00 p.m.** | **Effective Opening Statements** |
| **3:00 p.m.** | **Direct Examination and Officer Preparation in DWI Trials** |
| **4:00 p.m.** | **The Predicates Bowl** |

### New Investigators' Track

| | |
|---|---|
| **2:00 p.m.** | **Computer, Internet, & Phone Investigations** |
| **3:00 p.m.** | **Gathering Punishment Evidence** |
| **4:00 p.m.** | **New Investigator Q&A** |

| | |
|---|---|
| **5:00 p.m.** | **Adjourn** |

## Wednesday, July 16th

| | |
|---|---|
| **8:30 a.m.** | **DWI Case Law Update** |
| **10:00 a.m.** | **Case Scenarios** |
| **11:00 a.m.** | **Prosecuting Domestic Violence Cases** |
| **Noon** | **Adjourn** |

**End of New Investigators' Track**

## Thursday, July 17th

| | |
|---|---|
| **9:00 a.m.** | **The Effects of Alcohol on Driving Abilities** |
| **10:30 a.m.** | **Cross-Examination and Impeachment** |
| **11:15 a.m.** | **Cross-Examination of the Defense Expert** |
| **Noon** | **Lunch (provided by TDCAA)** |
| **1:15 a.m.** | **Punishment Evidence** |
| **2:30 p.m.** | **Probation Revocations** |
| **3:30 p.m.** | **Case Scenarios** |
| **4:00 p.m.** | **Final Argument** |
| **5:00 p.m.** | **Adjourn** |

## Friday, July 18th

| | |
|---|---|
| **9:00 a.m.** | **Ethical Dilemmas for Prosecutors** |
| **10:30 a.m.** | **The Lord's Work** |
| **Noon** | **Adjourn** |

# TDCAA Registration Form

## Prosecutor Trial Skills at the Hilton North & Towers in Austin
## July 13–18, 2003

### REGISTRATION

Space is limited to 125 prosecutors and 50 investigators. Advanced registration is required; no walk-in registrations will be accepted. This registration fee is charged to defray the costs of training and other related association expenses for the production of this seminar that cannot be paid by the Court of Criminal Appeals training grant. Registrants are entitled to attend the grant-sponsored portions of the course and, if qualified, to grant-authorized reimbursement independent of payment of the full registration fee. If you've not paid membership dues, please include the additional fee with your registration. Also, let us know if you have a disability and need auxiliary services to participate effectively in this meeting.

### REIMBURSEMENT FOR ELIGIBLE PROSECUTORS AND INVESTIGATORS

Under our grant, TDCAA can reimburse eligible prosecutors up to $40 per night for five nights (Sunday through Thursday) and eligible investigators for three nights (Sunday through Tuesday) at a hotel. All those eligible can be reimbursed up to $6 a day for breakfast, $10 a day for lunch, and $14 a day for dinner for meals not provided at the conference. The registration fee is nonreimbursable. TDCAA cannot reimburse for travel, hotel tax, parking, taxi costs, or other extraordinary expenses. Associate members are not eligible for reimbursement.

### HOTEL INFORMATION

Hotel rooms at the Hilton North & Towers, located at 6000 Middle Fiskville Road in Austin, are available for $80 for a single, $90 for a double, and $100 for a triple. Rooms at the Garden Court (which is connected to the Hilton) are also available; they cost $59 for a single and $69 for a double. Rooms at the Super 8 (also connected to the Hilton) are $49 for a single and $59 for a double. Rates are good until June 22, 2003, or until sold out. Call 512/451-5757 for reservations at any of the three hotels.

*** FOR CLE AND TCLEOSE CREDIT AND CANCELLATION INFO, SEE WWW.TDCAA.COM. ***

### PERSONAL INFORMATION

**Name** _____ **Name preferred on badge** _____

**Office** _____ **Title** _____

**Office address** _____ **City** _____ **ZIP** _____

**Phone** _____ **Fax** _____ **# of attorneys in office** _____

**Months in prosecutor's office** _____ **Number of trials** *jury* _____ *court* _____

**E-mail address** _____

**Current assignment** ***(misdemeanor, felony, juvenile, etc.)*** _____

**State Bar card # (attorneys only)** _____

**DOB (investigators only)** _____ **SS# (investigators only)** _____

**[ ] Please check here if we do not have your permission to distribute your e-mail address to course attendees.**

### FEES (please check one)

| For prosecutors | For investigators |
|---|---|
| [ ] $225 for TDCAA members | [ ] $200 for TDCAA members |
| [ ] $250 for members after June 22, 2003 | [ ] $225 for members after June 22, 2003 |
| [ ] $325 for nonmembers | [ ] $300 for nonmembers |
| [ ] $350 for nonmembers after June 22, 2003 | [ ] $325 for nonmembers after June 22, 2003 |

**To register, fill out this page and fax it to TDCAA at 512/478-4112 or send it to us at 1210 Nueces, Austin, TX 78701; or fill it out online at www.tdcaa.com.**

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# *Answers to your HIPAA questions (cont'd)*

identifiable health information in education records covered by the Family Educational Rights and Privacy Act (FERPA) and employment records held by a covered entity in its role as an employer.

An interesting scenario involves a school health program. Generally records belonging to schools that receive federal funds fall under FERPA and are considered education records rather than health records.[18] For those FERPA schools whose health service programs conduct one of the specified transactions electronically, those schools may be covered entities under HIPAA, and they may elect hybrid status. Even where these programs conduct covered functions (for students or others) and would need to comply with any electronic transactions standards that apply to it, the program does not have to comply with the HIPAA Privacy Rule with respect to records that are covered by FERPA because those records are excluded from the definition of protected health information.

A more difficult but related topic under this umbrella of covered entities and covered information deals with a county-sponsored health plan. A health plan is described under the Privacy Rule to include a group health plan, which is comprised of insured and self-insured employee welfare benefit plans under the Employee Retirement Income and Security Act of 1974 (ERISA). To resolve the dilemma of how a health plan, which is a covered entity, may disclose protected health information to the county as a health plan sponsor or employer, which is a noncovered entity, HIPAA allows a restricted flow of information. First, a group health plan, a health insurance issuer, or both may disclose enrollment and disenrollment information to the county.[19] Second, a group health plan, a health insurance issuer, or both may disclose "summary health information" to the county to obtain premium bids for providing health coverage or to modify, amend, or terminate the group health plan.[20] Finally, a group health plan and the health insurer may disclose protected health information to the county once the plan documents have been amended. Among other things, the county must agree not to use or disclose the protected health information for any employment-related action or decision.[21]

## Resources[22]

Not only has the federal government failed for the most part to fund the HIPAA mandate, it has also failed to provide a working model or at least the model forms required under HIPAA. If you need help in your HIPAA compliance efforts, I recommend signing up to become a member of either or both of the Hipaagives or Hipaalive listserves mentioned below in order to receive valuable exchange of HIPAA information and answers to HIPAA questions from other covered entities going through the compliance process. You can also contact local area compliance or privacy officers for additional guidance.[23]

The following is a list of resources that I found extremely helpful in my compliance effort:

- HHS and OCR website: **www.hhs.gov/ocr/hipaa**. (Also look at the Frequently Asked Questions [FAQ] link, where you can search for your desired topic.)
- Listserves that enable covered entities across the country to discuss and share knowledge with each other:
**www.hipaagives.org** (This site is geared toward governmental entities and provides sample forms including the Notice of Privacy Practices.)
**www.hipaadvisory.com/live**
**www.hipaalive.com**.
- Free sample sets of policies and procedures. You will need to modify them to suit your organizations:
**www.dhs.state.or.us/admin/hipaa/project/privpolicymanual.htm**
**www.mh.state.oh.us/hipaa/hipaa.policies.index.html**
**www.county.org./resources/HIPAA** (This site is geared toward county health plans.)
- Additional websites to obtain sample forms, documents, and Power Point presentations:

*Continued on page 32*

*Continued from page 31*

**groups.yahoo.com/group/ShareHIPAA**
**www.dirm.state.nc.us/hipaa**
**www.nchica.org**

n For foreign language translations: **www.systranbox.com/systran/box**: Type in your text or web page, and this site will translate it into different languages for you.

**www.awphd.org/resources_translatedForms.asp**: This site offers sample notices in different languages.

You will find that the people in the HIPAA world are very open and giving in sharing their knowledge and expertise; they understand the difficulties and frustrations that go hand in hand with this process. I would also like to take this opportunity to acknowledge and thank Leah Hole-Curry, J.D., of Fox Systems, Inc., for generously sharing her knowledge as well as her time in reviewing and editing this article.

# Endnotes

1 Sen. Edward Kennedy (D-Mass.) and former Sen. Nancy Kassebaum (R-Kan.) first proposed health insurance reform legislation (S. 1028) in July 1995. In March 1996, former Rep. Bill Archer (R-Tex.) proposed the HIPAA bill that ultimately passed both houses of Congress (H.R.3103). President Clinton signed HIPAA into law on August 21, 1996, as P.L. 104-191. Rae Ann Steinly, *HIPAA: What States Should Know,* 14, no. 1 Amer. Public Human Svcs. Assn. 21, 21 (January-February 2002). A copy of the text of the legislation is available on the Internet at www.thomas.loc.gov or www.aspe.hhs.gov/admnsimp/pl104191.htm#Subtitle.

2 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, p. 1, 110 Stat. 1936.

3 "Standards for Privacy of Individually Identifiable Health Information" or the Privacy Rule, including the Aug. 2002 modifications is codified at 45 C.F.R. parts 160 and 164 (2002) and is available at www.hhs.gov/ocr/hipaa/.

4 The Security Rule is codified at 45 C.F.R. Parts 160, 162 and 164 (2003) and is available at www.cms.hhs.gov/hipaa/hipaa2 or www.hhs.gov/news/press/2003pres/20030213a.html.

5 The Transaction and Code Sets Rule, including the Feb. 2003 modifications, is codified at 45 C.F.R. Part 162 (2003), and is available at www.aspe.hhs.gov/admnsimp/ or www.cms.hhs.gov/hipaa/hipaa2. For more information on standardized transaction code sets, see also www.wedi.org/snip/, or www.cms.hhs.gov, or www.wpc-edi.com, or www.sharpworkgroup.com/.

6 The final provisions regarding the Unique Identifiers for health providers, and health plans have not been released yet. The final standard for the National Employers Identification has been released in May 2002 for use in health care transactions. See www.aspe.hhs.gov/admnsimp/.

7 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 1176, 110 Stat. 1936.

8 Id. at § 1177.

9 Financial Crimes, U.S. Federal Bureau of Investigation, About the Health Care Fraud Unit (2003), available at http://www.fbi.gov/hq/cid/fc/hcf/about/hcf_about.htm.

10 Press release, Health Privacy Project, HPP Launches Privacy Complaint Monitoring Initiative (April 8, 2003), available at www.healthprivacy.org.

11 The Office of Management and Budget as well as other reports estimate that HIPAA implementation will cost the entire health care industry, public and private sectors, anywhere between $3.8 billion to $43 billion dollars over five years. Several state Medicaid agencies have estimated HIPAA compliance costs ranging from $18 million in Florida to $105 million in Texas. Rae Ann Steinly, HIPAA: What States Should Know, 14, no. 1 Amer. Public Human Svcs. Assn. 21, 27 (January-February 2002).

12 Office for Civil Rights, U.S. Dep't of Health and Human Services, Standards for Privacy of Individually Identifiable Health Information (Dec. 03, 2002), available at http://www.hhs.gov/ocr/hipaa/privacy.html.

13 45 C.F.R. §§160.103, 164.501, 164.504

14 Please see Texas' own definition of "covered entity" discussed in the "Conflicting State Law" paragraph of the longer version of this paper.

15 For a more detailed discussion of covered, hybrid, and affiliated entities, including a discussion on health plans and self-insured counties that contract with a third-party administrator to manage claims, please read the following: Aimee N. Wall, J.D., M.P.H., Forms of Covered Entities: Hybrids Entities and other Rare Breeds Institute of Government, UNC-CH HIPAA Training (Oct. 2002), available at www.medicalprivacy.unc.edu/resources_potm.htm.

16 The Security Rule preamble also discusses this electronic media concept. See also 45 C.F.R. §162.103.

17 45 C.F.R. §164.501.

18 Office for Civil Rights, U.S. Dep't of health and human Svcs., Final Privacy Rule Preamble, Subpart II, p. 16 (2000), available at www.hhs.gov/ocr/part2.html.

19 45 C.F.R. §164.504(f)(1)(iii) (2002).

20 *Id.* §164.504(f)(1)(ii).

21 Id. § 164.504(f)(3)(iv). See Brian D. Annulis, J.D., Not a Self Insured County Countyhipaa Listserve Archived Message (Dec. 21, 2002), available at www.hipaagives.org.

22 The website addresses listed in this paper are current as of the date of submission of this paper, March 31, 2002.

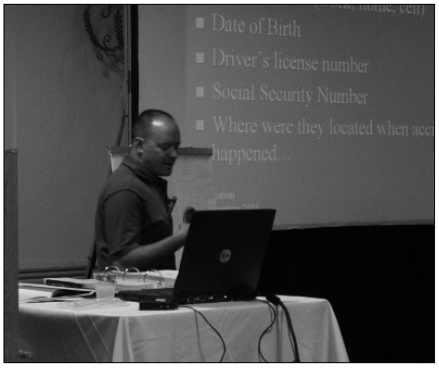
23 The Compliance Officers for some of the Texas entities that are in the forefront of meeting the HIPAA compliance dates are Krista Britt for Harris County, and John Scott for the Texas Department of Health.

**To read more about the Health Insurance Portability and Privacy Act, visit www. tdcaa.com.**

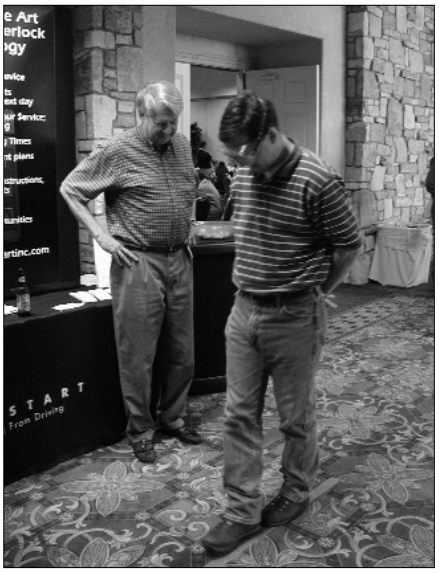
# Intoxication Manslaughter School photos

More than 220 prosecutors and police officers attended April's Intoxication Manslaughter seminar in Kerrville. Here are a few memories of the week.

*More photos on page 34*




A note on the yearly prosecutors-vs.-police volleyball game: 2003's winners are the prosecutors. The victorious team included Ken Kalafut, Billy W. Byrd, Bi Hunt, Angela Taylor, Felicia Kerney, and Gretchen Choe. Congratulations!


START
From Driving

# AS THE JUDGES SAW IT

*By Betty Marshall*
State Prosecuting Attorneys Office in Austin

The top cases decided by the Court of Criminal Appeals from February 19, 2003, through March 26, 2003.

## Questions

1 Prior to Billy Wayne McDaniel's probation revocation hearing, his attorney filed a motion asserting there was "an issue" regarding McDaniel's competency. Was the trial court required, on the basis of that assertion, to hold a competency hearing prior to the revocation hearing?

_____ yes _____ no

2 A jury convicted Tommy Trevino of murder, agreeing with the State that he shot and killed his wife, Michelle, in cold blood and staged the crime scene afterwards to make it look like self-defense. There was also some evidence that he acted in sudden passion, though the evidence was weak and impeached by State's evidence. Was Trevino entitled to a charge of sudden passion at punishment?

_____ yes _____ no

3 Alfredo Monreal pled guilty without a plea bargain to aggravated robbery and was assessed 18 years. A week after the trial court rendered judgment, Monreal and his attorney signed a waiver of appeal in open court. They then filed separate notices of appeal. The Court of Appeals dismissed the appeal. Does a valid, nonnegotiated waiver of appeal prevent a defendant from appealing any issue without the consent of the trial court?

_____ yes _____ no

4 John Watts was charged with discharging sewage into "water in the state," specifically a county drainage ditch, under Water Code §26.121(a)(1). At the State's request, the trial court orally instructed the jury that it was taking judicial notice of *American Plant Food v. State*, 587 S.W.2d 679 (Tex. Crim. App. 1979), in which drainage ditch water was "water in the state." Was this an improper comment on the weight of the evidence?

_____ yes _____ no

5 The trial court refused to let capital murder defendant Tommy Sells ask prospective jurors four questions: (1) if they would want to know the minimum length of time a defendant would serve in prison before becoming eligible for parole; (2) how the 40-year minimum sentence would be important to them in answering the special issues; (3) whether the 40-year minimum would make them more or less likely to consider a defendant a continuing threat to society; and (4) what kind of evidence would help them consider the 40-year ineligibility factor. Was the trial court correct?

_____ yes _____ no

6 More on Tommy Sells: the State failed to hand over copies of Sells' oral statements 20 days before the pretrial hearing at which his motion to suppress was heard. Was this error under art. 38.22, §3(a)(5) CCP?

_____ yes _____ no

7 Tony Arroyo was charged with assaulting Patricia Bivins. Before trial, the State replied to Arroyo's *Brady* motion by handing over Bivins' rap sheet. At trial, Arroyo wanted to impeach Bivins' credibility by introduc-

ing two prior judgments and a capias pro fine, but the State objected because Arroyo had not proven Bivins was the same person mentioned in the judgments and capias. Did Arroyo have to prove Bivins' identity in order to introduce exhibits acquired by reasonable reliance on the State's rap sheet?

_____ yes _____ no

8 At Johnny Rodriguez's trial for delivering cocaine to a minor "on or about Sept. 9, 1998," the minor, his daughter, testified that Rodriguez gave her cocaine on Sept. 9, 1998, and also on another 20 to 30 occasions during the preceding nine months. Were the prior deliveries extraneous offenses or merely repeated occurrences of the offense alleged in the indictment?

_____ extraneous offenses
_____ repeated occurrences

9 In the same case, was Rodriguez's daughter a party and therefore an accomplice to Rodriguez's delivery of cocaine because he could not have committed the offense without her participation?

_____ yes _____ no

## Answers

1 No. A trial judge need not perform a competency inquiry unless evidence is presented that raises a bona fide doubt about the defendant's ability to consult with counsel or understand the proceedings against him. Because McDaniel's motion did not assert he was incompetent or point out evidence of incompetency, the trial court was not required to hold a pretrial competency inquiry under sec. 46.02, §2(a) CCP. The trial court was also not required to hold an inquiry during the hearing under §2(b) because a psychologist said McDaniel was competent and McDaniel competently handled his own defense. *McDaniel v. State*, No. 744-02, delivered Feb. 26, 2003.

2 Yes. A sudden passion charge should be given if there is some evidence to support it, even if that evidence is weak, impeached, contradicted, or unbelievable. Because there was some evidence Trevino acted in sudden passion, he was entitled to a charge on sudden passion at punishment and was harmed by its omission because the jury could have found he shot Michelle in sudden passion, then staged the crime scene to make it appear to be a killing in self-defense. *Trevino v. State*, No. 2360-01, delivered Feb. 26, 2003.

3 Yes. Whether a plea is negotiated or nonnegotiated, a waiver of appeal is valid (i.e., voluntary, intelligent, and knowing) if the defendant knows what errors may have occurred during trial and what his punishment will be. Because Monreal's waiver was made after sentencing, it was valid and he could not appeal without the trial court's permission. *Monreal v. State*, No. 2289-01, delivered Mar. 12, 2003.

4 Yes. A trial court can take judicial notice of the law outside the presence of the jury, for example, in ruling on a motion for directed verdict, but it may not give the jury excerpts from judicial decisions or any statements that an appellate court has held that proof of X fact fulfills Y legal requirement. Moreover, *American Plant Food* did not hold that all drainage ditch water was "water in the state," only that the particular drainage ditch water in that case met the statutory definition. As a result, the trial court in Watts' case committed error by commenting on the weight of the evidence. *Watts v. State*, No. 2115-01, delivered Mar. 12, 2003.

5 Yes. Questioning prospective jurors about parole may be permissible in some situations, but Sells' first question was an implied "why" question and thus

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SPOTLIGHT ON ...

*By Cindy Franklin*
Assistant District Attorney in Belton

# Dana Cooley, DA for the 132nd Judicial District

Long the only felony prosecutor, Dana now heads up a 1½-attorney office in a mostly-rural jurisdiction.

In this issue, we turn the spotlight on a rural jurisdiction which until September 2002 had one felony prosecutor, Dana Cooley. In July 1995, Dana was appointed by then-Governor Bush district attorney of the 132nd Judicial District in Borden and Scurry Counties, and Dana won a contested race at the next general election. In fall 2002, she was able to get funds cleared to hire a part-time assistant district attorney, Ben Smith.

We asked Dana to tell us about her counties and about the special challenges of prosecuting solo and part-time in the wide open spaces of Texas.Dana's counties are rural and isolated. A 1901 pioneer who settled in the area reflected: "We had plenty of time to be still and know God. He was our nearest neighbor." Scurry and Borden counties are located about 90 miles northwest of Abilene at the base of the Llano Estacado. Scurry County is 904 square miles. More than 90 percent of that land is farms or ranches. The county is one of the leading oil-producing regions in Texas, due to its location in the Permian Basin, one of the state's largest petroleum deposits. In 1990 Scurry County was home to about 20,000 people, 12,370 of whom live in Snyder, the county seat.

Borden County's total population is fewer than 1,000 people. Gail, the county's only town, has about 300 residents. The region's historical landscape is dotted with buffalo hunters, Indian artifacts, cotton farmers, and part of the Comanche war trail to Old Mexico.

The biggest challenges of prosecuting solo are twofold. First, being the only attorney mandates good organization. As Dana points out, if she left something in the office that she needs at trial, she has to wait until the court takes a break to go get it. Preparation has to be thorough, and Dana still feels there is never enough time to get everything done as it needs to be.

The second challenge is mental. With no other attorney to discuss strategy with or bounce ideas off, isolation can set in. Now that Dana has a part-time assistant, sharing ideas is even more important than sharing the caseload.

But being an only prosecutor can be rewarding. Dana says that when she successfully finishes a big trial, there is satisfaction in knowing she did it all herself. But she is quick to point out that even pride of workmanship does not outweigh the advantages of having an assistant. Ben Smith is an intelligent and hard-working attorney. Even more significant is that he is a good, honest, and respected member of the community. She is clearly grateful to have Ben as her assistant.

Ben has a family law and litigation practice to supplement his part-time prosecutor salary. Ann Everett, secretary and victim/witness coordinator, fills both roles and the myriad others that come with running a law practice. Dana tries an average of 12 jury trials a year.

Clearly this small staff has their hands full even in the middle of nowhere!

## A few words from Dana Cooley

TDCAA asked Dana to tell us about her experiences as a rural D.A. Here are her responses:

**Greatest Accomplishment:** "Our law enforcement agencies work with my office very well. They know that they can call me or Ben at any time for any kind of assistance. My office stresses that we are all part of the community protection team. Because we all cooperate, we get excellent results."

**Most Rewarding Case:** "I can't say that any one case has been more rewarding than another, but I feel a great satisfaction when we are successful in a case with a child victim. I like helping a child know that they have great courage and have taken back control of their life."

**Greatest Satisfaction:** "My greatest satisfaction is living and working in a small rural community and helping make it a better and safer place to live. The people in my community are truly appreciative of what I do. They frequently stop me in the grocery store or at church to tell me that they see and appreciate my hard work. I love this community, and I hope that I make a difference to the others who live here."

*Continued from page 37*

## *As the Judges Saw It (cont'd)*

ambiguous and improper under *Barajas v. State*, No. 415-99 (Tex. Crim. App. June 26, 2002), and his other three questions sought to commit jurors to giving mitigating, aggravating, or no effect to the parole instruction and were therefore improper under *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001). *Sells v. State*, No. 73,993, delivered Mar. 12, 2003.

*Note*: Another of *Sells*' proposed questions, whether a venire person could vote "no" to the future dangerousness special issue if a defendant had just been convicted of the capital murder of a young girl, was also an improper commitment question under *Standefer*.

6 Yes. Art. 38.22, §3(a)(5) applies to pretrial hearings, so Sells had the right to have the trial court consider the admissibility of the statements 20 days after Sells received copies. In this case, though, any error was harmless because Sells had the opportunity to relitigate the issue at trial and did not do so, and he had copies of the confessions more than 20 days before trial. *Sells v. State*, No. 73,993, delivered Mar. 12, 2003.

7 No. By tendering Bivins' rap sheet to Arroyo without qualification, the State was representing that the information in the rap sheet was correct and was therefore estopped from later claiming Arroyo's exhibits were inadmissible on the ground of identity. *Arroyo v. State*, No. 1670-01, delivered Mar. 19, 2003.

8 Repeated occurrences. The daughter's testimony that Rodriguez delivered cocaine to her 20 to 30 times during the nine months preceding the date alleged in the indictment was not evidence of extraneous offenses and Rodriguez's remedy was to require the State to elect the occurrence on which it sought to rely for conviction. *Rodriguez v. State*, No. 290-01, delivered Mar. 26, 2003.

9 No. Once Rodriguez delivered the cocaine to his daughter, his participation in the offense ceased. The daughter might have committed an offense by receiving the cocaine, but she did not commit the same offense Rodriguez committed. She was therefore not a party and Rodriguez was not entitled to an accomplice witness instruction. *Rodriguez v. State*, No. 290-01, delivered Mar. 26, 2003.

## INVESTIGATOR SECTION

*By A.P. Merillat*
Investigator, Special Prosecution Unit in Huntsville


# High-profile investigations

How to coordinate resources and manage investigative operations for serial and cross-jurisdictional crimes

This column will attempt a brief, simplified discussion of the rules of evidence as they apply to Texas criminal cases as well as explanations of commonly used terminology. The discussion will focus on the rules most commonly encountered by an investigator and will not cover those rules that are only of interest to a prosecutor (such as procedure for cross-examination).

Over the past several years and with increasing frequency, many highly-publicized crimes have propelled previously obscure law enforcement agencies into the spotlight and subjected police departments to intense media (and ultimately public) scrutiny.

Whether it be a shooting at a school, the murder of a child model, a sniper wreaking havoc in a community, a serial killer on the loose, or any number of other horrific crimes that cross over jurisdictional lines, involve celebrities, and/or bring on the attention of the world, no department is exempt from the possibility that such a major crime could occur within its area of responsibility.

In the midst of an eruption of violence, especially in a jurisdiction policed by a small department, the best efforts of the sharpest detectives can seem to evaporate when all hell breaks loose. If a department has only a handful of patrol officers and even fewer investigators and a major criminal episode explodes onto their jurisdiction, the throngs of reporters, outcry from the public, calls for help, tips from well-meaning citizens, and demands by victims and their loved ones can all mount to present an unconquerable obstacle to the awesome task at hand. And, it must be remembered, during such an unplanned-for occurrence, daily operations and calls for service must still be given proper attention.

Preventing a high-profile crime from occurring in the first place is, for all intents and purposes, impossible. If a sexual predator finds his way into your community and abducts and murders a child, then another, then strays into a neighboring county and abducts and murders a few more, or a lunatic decides to stop off at your local cafeteria and open fire on the patrons there, no amount of Neighborhood Watch signs or citizens-on-patrol groups are going to stop them. But, during or in the aftermath of such crimes, local law enforcement officers will be expected to solve the crime, protect the public, and be accountable for their every move and decision.

Prior planning for a high profile or multiple-jurisdiction investigation is crucial. Drawing from the experiences of departments that have found themselves in the midst of highly-publicized crimes, the following suggestions could prepare an agency for such an incident. Clearly outlining and delegating responsibilities, identifying available resources, and training and equipping for an occurrence will allow a law enforcement agency to make an effective, credible response to a major criminal situation. And, it must be realized that an agency might not be expected to respond only to a tragic crime. Disasters, such as aircraft crashes, fires, explosions, and weather-related catastrophes can hit anywhere, anytime.

The public will look to its emergency personnel for help, and no matter

the volume of requests, everyone will expect a response. These suggestions deal primarily with a situation that might occur wherein more than one police agency is involved in a major criminal occurrence. However, the methods could be used by an agency in planning and preparing for a high-profile case to be handled by that department alone. The danger to such a case is the same in either instance: Confusion and unclear delineation of responsibilities will thwart the most sincere efforts of investigators.

## Planning

It is of primary importance that law enforcement agencies in and around a county or even several counties make determined efforts to hold meetings with the express purpose of agreeing on a plan of action, should a high profile crime occur in their area. Each agency should have a designated responsibility that it will shoulder at the first notice of a major occurrence. But those pre-determined responsibilities must be flexible, depending on, say, where a shooting happens, where a body is found, or where evidence is discovered when a crime does occur.

For example: If a sheriff's office agrees to take care of evidence storage should serial murders happen in the county seat while the local police department takes on the lead investigative and information dissemination duties, those roles could reverse in the event that the sheriff's office becomes the primary investigating agency for a rural serial crime, while the city police department could become the evidence repository. Pre-planning among various agencies (e.g., highway patrol, sheriff's office, police department, constables offices, and reserves) will take much of the confusion out of a serious, sudden tragedy. Planning sessions should result in a list of available personnel resources and those with expertise or forensic specialties (e.g., fingerprints, bloodstain pattern interpretation, crime scene specialists, interpreters, and medical examiners). A call-out roster should be maintained and updated regularly, and assignment of specified personnel to a task force in the event of a major criminal occurrence, would be beneficial. The task force members should have the cooperation and authority from their agency heads to immediately go into a special-assignment designation and suspend their current duties during a high-profile investigation. A written policy or mission statement adopted among the involved agencies will prevent, or at least slow, the problems that often occur with multi-agency investigations.

## Management

Probably one of the most difficult areas in a highly-publicized criminal episode is who will be in charge. This should be decided in planning meetings and included into a policy agreed to and accepted by the representatives of various member agencies.

Obviously, the venue that is hardest-hit or that will likely be the jurisdiction of prosecution is usually the proper leadership authority. This is not always true, however, as an inexperienced or understaffed agency might be located in an area where virtually all of the criminal acts are taking place. In such a case, cooperation and deference to the appropriate authorities is the only acceptable course. And this could be worked out long before the need arises—it is always better to endure personality battles out of the public eye. But once an agreement is made and adopted, all the parties must abide by it, or the consequences, played out in front of the news media, could be terrible for everyone involved. Most importantly, innocent people could be victimized and a suspect allowed to continue violent acts while egos go to war with each other.

**Investigative management.** There will be plenty of work to go around. If the case is to be solved and successfully prosecuted, it will be the result of intelligent, detailed, and comprehensive detective work complemented by competent, worthwhile support efforts from the other team members. If three or five or 25 investigators are all going different directions, pursuing self-developed leads or crossing-over into someone else's area

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of responsibility, work will stall. Because of the necessity to devote the most effort to the proper area of need, there must be someone to manage the investigative team. This person should be responsible for briefing team members, assigning duties, guarding against overlap of efforts, reporting to the task force manager, and so on.

**Information management.** During the course of a high profile case, all types of information will be received, evaluated, analyzed, prioritized, and disseminated. Agencies will amass mountains of info on evidence, progress, and direction of particular investigations, elimination of bad leads, and numerous other details. All of this will be shared with task force members on a timely basis to prevent duplication of work, unnecessary efforts spent on previously verified or discounted leads, and so on.

Member agencies of a law enforcement task force should pre-arrange for someone to be in charge of information management and dissemination. This would include tips and leads that come into a command center or investigative agency. If there is sufficient personnel, it would serve well to have an additional person supervise incoming tips and coordinate their analysis. A standard tip form should be used by each member agency to insure that sufficient details and those that will be compatible with data entry at each agency will be collected. Standardization also allows for a desirable measure of crime analysis when comparing tip sheets. (See the sample tip sheet on the opposite page.)

Also included in an information management area of responsibility is media relations. A pre-designated representative should be responsible for press releases and press conferences. The law enforcement agency should control the manner in which information is released to the press, along with the scheduling of such releases. It should never be the other way around. It is important to remember that not only interested citizens read the papers and watch television; suspects do too.

## Coordination

When witnesses are identified and located and as the numbers grow throughout a highly-publicized investigation, they have to be dealt with through coordination efforts aimed at follow-up, statements, possible special needs that arise, and hopefully, preparation for trial against a perpetrator. A member of an interagency task force should be designated for witness coordination.

**Solving and successfully prosecuting a case will be the result of intelligent, detailed, and comprehensive detective work supported by other team members.**

Other areas to be addressed when planning investigative strategy include evidence coordination, crime scene management, and crime lab coordination. Each of those areas should be covered by a person responsible for insuring that optimum efforts and proper actions are taken by personnel involved in a multi-agency task force. Members of the district attorney's staff or other prosecutorial agency are valuable assets to such a task force, especially when a need for a search warrant, subpoena, or legal advice arises.

In areas where manpower is limited, more than one area of responsibility could be borne by an individual. The desired result is that the areas are covered responsibly and with proper accountability.

Although most investigators would never expect to find themselves in the middle of a mass murder or serial crime investigation, the increase in high-profile crimes and the threat to the public presented by violence-espousing groups dictates a need for law enforcement agencies to be prepared. Those in charge of police departments, sheriff's offices and other law enforcement agencies should devote serious attention to the possibility of becoming involved in these types of investigations.

To order a copy of the *Investigator's Desk Reference Manual,* visit www.tdcaa.com or call 512/474-2436.

*Sample tip sheet*

## SUBJECT INFORMATION

**PRIORITY:**

| LAST NAME | FIRST NAME | MIDDLE | TASK FORCE TIP # |
|---|---|---|---|
| | | | |

| NICKNAME OR ALIAS | SOC SEC., DPS, SID #, DL # (SPECIFY) |
|---|---|
| | |

ANY KNOWN/SUSPECTED ADDRESSES (CURRENT OR PAST- SPECIFY)

EMPLOYER & ADDRESS OR LOCATION

| RACE | SEX | D.O.B. | PLACE OF BIRTH | AGE OR RANGE | HEIGHT | WEIGHT | HAIR | EYES | BUILD | COMPL |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |

| VEHICLE DESCRIPTION, (MAKE MODEL, COLOR, ETC.) | L.P. |
|---|---|
| | |

| SOURCE NAME | SOURCE CONTACT INFORMATION |
|---|---|
| | |

CONCISE TIP INFORMATION

IF ADDITIONAL SPACE IS NEEDED, USE SUPPLEMENTARY FORM

## SOURCE INFORMATION

| LAST NAME | FIRST NAME | MIDDLE |
|---|---|---|
| | | |

| RACE | SEX | D.O.B. | OTHER IDENTIFIERS | OCCUPATION/EMPLOYER |
|---|---|---|---|---|
| | | | | |

| ADDRESS | HOME PHONE | WORK PHONE | SS#, DPS#, DL# (SPECIFY) |
|---|---|---|---|
| | | | |

ADDITIONAL INFORMATION

| RECEIVED BY | DATE & TIME | COMPUTER CHECK BY | DATE & TIME |
|---|---|---|---|
| | | | |

| ASSIGNED TO | DATE | RESPONSE DUE DATE |
|---|---|---|
| | | |

*This sample was modeled after the tip sheet used by the Green River task force in King County, Washington. Such a form, if used by all members of a task force, will allow for a cross-indexing system, standardizing recording procedures, and prioritizing incoming tips. It also provides a suspense date, where an assigned investigator must respond to the team manager as to how the tip was pursued and its worth to the investigation. Naturally, the form can be adapted to suit the needs and mission of any agency or task force.*

## THE AGONY COLUMN

*By Rick Miller*
County Attorney in Belton

# Disciplining employees

How to fairly prevent and correct problem behavior without alienating your other employees

What do you have to worry about this week? Trials out the yazoo. New legislation in the form of an unfunded mandate that further chews up scarce resources. Unsympathetic commissioners who are not inclined to fund a new position. Newshounds who want to do a story on why you legitimately had to dismiss a case against a local bigwig for lack of sufficient evidence. An inmate lawsuit for goodness knows what. And on top of that, you've got an employee discipline problem to deal with.

If you're lucky enough to have a staff, you will eventually have a discipline problem, be it major or minor. Either way you have to deal with it; it can't be ignored, 'cause sure 'nuff it will become a major problem at some point.

Some discipline problems are easy to deal with. Lying and stealing and other intentional torts can be resolved very quickly: by documenting the situation and immediately terminating the person. You can take some comfort from the Government Code: A prosecutor may employ personnel who in his or her "judgment are required for the proper and efficient operation and administration of that office" (art. 41.102), and "all personnel of a prosecuting attorney's office are subject to removal at the will of the prosecuting attorney" (art. 41.105). But those are the easy ones.

Your headaches will actually come from performance problems on the job that call for some response other than termination, such as absenteeism, incompetence, or personality quirks that affect the quality of work in your office. To merely terminate folks over such problems is not a realistic response, given the county's investment in them. You have to have a system in place for handling these problems, and you must explain it to the employees it affects. The system has to be effective, fair, and applied consistently and uniformly. The following are some suggestions to consider in setting up your system.

## To discipline or not?

Whether or not an employee is to be disciplined should be related to the existence of clearly articulated policies. If you have a written policy in place and your staff understands it, a deviation can be easily documented and an appropriate disposition determined. So the first suggestion is to establish clear policies on those functions important to the quality of work in your office. Such policies would apply to matters where it is important that the functions be done timely, accurately, etc. Get your staff's input during the policies' development so they reflect reality and are readily understood. If you have continuing problems with some aspect of office procedures, it's necessary to develop a policy. A deliberate violation of a written policy is easy to document.

But you can't have a written policy for EVERYTHING, can you? Who would want to work in that office? After all, our employees are intelligent and dedicated and should be expected to exercise some common sense, or at least ask questions. So if a screwup occurs, you'll have to investigate to what degree, if any, a disciplinary response is called for. Is the activity one that involves a common procedure that is

and has been widely practiced in your office? Has the employee been trained in that procedure? Should the employee reasonably have known better? That might call for a disciplinary response. On the other hand, if it is a unique situation and there has been no preparation of the employee, it is a training problem, not a discipline problem. Discipline is there for an intentional or reckless act, much like a crime, while training should be relied on to improve employee performance where the employee is legitimately having problems with procedures.

## Document everything

Get in the habit of documenting. Even if there is nothing but a conversation about a minor screwup, memorialize it for future reference. If the matter is not corrected, that memo is an important part of your justification for whatever more formal disciplinary measure you might take down the line. To be fair, though, if the minor problem is corrected and a sufficient amount of time passes without a recurrence, throw the memo away; it has served its purpose.

That is not true for major disciplinary problems, however. If an employee has become a barrier to the effectiveness of your office, where you might entertain the idea of termination, you are better off documenting each episode involving that employee so as to build your case. This is especially important if that employee is terminated and turns around and files a lawsuit alleging a whistleblower violation or some form of discrimination.

How do you document? The memorandum, or even a letter of reprimand, should describe: (1) the objectionable conduct; (2) the policy or procedure as it should be performed; (3) a plan of action for remedying the problem; and (4) a scheduled date for evaluation and review. The plan of action should involve a supervisor's active participation. Provide the employee with the original memorandum; place a copy in his or her personnel file. The employee should initial and date the file copy. More serious actions, such as suspensions without pay, should identify the undesirable conduct, relate it to the desirable conduct, and specifically describe the period of suspension or other disciplinary action imposed. The language should be short, sweet, and businesslike; it's too late for any preaching or moralizing.

## Performance appraisals

Some offices may have periodic performance evaluations of all personnel. If this is the case, such evaluations need to be honest. A series of glowing reviews in the personnel file of a person you terminate for bad performance will look strange to a jury in a resulting lawsuit. Much like documenting a counseling session, a good evaluation will recognize the positive things the employee has done during the evaluation period, then relate the areas that need improvement, along with a positive plan of action to deal with those deficiencies. Merely assigning numbers or brief word descriptions to performance deficiencies, without offering a remedial plan, renders the evaluation worthless. Your personnel always want to know where they stand, and that evaluation system is an important component to your discipline system.

While the law does not require prosecutors to be fair, it is the better approach. Investigate and marshal your facts before making an accusation. Regardless of the seriousness of the violation—short of a crime in which *Miranda* might have to be invoked—always give the employee an opportunity to respond. It doesn't have to be anything formal, but if we've learned anything as prosecutors, it's that there are always two sides to every question. Who knows? The employee might have some information that strengthens your position, or maybe it is information that mitigates the seriousness of the disciplinary problem and may lead you to choose a different disposition. If you have your facts lined up, a few minutes listening to the employee will not hurt.

*Continued on page 46*

*Continued from page 45*

In addition, if you do that consistently, your other employees will realize that in similar circumstances, they'll have an opportunity to explain their side of the issue ... and that you are fair in dealing with them.

## Take action

The discipline should be administered progressively and proportionately. The lowest form is an oral reprimand (still memorialized in writing), followed by a written reprimand. A poor evaluation report can reflect performance problems. After that, it sort of depends on the nature of employment. Your attorneys will be considered exempt employees, so you cannot use discipline that assumes an hourly wage. To do otherwise would require you to treat them as nonexempt and pay overtime. For example, you may think that the conduct calls for a short (e.g., 10-day) suspension without pay. That would be treated as an hourly penalty; thus they become nonexempt. Usually attorneys are paid monthly, so probably the lowest suspension without pay would be for that length of time without jeopardizing their exempt status. With nonexempt employees, there is no problem. And finally, beyond a short suspension without pay, there is termination of employment. Depending on the nature of the disciplinary problem, the manager's response should be with the least restrictive disposition appropriate to the conduct, the response growing stronger with each new violation. Of course, you skip all that with egregious conduct and go straight to suspension or termination.

Finally, remember that discipline is not an end in itself. It should be intended to accomplish a positive result, that is, resolution of the original problem. Positive discipline reinforces what you want to accomplish, such as thorough training, positive feedback, and, where appropriate, recognition of accomplishment. It is positive discipline to set reasonable standards with which your employees are familiar. It means an ongoing evaluation system that nips problems in the bud by identifying them while still minor and adopting a corrective plan. The whole point is to salvage the investment in your employee. Negative discipline, on the other hand, is a punitive response for inexcusable conduct. It has no positive outcome; hopefully it engenders compliance with your policies and expectations, even if grudgingly. Negative discipline is a measure of last resort when all else has failed.

All of us like to be the good guy with our staff. It's not easy to sit across from someone you've known and worked closely with and tell them that you're hitting them in the pocketbook by suspending them. But that's why you get paid the big bucks. Much as you would like to have a close, friendly relationship with your staff, you are the boss, and that translates into the necessity of maintaining an arm's-length relationship with them. You have a responsibility to run an efficient, cost-effective office, and because the commissioners court is usually not generous with your budget, you can ill afford to have an employee detracting from that mission and whose actions negatively reflect on your office administration. In a nutshell, discipline means that you help that person get it right, or you get another employee.

**Always give the employee an opportunity to respond. It doesn't have to be anything formal, but if we've learned anything as prosecutors, it's that there are two sides to every question.**

*Continued from page 13*



# Newsworthy

## More members called to service

**Brad Clark**, formerly with the Brazos County DA's office;
**John Hubert**, ADA in Kingsville; and
**Doug O'Connell**, ADA and Special Assistant USA in Austin.

Please keep them in your thoughts and prayers. Continue to let us know of anyone in your offices called up to serve.

## *Lone Star Award nominations due May 25*

Nominations for the second Lone Star Award are due to TDCAA May 25. The Lone Star Award for Excellence in Prosecution is presented to the prosecutor who has best demonstrated excellence in the direct representation of the people of the State of Texas during the preceding 12 months.

Award presentation is at the Annual Criminal and Civil Law Update September 24–26 in Corpus Christi. For a faxed nomination form, call 512/474-2436. or visit Legal Resources on www.tdcaa.com (search for "Lone Star award"). Fax completed forms to the association at 512/478-4112.

## Annual Update info

Make plans to be in Corpus Christi September 24–26, for an annual meeting you do not want to miss! We have a great lineup of speakers and educational tracks for everyone. Our welcome reception is Wednesday evening at the Omni Bayfront with a dinner dance Thursday at the Ortiz Center on the waterfront. Golf, tennis, and domino tournaments are also planned. Make hotel reservations (800/THE-OMNI) now—they're going fast. Check tdcaa.com for more hotels and watch for the brochure and registration info coming soon.

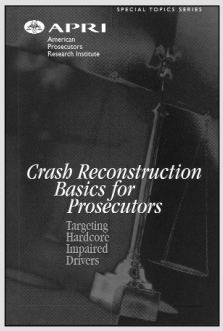
## *State Bar seminar scholarship available*

The Criminal Justice Council is pleased to announce the availability of a limited number of scholarships for prosecutors and criminal defense attorneys who wish to attend the State Bar of Texas 2002 Advanced Criminal Law Course. The course is in Dallas, July 28–31, 2003. Course tuition and reasonable personal expenses not to exceed $1,000 will be reimbursed. Applicants must be members of the Criminal Justice Section of the State Bar of Texas, not have attended the course within the past two years, and be financially unable to attend without scholarship assistance.

Fax written requests for applications to Jack Strickland at 817/338-1020. The deadline for applications is June 23; scholarship recipients will be notified on or before July 1, 2003. All nonscholarship attendees who are current members of the Criminal Law Section of the State Bar will receive a $25 tuition discount.

## Crash reconstruction booklet available online

If you didn't attend TDCAA's Intoxication Manslaughter School in Kerrville, you missed a fascinating presentation on crash reconstruction by John Kwasnoski, professor emeritus of forensic physics at Western New England College in Massachusetts. The good news is, his booklet entitled




*Crash Reconstruction Basics for Prosecutors: Targeting Hardcore Impaired Drivers* (at left), is available free online in Adobe PDF format. (To view it, you need Acrobat Reader, which is also available online for free.) The 40-page document is available at www.ndaa-apri.org/apri/programs/traffic/ntlc_home.html.

## *Board elections coming up at Annual*

Elections for 2004's TDCAA Board of Directors will occur at 5 p.m. Wednesday, September 24 at the Annual Criminal & Civil Law Update in Corpus Christi. The following slate of officers will appear on the ballot: Jaime Esparza of El Paso for Chairman of the Board; Bruce Isaacks of Denton for President; and Yolanda de León for President-Elect. In addition, directors for Regions 3 and 8 are up for election. Directors Steve Reis (Region 5) and Bob Gage (Region 6) are eligible to run for a full two-year term. To be eligible for one of these slots, you must be a TDCAA member and an elected or assistant prosecutor. Only elected prosecutors can vote.

VICTIM ASSISTANCE

*By Irene Briones-Odom*
Victim-Witness Coordinator at the District Attorney's Office in Williamson County

# Helping alien crime victims

Fear of deportation may make illegal aliens reluctant to report crimes and press charges. Here's an Austin-based program that offers these victim-witnesses peace of mind until justice is served.

It was my first time out with an investigator since I took on the job as victim-witness coordinator in Williamson County last October. While driving on a cold, rain-slick highway, Chris Herndon, our investigator, clued me in on the case we were investigating. It was attempted aggravated sexual assault and aggravated assault against a woman named Maria.* The investigator had called Maria's home number and left messages as best he could with someone who spoke only Spanish.

We arrived at the apartment and were greeted by a young man. I introduced the two of us and explained why we were there. As we shook our umbrellas at the door, he invited us in and said he was Maria's husband. Once in the apartment he introduced us to Maria's mother and younger siblings.

Chris explained both our jobs and asked (through my translation) where Maria was. We were told she was at work and would not be available until later that evening. As we asked the family members questions about the night of the attack, we felt hesitation in their answers. Chris and I gave them a statement form and asked them to think about the attack, write down events as they remembered them, and return the forms to us when complete. We gave them our cards and asked that Maria call us to schedule a meeting.

The following day Maria called and agreed to meet us after work. It was another gloomy rainy day so we picked her up and took her to an office where we could speak comfortably. She was 21, neatly dressed, and petite. We asked how she was doing and if her family had explained why we needed to see her. She bowed her head and answered yes—and meekly requested that future meetings happen outside her home. I asked if this was causing her trouble at home, and she said yes. As we had suspected, family members were pressuring her left and right to drop the charges. For one thing, the case was "bringing too much attention to the family"—a problem because they were illegal aliens, and they feared deportation back to Mexico. Additional pressure came from her husband's family: Maria's own brother-in-law was the perpetrator, and his family urged her not to pursue legal action against him.

I had dealt with victims who were illegal aliens while processing protective orders at my previous job, so I knew exactly what I could do for her. Close to losing our main victim-witness for fear of deportation, I quickly asked her direct questions, such as how she felt and what she wanted. In her low, quivering voice she told us how she wanted her attacker to pay for what he had done to her and her life. Those were beautiful words to my ears. We succeeded in making her feel comfortable and safe enough that she rehashed the nightmare of the crime with more clarity, so much so that we were sure we had enough to successfully present this case to a grand jury.

## PAPA

When we ended our interview, I asked Maria to come to my office so I could give her the name and the number of a wonderful resource, Political Asylum Project of Austin (PAPA).[1] PAPA began in 1987 as a joint project of Casa Marianella, the Friends Meeting of Austin, and the Austin Chapter of the

National Lawyers Guild to address the legal needs of Central American refugees fleeing their war-torn countries and arriving at the Texas border in the 1980s.

In October 2000, Congress recognized that victim cooperation and assistance are key to effective crime detection, investigation, and prosecution and passed the Victims of Trafficking and Violence Protection Act. It strengthened law enforcement's abilities to detect, investigate, and prosecute crimes against immigrants by amending certain sections of the Immigration and Nationality Act (INA) to create the U-visa. This document provides legal immigration status, including work authorization, to crime victims and certain family members, most of whom will be able to adjust to lawful permanent resident status after three years. The U-visa is available for up to 10,000 victims of certain crimes each year who cooperate in the investigation and prosecution of the perpetrators.

## Back to Maria

Sure enough, a week later our victim showed up at my office with her husband. I was elated to see her, but she seemed somber and nervous. I excused us from her husband's presence; once Chris and I had her alone, I asked her what was wrong and how she was feeling. She said she was there to write a statement to drop charges. I asked if she understood what she was asking for, then I explained what dropping charges meant.

She told us her family had pressured her into this action. I asked her to give me a chance to work with her a little: Did she still want to punish the man who attacked her? She quickly replied yes. She started crying, saying she and her family were all scared of deportation.

**When the victims are immigrants, their illegal immigration status in the United States can directly affect their ability to cooperate and assist in these efforts.**

Chris and I tried consoling her, then I reminded her about the PAPA program. I told her if she'd follow my instructions and fill out the PAPA paperwork, she would be relieved and satisfied that she'd done the right thing. Considering all the peripherals that Maria was dealing with, I prayed that she'd trust me enough to follow my directives. After wiping her tears and composing herself, she walked with us out of the office and told her husband she was done. She said it in a way so as to make him believe she had dropped the charges.

Weeks passed before I heard from Maria. Then in the mail came papers from PAPA referencing my Spanish-speaking victim. I was thrilled—she had followed through and applied for a U-visa! When I received this notice, I felt an accomplishment that I hope other coordinators will experience one day. I had gained her trust! I knew that she would become stronger, which is what we ultimately want for our victims.

I quickly gave the paperwork to the prosecuting attorney, whose signature was required to prove Maria's importance in investigating and prosecuting the attempted aggravated sexual assault case. The paperwork was completed and mailed out immediately. The attacker has since been indicted, and our victim is now very thankful, cooperative, and empowered with a new life.

I hope my experience will help others know the powerful resources we have at our fingertips. I encourage you to visit PAPA's web site at www.papaustin.org. It will open your world to new avenues.

* The victim's name has been changed.

## Endnote

1 In February 1990, PAPA became incorporated as an independent, nonprofit organization. Over the years, the services PAPA provides have expanded considerably to meet the growing legal needs of the immigrant community in Central Texas.

SENTENCING TIPS

*by John Bradley*
District Attorney in Georgetown

# How to get the defendant in the doghouse …

… and other creative conditions of supervision

Every probationer receives a written list of the basic conditions of supervision. As prosecutors often tell a jury, those conditions are essentially the same rules by which every law-abiding citizen must follow. But, nowadays there are likely to be a few more conditions of supervision that come from the creative minds of prosecutors and judges. This column will give you ideas on how to draft, recommend, and successfully defend such a condition.

In 1993, the Legislature amended the Code of Criminal Procedure to state that the judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.[1]

That simple statement officially authorized unique sentencing orders as a part of community supervision and encouraged prosecutors and judges to be imaginative in their recommendations. Creative conditions often arise from a case's unique facts and seek to address a defendant's peculiar criminal misconduct. In general, these creative orders are divided into prohibition and performance conditions.

## Prohibition

A prohibition condition prohibits a defendant from participating in a particular behavior.

For example, several years ago, a Houston judge prohibited a music teacher from playing the piano while on supervision for indecently touching two female students. When he imposed the condition, the judge explained, "You can't have a piano in your house. You can't play the piano. You stole that (pleasure) from these girls, so it is only right that you not have a piano."[8]

For a discussion of the legal issues surrounding prohibition conditions, see cases cited in the table *below*.

To avoid litigation on the imposition of a prohibition condition, a prosecutor should draft the wording of the condition to specify in detail the behavior to be avoided, any steps the defendant must take in avoiding the behavior (such as resignation from employment or surrender of a license), and provide a means of proof for showing the behavior is being avoided.

| Prohibition | Authority |
|---|---|
| No access to computer | *United States v. Paul*, 274 F.3d 155 (5th Cir. 2001) |
| Not run for political office or campaign for others | *United States v. Tonry,* 605 F.2d 144 (5th Cir. 1979) |
| Avoid race tracks and not place bets | *United States v. Bishop*, 537 F.2d 1184 (4th Cir. 1976) |
| No employment in law enforcement | *United States v. Brochway*, 769 F.2d 263 (5th Cir. 1985) |

## Performance

A performance condition seeks to require a defendant to perform or accomplish a particular task. Generally, the task is related in some way to the

misconduct and seeks to impress upon the defendant the misconduct's significance or the need for additional work to reform him.

For example, an Orange County prosecutor recently recommended that a defendant sleep in a doghouse outside his home for 30 consecutive nights. The defendant, who had used excessive force against his son and made him sleep in a doghouse, agreed to the condition to avoid spending 30 consecutive days in the county jail.[2] By sleeping in a doghouse, the defendant no doubt experienced the humiliation and discomfort that he had imposed upon his own son and perhaps gained more insight into why his own misconduct was wrong and should not be repeated. (See the photo on page 52.)

There have been several instances of this type of condition, including a Harris County judge who required a drive-by shooter to observe the autopsy of a gunshot victim. As the judge said at the time, "Young people do not realize the terrible wounds made by knives and guns. When you see someone opened up like that (at an autopsy), the brains removed, you realize that life has ended."[3]

A variation of this type of condition is one that requires the defendant to remind himself and others of his misconduct. For example, a Bexar County prosecutor recommended that a defendant, who had killed an off-duty police officer while driving drunk, carry a photo of the officer at all times in his wallet.[4] Likewise, a Harris County judge has required a defendant to stand at the scene of his crime with a sign notifying passing drivers about the dangers of drunk driving.[5]

Another more common task required by a creative condition is a public apology. Public acceptance of responsibility and the accompanying shame has long been recognized as a legitimate step in the reformation of a defendant. So it is a positive, restorative act for a wife-beater to apologize on the steps of city hall, as a Harris County judge once required.[6] And that was the motive for a Brazos County prosecutor recommending that a college student take out a full-page newspaper ad to apologize for secretly videotaping his sexual encounter with a girlfriend and sharing the tape with his fraternity brothers.

Finally, a growing motive for public acknowledgement of a crime is for the protection of the community. For example, a Nueces County judge amended the conditions of all sex offenders to require them to post a large sign outside their homes, stating: "DANGER: REGISTERED SEX OFFENDER LIVES HERE."[7] The purpose of such notice was to warn neighbors about the risk that one of the defendants might victimize another child.

For a discussion of the legal issues surrounding performance conditions, see the rules, statutes, opinion, and cases listed in the following table:

| Task | Authority |
|---|---|
| Place sign on door of home notifying neighbors of sex-offender status | Tex. Code Crim. Pro. art. 42.12 §(a)(23); Atty. Gen. Op. DM-437 (1997) |
| Consent to search home at any time | *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) |
| Submit to polygraph | *Ex parte Renfro*, 999 S.W..2d557 (tex.App.—Houston [14th Dist.] 1999, pet. refused) |
| Obtain nursing school diploma in one year | *Shipp v. State*, 985 S.W.2d 621 (Tex. App.—Texarkana 1999) |
| Resign from job | *United States v. Gerena*, 553 F.2d 723 (1st Cir. 1977) |
| Surrender peace officer license | 37 Tex. Admin. Code § 223.13(a)(2) |

To avoid litigation on the imposition of a performance condition, a prosecutor should draft the wording of the condition to specify in detail the task to be performed, establish a deadline for its performance, and provide a means of proof for showing the completion of the task. In addition, the task should have an obvious relationship to the defendant's particular misconduct and be a reasonable method for accomplishing the goal.

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*Continued from page 51*

## Challenges

Creative conditions of supervision can be controversial, particularly if a defendant believes they infringe on a constitutional right. For example, last year the U.S. Supreme Court decided whether a defendant's Fourth Amendment search and seizure rights were violated by a condition requiring him to submit to a warrantless search by police at any time. The Court concluded that the search was reasonable under the Fourth Amendment, given the defendant's reduced expectation of privacy and the presence of a reasonable suspicion that the defendant was involved in criminal activity.[9] However, the Court expressly left open the question of whether a search is legal absent any reasonable suspicion, and at least one lower court has already answered in the negative.[10]

In addition, the Legislature has narrowed judicial discretion regarding conditions in two areas: payment of money and a particular surgical procedure. As to money, the Legislature has written its laws to set out the specific circumstances in which a defendant may be ordered to pay money, excluding all financial conditions not expressly authorized by law.[11] As to surgery, in response to a controversial decision made by a Harris County judge (granting probation in exchange for castration), the Legislature has prohibited judges from requiring an orchiectomy (removal of a defendant's testicles) as a condition of supervision.[12]

By far, the simplest method for avoiding a challenge to a condition of supervision is to have the defendant agree to its imposition or waive any right to appeal.[13] Interestingly, according to the Court of Criminal Appeals, even questionable financial and surgical conditions may be imposed if the defendant does not object.[14]

## Conclusion

Creative conditions of supervision will continue to draw attention, simply because they try to balance the competing interests of protecting the public, restoring the victim, and punishing or rehabilitating the defendant. But by carefully tailoring conditions to the facts of particular cases and remaining sensitive to constitutional issues, prosecutors can avoid federal court and the legal doghouse.

## Endnotes

1 Tex. Code Crim. Pro. art. 42.12 § 11(a).

2 *Houston Chronicle*, AP, Section A, p. 36 (March 14, 2003).

3 *Houston Chronicle*, Jo Ann Zuniga, Section A, p. 37 (November 15, 1996)

4 *Houston Chronicle*, Section A, p. 22 (January 29, 2003); *San Antonio Express-News*, p. 1B (December 27, 1998).

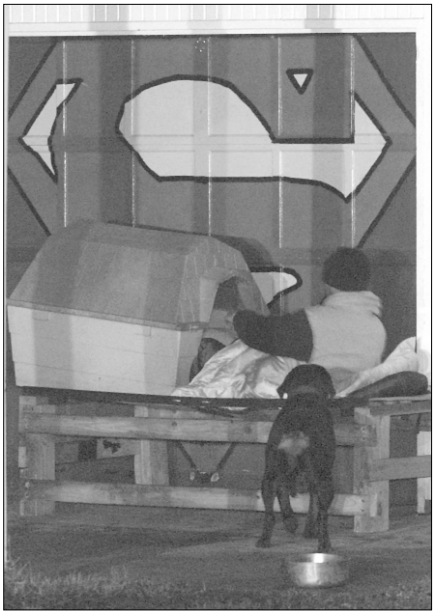
5 *Houston Chronicle*, Stefanie Asin, Section A, p. 33 (November 22, 1997).

6 *Houston Chronicle*, John Makeig, Section A, p. 11 (July 30, 1996).

7 *Banales v. Court of Appeals*, 93 S.W.3d 33 (Tex. Crim. App. 2002).

8 *Houston Chronicle*, Rad Sallee, Section A, p. 26 (May 20, 1994).

9 United States v. Knights, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001).



*Curtis Robin Sr., of Vidor settles in to spend his first of 30 consecutive nights in a doghouse in front of his garage. An Orange County judge ordered the punishment so Robin felt the same discomfort and humiliation as his son, whom he'd made to sleep in a doghouse. Photo by Jennifer Reynolds reprinted with permission from the* Beaumont Enterprise

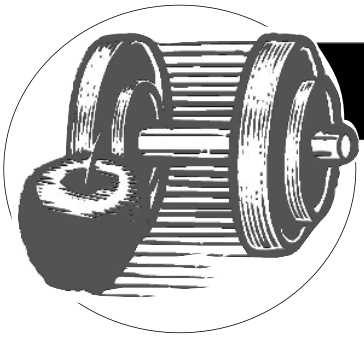
10 See *United States v. Crawford*, __ F.3d __ (9th Cir. 2003) (en banc) (holding that suspicionless search violated parolee's Fourth Amendment, even though condition of parole authorized the search).

11 Tex. Code Crim. Pro. art. 42.12 § 11(b); *Busby v. State*, 984 S.W.2d 627 (Tex. Crim. App. 1998); Atty. Gen. Op. 1993, No. DM-245.

12 Tex. Code Crim. Pro. art. 42.12 § 11(f); *Houston Chronicle*, Julie Mason, Section C, p. 1 (March 22, 1992).

13 *Speth v. State*, 6 S.W.3d 530 (Tex. Crim. App. 1999).

14 *Speth v. State*, 6 S.W.3d 530, n. 8 (Tex. Crim. App. 1999).



## DR. JOHN'S CORNER

*By Dr. John Krampitz*
UT Houston School of Public Health in Austin

# Diabetes: a national epidemic

## How you can lower your risk for Type II diabetes

Diabetes is the seventh leading cause of death in the United States. The disease kills more people each year than either AIDS or breast cancer. Almost 8 million Americans have diabetes and are not aware of it. This can be dangerous because irreparable damage may occur before a person is diagnosed with the disease. This damage can cause blindness, leg circulation problems leading to amputation, kidney failure, heart disease, and stroke. And frighteningly, Type II diabetes is increasing at epidemic levels among school-age children in the United States.

People with diabetes have trouble removing sugar from their blood and delivering it to the cells for fuel. Glucose or sugar is produced when we digest food. As we do, the pancreas secretes a hormone called insulin, which allows glucose to travel from the blood into the body's cells. In Type I diabetes, the pancreas actually stops making insulin. This specific type of diabetes is believed to be triggered by a genetic condition that causes a malfunction in the immune system. In Type II diabetes, the pancreas still makes insulin, but the insulin loses its effectiveness for some unknown reason. If a person's insulin loses its effectiveness, the pancreas responds by producing abnormally high levels of insulin in an effort to keep glucose levels normal. However, increased insulin levels raise blood pressure, cholesterol, and triglycerides. Untreated, diabetes has devastating, long-term effects.

The tragedy of Type II diabetes is the number of children and young adults who are now affected by the disease. It used to show up primarily in older adults. In fact, adult-onset diabetes was the common name for Type II before the disease started showing up in such large numbers of children. As we age, physical activity levels decrease, yet we continue to consume the same number of calories in our daily diets. The combination of low levels of physical activity and fat-rich, high-calorie meals triggers the physiological conditions that cause Type II diabetes.

There is good news, however. At least 75 percent of new cases of Type II diabetes can be prevented, and some experts think higher rates are possible in children. That's because 50–75 percent of new cases appear to be triggered by obesity, and 30–50 percent are associated with low levels of physical activity. In fact, being overweight increases your risk of diabetes more than tenfold. In one study, women and men cut their risk by 30 percent simply by losing 10 pounds and keeping the weight off. Those who exercise at least one to three times a week have a 30–40-percent lower risk than those who exercise less. Furthermore, you can increase your amount of exercise with any kind of physical activity: bowling, dancing, gardening, walking, or taking the stairs instead of the elevator. Lastly, high-fiber diets (fruits, vegetables, beans, and whole grains) are associated with a lower risk of diabetes, not to mention cardiovascular disease.

While it is certainly important that adults follow good health practices, it's vitally important that parents encourage their children to be active and teach them how to make healthy food choices. Physical activity levels and dietary habits track from childhood to the adult years. A kid who is sedentary and consumes a diet high in fats will likely become an obese adult with chronic adult diseases such as Type II diabetes, cardiovascular disease, and osteoporosis. In fact, most adult diseases have their beginnings in childhood. Yet most can be prevented by following two simple rules: Be physically active on a daily basis and eat healthy foods.

# KEY PERSONNEL SECTION

*By April Bridges, CLA*
Key Personnel Board, Region 6 Representative,
Anderson County Criminal District Attorney's Office

# Have pride in what you do

## You have control over the attitude you bring to your job. Does your attitude make your job easier—or harder?

It is that time of the year again. The courts are in full swing and the office is in chaos with everyone going in different directions while still demanding efficient work from the office staff. Just when you think the world is ending and you are ready to pull every hair out of your head and scream at the top of your lungs, someone else comes into your office and asks you to manage another task on top of your already packed workload. We have all been there, and quite frankly, it will never change. This article is to inspire those legal assistants who are new and haven't been "baptized" yet and those who may be burned out and ready to quit.

I have been a legal assistant for five years now, three of those years in a criminal district attorney's office, and I have seen many changes in the law. I have come to understand how important the legal assistant is to the legal system as a whole. The demands made on all people working in the legal system are enormous. I believe that legal assistants and others in the office are suffering from more burnout now than ever before. It is no secret that working in a prosecutor's office is one of the most stressful, depressing and demanding jobs. It can be overwhelming. I have a phrase that I try to live by everyday: "Think about what you are doing and understand why you are doing it." I try to apply this phrase in all areas of my work, and when I do that, I am able to keep what I am doing in perspective. It helps to give meaning and purpose to my work.

Do you know anyone who doesn't want to feel as though their work is making a difference? Too many people in general and too many legal assistants in particular don't feel appreciated. William James, the great psychologist, said, "The deepest principle in human nature is the craving to be appreciated." The legal assistant deserves to be appreciated every day. Have you ever heard of someone complaining that they get too much appreciation for what they do? I don't think so, and unfortunately, the reverse is often true. Anyone working in a prosecutor's office knows the world of criminal law is not always a friendly, happy environment. The stress takes its toll on working relationships. It takes a keen awareness of this to create an atmosphere of love and appreciation of each other to combat the stressful working environment. There needs to be cooperation and a healthy, caring attitude in all relationships. We spend far too much of our time at work not to be concerned about the quality of those hours and the relationships we have.

Our own attitudes in the workplace are also important. What is your attitude? Are you willing to look at your own behavior? Do you accept tasks with a smile? Do you respond with a "No problem!" when asked to do something, or do you complain?

A person's attitude will make or break an office, a church, or a home. The remarkable thing is we have a choice every day regarding the attitude we will embrace for that day. We cannot change our past; we cannot change the

fact that people will act in a certain way. We cannot change the inevitable. The only thing we can do is play on the one thing we have, and that is our attitude. I am convinced that life is 10 percent what happens to me and 90percent how I react to it. And so it is with you...we are in charge of our "Attitudes." Every time someone comes to me complaining, I can choose to accept their complaining or I can point out the positive side of life. Life is all about choices. When you cut away all the junk, every situation is a choice. You choose how you react to situations. You choose how people affect your mood. You choose to be in a good mood or bad mood. The bottom line is that it's your choice. With this being said, your attitude is more important than you realize.

You get what you tolerate both as a lawyer and as a legal assistant. The work is tremendously rewarding. We feel good when we help people, and it makes our work worthwhile. If you are just another legal assistant, maybe you aren't happy. Is it you?

Look inside first and see if you may be the cause of the problem. Then determine what can be done to change the situation. If you don't know, you will just go on feeling unfulfilled in your work and maybe in your life. You owe yourself the effort. You deserve to be happy!

My experience is that work must be rewarding and fulfilling; otherwise it is just work. I don't want to be just another legal assistant. I want to be a legal assistant who makes a difference in people's lives, and I couldn't work with others who don't share the same attitude. The legal assistant in a prosecutor's office is in a wonderful position to make a difference if allowed and willing to do so. The point is that making a difference doesn't take an overwhelming effort but can be accomplished one victim at a time, one case at a time.

Working in a prosecutor's office is very difficult yet rewarding work. The demands are great but so are the returns. Hopefully you feel the same about your work as I do. If not, you need to ask yourself why not and decide what you are going to do about it. Don't be afraid to be an idealist. Don't let people tell you that you are just a dreamer. You aren't just dreaming if you believe a person's work was meant to be fun and rewarding. Don't tolerate insipid negativity. Have the courage to deal with problems you can solve with love and respect. You deserve to be working in a happy and nourishing environment, not a war zone.

Be proud to be a legal assistant. Remember that you are a very important part of a noble profession.

*Continued from page 9*

# Solved: five 15-year-old serial murders—thanks to an open mind and cracker crumbs

victims, who was a sorority sister of Little's wife.

"John just did a phenomenal job. I can't say enough good things about the quality and manner of the work he performed," Macha says.

Little says the key to cracking the case was to "keep an open mind about everything. It became apparent that in each of these cases, [law enforcement] locked in on somebody and didn't look in other directions. Granted, there were some good reasons to lock in on these other suspects.

"But in these cold cases, sometimes it helps to bring in someone who doesn't have preconceived notions, who will review the cases without talking to anybody about them at firstsays."

## Other solved cases

The Texas Rangers' year-old cold case unit, given discretionary statewide investigatory jurisdiction via a statute passed in 2001, has recently cleared four homicides, including a 1992 murder of a 15-year-old Seguin girl[2] and the 1988 murder of a woman near Copperas Cove.[3]

In the Seguin case, defendant Guadalupe Chino Sandoval had been a suspect from the beginning, but police were never able to build a case strong enough against him until advances in DNA testing methods showed the victim's blood and the defendant's mucous on a blue bandana found near the murder scene.

In the Copperas Cove case, Coryell County prosecutors indicted John Swart for the murder of his wife after authorities initially lacked enough evidence to arrest anyone.

Rangers told the Austin American-Statesman that they agree to take on cases that meet criteria based on solvability, including whether any suspects were identified at the time of the crime and whether any witnesses remain available.

*Editor's notes: For more information about the Wardrip case, visit A&E TV's website at www.aetv.com/tv/shows/coldcasefiles/ (episode 16). DPS' Unsolved Crimes Investigation Team invites law enforcement agencies to submit cold case files for possible investigation. Call 210/832-9447 for more information.*

## Endnotes

1 *Wardrip v. State*, 56 S.W.3d 588 (Tex. Crim. App. 2001).

2 "Seguin: DNA Links Killer to 1992 Murder," Associated Press, March 18, 2003.

3 "Texas Rangers are on the (cold) case," by Tony Plohetski, *Austin American-Statesman*, April 14, 2003, p. B1.

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