

THE DEFENDER

2022
VOLUME 2

HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION



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A WORD FROM YOUR PRESIDENT

Jed Silverman



It is such a humbling and exciting thing to be President of HCCLA. I think back to the first day I became a lawyer—and that is the only thing that feels remotely close to becoming President of such a great organization. We are all excited to be back to our semi-normal courthouse lives. Seeing old friends and watching my brothers and sisters kicking major ass warms my heart.

The world feels like such an odd place today. I remember the days when jury panels 100% believed that whatever a police officer said was the holy gospel. Perhaps the tide has turned as a result of sacrificial lambs like George Floyd. Before the advent of police cameras and body cams, we in the defense bar all knew about the injustices taking place on our streets at the hands of the police. Now, that reality has been shown to the eyes of the world.

Whether liberal, conservative or anything else, as a criminal defense lawyer, the ultimate question is how do we use the energy in today's world to raise that elusive and so important reasonable doubt? I digress. These are the things that I think about and encourage all of you to reflect on.

Collectively, we have many battles to fight. With the new judiciary and federal lawsuit, we got to experience bond reform, and then like whiplash, saw our clients getting their bonds revoked and raised. For those judges, it seems the fear of a news camera overshadows a person's constitutional right to be presumed innocent and given a reasonable bond.

Fair judges who have the audacity to question the merit of the State's case are being made an example of and literally run out of office. I take issue with this, and I know the membership feels the same. When I started practicing 23 years ago, there was a pipeline from the DA's office to the bench.

The defense bar was belittled for having the nerve to call out an unfair judge. Today, when the State puts their sights on a judge they don't like, that judge is systematically removed. This is not justice. Friends, we swear an oath to stand up to injustice. This is not a fight where we should stand idly by as mere spectators. Injustice anywhere is injustice everywhere. As my daughter Ella tells me each day, be brave.

These are some of the big issues that concern me, and I hope concern all of you. As your President, I will fight these injustices wherever I find them and anything else that threatens freedom.

*Thank You and
Let Freedom Ring*

HCCLA NEWS ROUNDUP

WELCOME NEW HCCLA MEMBERS

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- Jason Goodwin
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- Gabriela Salcedo, *Mary E. Conn & Associates*
- Kendall Seymour, *The Oggero Law Firm*
- Stephanie Willis, *Mary E. Conn & Associates*



READING THE DECLARATION OF INDEPENDENCE:

PITCHFORK STYLE



Article by Allison Mathis, HCCLA Vice President
Photos by Bob Rosenberg

This year, for the thirteenth year in a row, HCCLA members gathered in honor of the Fourth of July to read the Declaration of Independence. I have participated before, for different reasons in different years: when I was younger and hungry for connection with our community, I dressed in a suit and pretended to be at the courthouse anyway for business. I wasn't, though. I didn't have any business. After that, I clomped indelicately on my too-big thrift-store high heels to Char Bar in the wet heat.

Later, when I practiced in New Mexico, I helped organize a reading on the steps of the New Mexico courthouses. My chief there, Matt, was a veteran, and so were several of our lawyers, a paralegal, and



THANK YOU TO OUR 2022 READERS!

Brian Ayson, Scott Bernstein, Porscha Brown, Alex Bunin, Shelby Burns, Beth Cavanaugh, Mary Conn, Neal Davis III, Nicole Hochglaube, Todd Dupont, Danny Easterling, Kate Ferrell, Robert Fickman (Event Founder/Organizer), Maggie Kiely, Edward Mallett, Allison Mathis, Troy McKinney, Ashley Medlin, Stephanie Morales, Nathaniel Munier, Murray Newman, Smith Newman, Robert Pelton, Eric Peres, Judge Bob Rosenberg, Cory Roth, Grant Scheiner, Jed Silverman (HCCLA President), Ashley Smith, Wade Smith, Paul St. John, Tom Zakes

an investigator. As we stood together reading, our tiny, beleaguered office, it felt hugely important and sacred. The prosecutors and judges gathered and listened to us respectfully, and the local media took pictures and ran them on the front page the next day. When I came back to Harris County a few years ago, I read again, this time invigorated by my return to Harris County and my experiences practicing before judges who, in spite of presiding over one of the most populous and cosmopolitan places in the world, didn't show up for hours without explanation, didn't read motions or briefs, didn't know the law, and didn't care to. That was before Covid shut everything down and scattered our readings onto Zoom. This year, we came back together in person.

HCCLA NEWS ROUNDUP



I wasn't sure I wanted to participate, though. Not this year. I didn't want to celebrate our nation's government at all this July. The Supreme Court had started handing out a bunch of garbage opinions that I won't go into here because I'm still so stung and furious. You know what I'm talking about. I felt, for maybe the first time in my life of small defiances, that the right side was not going to win in the end. That the rule of law is dead, and that the world is careening toward an end that we've refused to stop. The bread and circuses, the cheap luxuries and glowing rectangles of modern life have distracted us so much and made us so comfortable, like that ridiculous frog in that ridiculous pot of warming water, that there will be no revolution. Hope, I felt, was gone.

But I suppose, dear friends, that's why we do this thing anyway. That's why this is still important. I've read enough Robb Fickman Press-Releases to know that this event began and remains an exercise in freedom from tyrannical rule—the defense bar's abject refusal to accept sanctimonious prosecutors and lawless judges, and not just the ones in the CJC.

On the day of our reading, it was raining outside. We gathered under the awning of the Family Law Center, the scattered handful of us who managed to be there. Ashley Smith, Wade Smith's new wife, wearing a beautiful dress and shaking very slightly, belted out one of the most beautiful versions of "The Star-Spangled Banner" that I have ever heard. I looked over at Christina Appelt, sitting off to the side, as she always does, the secret anchor of our group, decked out in Fourth of July finery, including festive glittery red, white and blue sunglasses. We were all silent as Ashley squeezed the last notes from that difficult song, and I knew that I needed to be here, with these people, right now.

The Declaration is a historical document. There are parts in it that have not stood the test of time. The point, to me, I guess, is that we have grown and moved as a nation to the point that we can see the problems with that document—that we collectively know that so much of it is wrong, and that we can and should work for change. I think of the crowded rooms at those conventions long ago, full of sweating old white guys who probably smelled like horse crap and worse, who never



brushed their teeth and thought most vegetables were poisonous. Their refusal to acknowledge the personhood of the other people they lived with—Native Americans, African Americans, women, and the proletariat—are things we can't forgive them for. But we can look back at a time when they were impossibly overwhelmed by the organization of the British empire, when the best they had was a scattered conspiracy and a few compelling speakers, and how they managed to turn that into a true revolution. Pitchfork style.

In Norse mythology, the end of the world will be brought about in part by the release of the giant wolf, Fenrir, who at this very second, is being held down by magical chains no wider than a human hair. As he is restrained, Fenrir growls and fights toward his eventual escape, slobbering and foaming at the mouth. The Norse tell us that the saliva that drips from those massive, waiting jaws is called "hope." Our coming together and reading that document, that record of a revolution, even though we are in many ways chained and restrained by the authoritarian government, is the hope that I so badly need.

That day, I declared my independence from King George, from a lack of representation, from the dour old men looking down at me from their frames on the courthouse walls, from Kim Ogg's cruelty and political grasping, from corrupt and unethical judges, from this sinister government. Now more than ever, friends, we are called to stand together. Join me in carrying this tiny flicker of hope into the dark future.

Allison Mathis is the Supervising Attorney of Neighborhood Defender Services' Houston Office. She is also a book snob, a wine equal-opportunist, a good cook and a bad singer. Prior to her current position, she was a post-conviction attorney at the Harris County Public Defender's Office, a trial attorney in Aztec, New Mexico (where she lived in a yurt! Yes, a yurt!), Tribal Advocate for the Swinomish Indian Tribal Community in LaConner, Washington, Chief Public Defender of the Republic of Palau, and as a superlative late-night diner waitress. For the past five years, she has served as agony aunt to both sides of the bar writing the "Ask Allison" column for the American Bar Association's Criminal Justice Magazine. She lives in Houston with her husband, Mike, her kids, John and Julia, and their fish, Orange Julia and Lizard.

HCCLA BANQUET

THE DEFENSE NEVER RESTS

Celebrating 52 Years of Justice

BY CHRISTINA APPELT, EXECUTIVE DIRECTOR

HCCLA was all set to celebrate its 50th Anniversary in the spring of 2020, but Covid-19 had other plans. As the rest of the world shut down, you all stayed the course. Criminal defense lawyers are resilient that way. You can adapt to any new circumstance, however unusual or challenging. Many of you converted your homes into offices, homeschooled your children, masked up in an unfinished courthouse (or a stadium pretending to be a courthouse), while Zooming in and out of jails and courts. The defense NEVER rests!

Some remarkable victories were achieved during these trying times. By Spring 2022, it was time to celebrate them. On May 12, 2022, HCCLA held its 52nd Anniversary Annual Banquet at The Ballroom at Bayou Place in the heart of downtown Houston. Nearly 400 attended, including many judges and other elected officials. Honoring three years of award recipients (2020, 2021, 2022) in one night took some thoughtful planning, but it was all worth it. The heartfelt speeches and inspirational courtroom war stories made for a special evening.

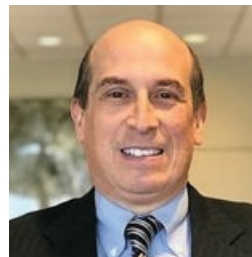
The defense never rests, especially in Harris County. HCCLA proudly boasts some of the best lawyers in the nation. Congratulations to each and every award winner!

MEMBER OF THE YEAR

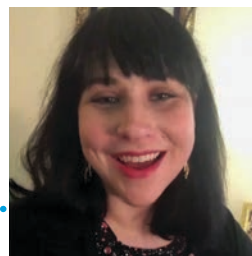


**MURRAY
NEWMAN**
2022

PRESIDENT'S AWARDS



**DAVID
ADLER**
2022



**ALLISON
MATHIS**
2022

LAWYERS OF THE YEAR

ROBERT K. LOPER 2020



BRADLEY LOPER 2020



JON STEPHENSON 2020



WENDELL ODOM 2020



NEAL DAVIS III 2020



BRIAN HOBSON 2020



BRENT MAYR 2021



MANDY MILLER 2021



J. JULIO VELA 2022



RICHARD "RACEHORSE" HAYNES

LIFETIME ACHIEVEMENT



HON. CRAIG WASHINGTON 2020





WENDELL ODOM, JR. 2020



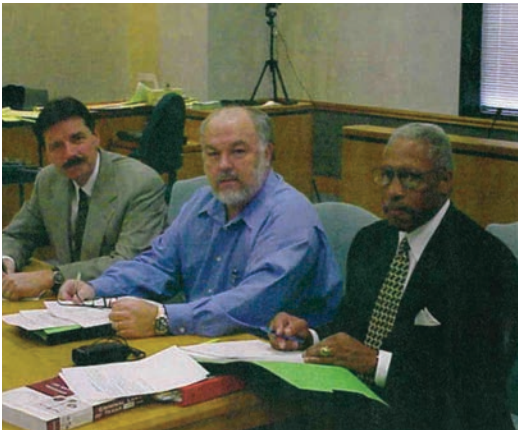
PAUL SCHIFFER 2020



RICHARD “RACEHORSE” HAYNES

LIFETIME ACHIEVEMENT

continued



WAYNE HILL 2021





WINDI AKINS PASTORINI 2021



GUS SAPER 2021



PHOTOS BY BOB ROSENBERG





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By Dean Watts

THE BIGGEST MISTAKES HOUSTON LAWYERS MAKE WHEN PRACTICING IN EAST TEXAS

As a criminal defense lawyer practicing in Nacogdoches for the last 25 years, it is always interesting to have Houston lawyers travel up Highway 59 to defend their citizen accused. However, the practice of criminal defense down there is worlds away from the practice up here, and I've noticed Houston lawyers make three big mistakes when they practice their trade in rural locations.



Dressing as if you walked out of a fashion magazine. No doubt, it's important to look your best. But you stick out like a sore thumb wearing a tailormade suit with matching socks and shiny shoes. I know some lawyers in rural areas who haven't bought a suit in decades (I'll take the 5th on this one). You don't need to dress like a slob, but khakis and a blue blazer (or some derivation thereof) are standard courtroom attire in most rural locations. I've seen ordinarily reasonable prosecutors dig in their heels against someone they think is trying to intimidate them visually. So it's a good idea to tone it just a bit when you step into rural courtrooms.

Talking to prosecutors like they are fools. This is probably the worst mistake you can make. Although a big firm may not have courted your small-town prosecutor right out of law school, they are usually pretty competent. If they aren't, they don't last long. The locals may remember prosecutorial mistakes in rural areas for decades, so if a prosecutor has been there a while, they probably know what they're doing, or they wouldn't survive. A case that might ordinarily be dismissed because of a bad stop may need a few more settings so the local prosecutor can casually "lookup" all that complicated law you arrogantly thrust upon them. Local prosecutors drive to the local courthouse every day. Houston lawyers have to drive for hours to get here. Food for thought on the long drive home!



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Sister Helen Prejean,

ACTIVIST & AUTHOR OF
DEAD MAN WALKING



Assuming the Prosecutor and the Judge are in cahoots. There is a mistaken belief that everyone who practices in rural areas is all "in it together." You probably heard this from the Defendant who just hired because they want an outside lawyer who is not part of the local system. However, this may or may not be accurate. While judges and prosecutors usually get along to some degree in rural areas, I've noticed that most often, Judges and DAs have one or more conflicting agendas. For example, the DA may be tough on crime, but the Judge is getting an earful from the Sheriff about the overcrowded jail. It's never a bad idea to give local council a call to determine the political currents swirling around the jurisdiction to which you're traveling. Like the wind, they are constantly changing.

I hope this will help you as a Houston practitioner the next time you come up 59 to practice in East Texas. The bottom line is, treat locals with respect, and it will be reciprocated.

Just don't get too comfortable here. We have all the competition we need already!



Dean Watts has been practicing criminal law in Nacogdoches for 25 years. He is a graduate of George Washington University, SMU law school, and the National Criminal Defense College. He has been Board Certified in Criminal Law since 2004 and has been selected as a Texas Super Lawyer for the past two years.

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THE UPDATED PERFORMANCE GUIDELINES IN CRIMINAL CASES: CONTINUING PROGRESS FOR TEXAS CRIMINAL JUSTICE

WRITTEN BY JANI MASELLI WOOD, ANDREA MARSH, AND JEFF BLACKBURN

The right to counsel is the most basic guarantee of our criminal justice system. Without a good lawyer, innocent citizens may be convicted of crimes they did not commit, people may remain in jail unnecessarily before they are even convicted of a crime, and people who need another chance may never get one.

Performance Guidelines

The State Bar of Texas Board of Directors adopted the Performance Guidelines for Non-Capital Criminal Defense Representation in January 2011. The guidelines were drafted by the State Bar Legal Services to the Poor in Criminal Matters Committee to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of individuals accused of crime.

In 2021, the committee updated the guidelines to reflect changes in the law over the past decade in areas including preservation of error and collateral consequences (such as immigration consequences and court costs). The board of directors approved the updated guidelines in September 2021. A draft version of the updated guidelines was circulated to the State Bar of Texas Criminal Justice Section and the Texas Criminal Defense Lawyers Association before the bar approved them.

The guidelines are a step-by-step guide to what lawyers should do in criminal cases. They remind attorneys that certain actions, like investigating facts before trial, should be considered in every case regardless of funding issues or local practice. At the same time, they remind judges and county officials that lawyers have work to do and steps to take that have to be paid for no matter how constrained counties feel about their budgets.

The Guidelines' Structure

The guidelines provide a road map of potential courses of action and best practices for every stage of a state criminal proceeding from arrest through direct appeal.

Potential Application of the Guidelines

The guidelines can be applied in many ways by both defense lawyers and county officials who want to improve public defense services in their jurisdiction.

Defense attorneys can use the guidelines:

- As a personal checklist that is useful for attorneys at every level of experience;
- As a tool to assist in the training of new criminal defense attorneys;
- As a tool for self-evaluation by defenders;
- As an objective tool for the internal evaluation of attorneys in a public defender's office or managed assigned counsel system;

- As a tool for advocating for additional resources for criminal defendants and/or defender offices; and
- As persuasive authority for arguing that a client did not receive effective assistance of counsel at an earlier stage of the proceedings.

Judges and local officials can use the guidelines:

- As a tool for improving attorney performance, by requiring attorneys to be familiar with and follow the guidelines as a condition for receiving court appointments; and
- As a tool judicial review panels can use to screen attorneys who apply to receive court appointments, supplementing the experience-based attorney qualifications in county indigent defense plans.¹

Conclusion

The updated Performance Guidelines for Non-Capital Criminal Defense Representation reflect changes in the law. Their use will help ensure that people accused of crimes will receive not just a lawyer, but a lawyer who is ready and able to do the job they should do under the law. **TBJ**

NOTES

1. The Fair Defense Act, or FDA, requires counties to adopt objective qualifications that attorneys must meet in order to be eligible to receive court appointments but recognizes that these experience-based qualifications alone are insufficient to guarantee high-quality representation. Accordingly, the FDA specifies that attorneys who meet the qualifications also must be approved by a majority of the judges in their jurisdiction. Tex. Code Crim. Proc. art. 26.04(d); See, e.g., *Davis v. Tarrant County*, 565 F.3d 214, 217–18 (5th Cir. 2009) (suit by criminal defense attorney alleging his application for inclusion on felony court appointment wheel was denied because he did not have good personal relationships with judges; dismissed on immunity grounds).



JANI MASELLI WOOD

chairs the State Bar of Texas Legal Services to the Poor in Criminal Matters Committee. She is chief of the Harris County Public Defender's Office Appellate Division.



ANDREA MARSH

is vice chair of the Legal Services to the Poor in Criminal Matters Committee. She is the director of the Mithoff Program at the University of Texas School of Law and the founding director of the Texas Fair Defense Project.



JEFF BLACKBURN

was a previous chair of the Legal Services to the Poor in Criminal Matters Committee. He is a criminal defense and civil rights lawyer and co-founder of the Innocence Project of Texas.



HCCLA ETHICS FROM THE EDITOR

BY ROBERT PELTON

In June 2011, Jim Skelton and I were talking about the State Bar helpline. Several people were concerned that criminal lawyers needed a place for help. Jim said why don't you create your own helpline. I got the ok from HCCLA and TCDLA and created an Ethics hotline for criminal defense lawyers. I also agreed to write a monthly article for the Voice and Defender. Now I have over 90 published articles. I picked some of the smartest lawyers in the state to be on my committee. Most of the original members are still on board. We get many calls from lawyers needing help.

In a couple of cases, we prevented a lawyer from suicide. One lawyer called and said he had a computer talking to him, and his guns were talking. I told him I could solve that problem like Ghost Busters. I got an investigator to go get the guns and talking computer. The next day I told him I put a West Texas spell on the guns and computer, and they were fixed. He told me to keep the computer and guns. As he insisted, he signed all the haunted guns and computer over to me. Our spell worked and they have not talked since.

Since 2011, our ethics group has been involved in many positive things. We are now trying to get a rule passed to help free wrongfully convicted citizens. The letter below is our position on the matter. Many times, some prosecutors hide evidence and wrongful convictions happen.

Re: Proposed Changes to Texas Disciplinary Rule
of Professional Conduct 3.09

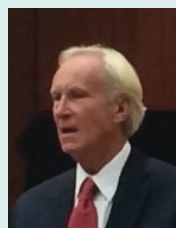
Dear Mr. Kinard,

I am writing to you on behalf of the Texas Criminal Defense Lawyers Association, the largest state association for criminal defense attorneys in the nation with over 3,200 members. Our organization has been invited to provide input on the proposed change to Texas Disciplinary Rule of Professional Conduct 3.09. I asked our Ethics Committee, which routinely reviews ethical issues for our association, to review the proposed change and assist in this undertaking. TCDLA believes the "more likely than not" standard should be used rather than "clear and convincing evidence" standard. As other practitioners have expressed, wrongful convictions of innocent individuals continue to be a significant problem in Texas. While multiple individuals have successfully been exonerated over the past several years, members of our association and others continue to work to help numerous individuals who have been wrongfully incarcerated for many years. Our association views this change to Rule 3.09 as a vital step in assisting this process. While prosecutors are obligated to disclose exculpatory evidence, there has never been any clear guidance regarding their obligations after they have obtained a conviction. More importantly, while rules and statutes discuss their duties and obligations generally, there has never been specific directives as to what their ethical obligations are upon learning of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense. This proposed change correctly addresses both concerns by requiring prosecutors not only to disclose the exculpatory evidence in a specific manner but to take affirmative steps to correct the potential miscarriage of justice. This is an honorable task and one that we are pleased to support.

Sincerely,

Heather Barbieri, TCDLA President-Elect

cc: Robert Pelton, Chairman, Ethics Committee



Robert O. Pelton is a Criminal Defense Lawyer with offices in Houston and Abilene, Texas. Mr. Pelton has been named "Top Lawyer for the People" and one of Marvin Zinder's "Marvin's Angels" by H-Texas Magazine (2007). He was the personal lawyer for Marvin Zindler for 31 years. He was also rated by Super Lawyers (2014-22). Mr. Pelton

is a Past President of HCCLA (1985-86); Founder and Chairman of HCCLA and TCDLA Ethics Committees (since 2011); a recipient of the Jim Bowmer Award for Professionalism from the Texas Bar College (2012); HCCLA Richard "Racehorse" Haynes Lifetime Achievement Award (2016); TCDLA President's Awards (2011-2022); and received a United States Congress Proclamation from Congressman Ted Poe for his Zeal and Tenacious Defense of his Clients (2016); and recently the President's Award from the State Bar of Texas, the first time this honor has been awarded to a Criminal Defense Attorney (2021).

strategy:

FORCE DISPARITY

by Joseph W. Varela

The indictment reads, “The State of Texas vs. Your Client.” The State of Texas: 30 million people; an area larger than any Western European nation; the world’s ninth economy. The Harris County District Attorney’s Office is one of the largest such offices in the nation. It has a budget of \$65 million. It employs 820 people, including lawyers, investigators, professionals, support personnel.² It has divisions that specialize in prosecuting certain crimes. You are most likely a solo practitioner or a partner in a very small firm.

When it became clear that Russia would invade Ukraine, much was made in the press about the disparity of forces between the two nations. Graphics such as Figure 1 were widely circulated.

.....

Whoever has forces
where the enemy does
not give them sufficient
employment, whoever has
part of his forces
on the march

—
that is, allows
them to lie dead

—
while the enemy’s
are fighting, he is
a bad manager
of his forces.

CARL VON
CLAUSEWITZ¹

.....

RUSSIA		UKRAINE
845,000	MILITARY FORCE	130,000
\$78 billion	MILITARY BUDGET	\$1.6 billion
27,607	ARMORED VEHICLES	4,460
3,082	WARPLANES	27
973	ATTACK HELICOPTERS	4
289	WARSHIPS	21
63	SUBMARINES	1

SOURCE: GLOBAL FIREPOWER (GFP)

FIG. 1: AN EXAMPLE OF A PRE-WAR COMPARISON

Russia, we had been told, was a peer or near-peer force measured against the USA and NATO. It was believed that Russian President Vladimir Putin had caused the military to upgrade its capabilities and could credibly hold it out as the world's second armed force.

To Western pundits and politicians, it appeared to be no contest.³ How, they said, could Ukraine hope to stand up to forces such as these? Prognosticators predicted that Ukraine would collapse in days or weeks. Russia displayed confidence at all scales. There was general mobilization neither of the military nor of the economy. Many infantrymen were issued only a few days' supply of food and ammunition. Some soldiers packed their dress uniforms. Western opinion held that at best, the Ukrainians would continue a popular resistance after a swift strategic defeat. The prospects for Ukrainian sovereignty seemed dismal.⁴

As the world now knows, no such thing occurred. Russia invaded Ukraine on February 24 with about 190,000 men organized around some 120 Battalion Tactical Groups, i.e., air-land maneuver units. These were supported by elements of the Russian air force and navy. Within hours, these thrusts were in trouble.

Russia first tried a lightning strike in the north, using Putin's vaunted VDV airborne elite soldiers. The plan appeared to be to seize Hostomel airfield near Kyiv, and bring in an invasion force by air. The capital captured, and the government deposed, Putin would be in a position to dictate terms. This and other special-operations attacks failed spectacularly. At Hostomel the Ukrainians were waiting; they immediately counterattacked and inflicted heavy losses. Russian air support failed to appear and follow-on ground forces were interdicted. The surviving VDV were last seen running into the woods.

Putin had commissioned Chechen Prime Minister Ramzan Kadyrov to supply mercenaries. At extravagant cost, an armored column of these battle-hardened "Kadyrovites" was equipped with the latest Russian weapons and sent as an independent striking force to seize

the government in Kyiv. They brought with them their reputation for ruthlessness and brutality. Two days into the war, this column was ambushed by Ukrainian light infantry using man-portable rockets and drones. The Chechen column was obliterated. Fifty-six tanks were lost, along with hundreds of Kadyrov's elite mercenaries including their commanding general.

Then the Russians assembled a forty-mile-long convoy and sent it against Kyiv. It included tanks, armored personnel carriers, supply trucks, mobile anti-aircraft, and motorized infantry. Surely this juggernaut could accomplish what the lighter forces did not? Ukraine and the West anxiously tracked its ponderous descent on the capital. The forty-mile convoy never got there. It was stopped by thirty men. Thirty men mounted on four-wheel motorcycles and armed with portable weapons went out at night and shot up the leading vehicles. The road-bound convoy now immobilized, Ukrainian forces harassed it with all available armaments and after taking heavy losses, it broke up and scattered. By about March 10 the Russian offensive in the Kyiv-Kharkiv region was stopped, and forces in the north later withdrew under fire and were re-positioned in the east.

There, Russia's air force having failed to secure air superiority, the army fell back on its age-old tactics of indiscriminate heavy shelling and slow advance. As Western weapons such as HIMARS guided rockets and guided artillery came on line, Russia lost almost all of its maneuver capability. Russian gains per day were measured in hundreds of meters. As this is written, the war is consuming Russian men and equipment voraciously. Estimates of Russian losses vary wildly but reasonable Western appraisals claim 50,000 casualties and perhaps 5000 pieces of equipment lost.

It appears that Russia has almost run out of combat power and is facing a Ukrainian counteroffensive. Russia is now recruiting men up to age 60 and is hiring convicts to replenish its losses. To be sure, Ukraine has suffered appalling losses itself, and the outcome of the war is still in doubt, but Russia has already been defeated on the strategic level.⁵

How did this happen? How did the world's second army fail against a manifestly smaller opponent? How did Ukraine surprise the world, if not themselves?

To answer this question, I will argue that simple comparisons of force disparity between Russia and Ukraine such as Figure 1 offer a misleading picture.

This argument has implications for the defense lawyer.⁶

Let's first examine the Russian military. Like its Soviet predecessor, it is designed to compete with the USA and NATO anywhere in the world. It features a large land army equipped with all manner of weapons and vehicles. There is a blue-water navy of expeditionary surface ships and nuclear-powered submarines. The air force includes strategic bombers, fighting aircraft, and a large helicopter fleet. Russia has by far the world's largest collection of strategic and battlefield nuclear weapons, which are extremely expensive to build and maintain. Russia can also boast of costly advanced weapons such as T-14 tanks and hypersonic missiles. The Russian military is in essence a shoestring copy of the US military.⁷

And here's the point: The disparity in Figure 1 looks like an overwhelming mismatch, but how much of that

Russian strength is relevant on the ground in Ukraine? The expensive super-weapons either have no measurable impact, or do not exist in sufficient numbers to be fielded. The navy is of limited utility in a mostly land invasion. Ukrainian coastal defense (and Turkish diplomatic action) has seen to that.⁸ The strategic bomber fleet is useless as long as Ukrainian air defenses exist. The big nuclear arsenal is not intimidating anybody from supplying help to Ukraine. Much, or most, of the Russian military establishment is not relevant to the war.

Now to examine the Ukrainian side. Ukraine has regular forces, with combat experience in the Donbas region since 2014. The regular forces' weapons and training are optimized only to repel a foreign invasion. Ukraine spends no money on an expeditionary navy. Its air force has no strategic bombers. It buys no nuclear weapons. It spends not a penny on specialist soldiers or civilian experts to run such systems. Ukraine's entire military is organized to defend Ukraine against Russia. Ukraine has far fewer active-duty soldiers than does Russia, but every man exists only to defend the homeland. The regular army is augmented by the Territorial Defense Force of military reservists and civilians trained in support services, such as logistics and medical aid. And since the invasion, it

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has raised a large force of Volunteers at almost no cost. In the opening days of the war, anyone who showed up at a recruiting station could get a rifle and a yellow armband.

These Volunteers were not sent to the front as cannon fodder but were employed intelligently doing rear echelon duties such as guarding prisoners and supply routes, thereby freeing trained soldiers to fight the Russians. Some of these Volunteers armed themselves with rifles and portable weapons to hunt Russian armored units stuck in the mud. They roamed the fields and forests at night, invisible and terrible.

What is happening in Ukraine is that only a fraction of the Russian military is meeting all of the forces Ukraine can muster.



FIG. 2: UKRAINIAN VOLUNTEERS RECEIVE AK-74 RIFLES

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The District Attorney's Office appears formidable, but it cannot bring its entire panoply of personnel against you and your client. The vast majority of its forces are irrelevant to your client's case, or are occupied elsewhere.⁹

You, however, can devote your entire attention, or a significant portion of it, to your client's defense. In the courtroom, which where it counts, you can aspire to match the opposition. It takes a great deal of effort, and efficient allocation of limited resources, but when the trial starts, you should be more-or-less at parity with the prosecutor's lawyers.

One way to do this is by specialization. There are lawyers in Harris County whose practice is devoted almost entirely to DWI defense. DWI defense is a niche practice which requires mastery of arcana such as field investigations and scientific testing.

Lawyers who so specialize do not face all the expertise of the DA's Office, but only that portion that can be devoted to the prosecution of DWI and related crimes.

By limiting their practices, specialist defense lawyers can build up at least as much expertise as anything the DA can throw at them.

Other lawyers may find that their practice concerns complex felonies. Their file cabinet contains fewer but more difficult cases.

They will find themselves daily up against experienced prosecutors, frequently from special divisions.

Complexity of cases might appear at first glance to be a disadvantage, but it can be leveraged to achieve something closer to parity. One method is to start working early and stay ahead of the prosecutor. Particularly in the early stages of a prosecution, the defense can devote more time and attention to a case than can the prosecutor. If a defense lawyer immediately obtains and reviews discovery, investigates the case, does legal research, and otherwise actively prepares for trial, he will be ahead of the prosecutor's preparation curve.

By early mastery of a complex case, the defense lawyer finds himself in a position to influence any plea-bargaining and can credibly represent himself as ready for trial.

Defense lawyers have to think like Ukrainians.



Joseph W. Varela graduated from the University of Texas School of Law. He was licensed in 1983. He is board certified in criminal law, and practices criminal trial and appellate law in Harris County.

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- 1 On War, Book III, Chapter XIV (1832). Trans. J. J. Graham.
- 2 Personal communication, Harris County District Attorney's Office, July 2022.
- 3 I have departed from my usual practice of extensive references. The war in Ukraine is an emerging situation and I have relied on contemporary news reports which will not be cited. Additional information was obtained from videos of military action posted on the internet. Doubtless, when the histories are later written, the record will be corrected.
- 4 I confess that I was in this camp. I thought the likely outcome would be a rapid conquest followed by high-intensity guerrilla resistance. But I'm in good company: the appreciations of military thinkers worldwide failed comprehensively. That so many experts got it utterly wrong is itself unsettling.
- 5 And, I would add, on the level of grand strategy: The USA's position of leadership is re-affirmed, NATO is invigorated, Russia is isolated financially and diplomatically.
- 6 In choosing to do so I ignore other Russian failures such as a flawed conscription system, reliance on outdated weapons, chaotic logistics, poor command structure, incompetent leadership, lack of realistic training, systemic corruption, intelligence failures, bad morale, and everything else the Russians got wrong. These factors are critical to Ukraine's success to date, but are not necessary for my argument.
- 7 The US alone spends at least ten times as much on its military as compared with Russia. And the US still has to make hard choices on how that money is allocated.
- 8 Without a navy to speak of, Ukraine sank the Black Sea Fleet's flagship and compelled said Fleet to retreat from the coast.
- 9 This is not a criticism; how could it be otherwise?



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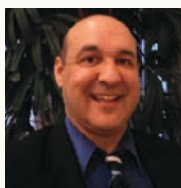


A PRACTICAL GUIDE TO EVALUATING BLOOD EVIDENCE IN DUI/DUID CASES

By Sol Bobst MBA PhD DABT ToxSci Advisors LLC

A common issue in DWI / DUID cases is the collection of blood and transfer to a crime laboratory for testing. There are several topics that can be evaluated to determine if the blood collection has issues of reliability. ▶▶▶▶

- i Collection of Diagnostic Blood Specimen's: Fourth Edition: <https://www.clsi.org/standards/products/general-laboratory/documents/gp41/>
- ii Chang & Kollman (1989) The Effect of Temperature on the Formation of Ethanol by Candida Alicans in Blood. J Forensic Sci 34(1) 105-109.
- iii Anderson (2015) Collection and Storage of Specimens for Alcohol Testing. Chapter 10th, Garriott's Medicolegal Aspects of Alcohol, 6th Edition, Lawyers & Judges Publishing Co.
- iv Blume & Lakatua (1973) The Effect of Microbial Contamination of the Blood Sample on the Determination of Ethanol Levels in Serum. American Journal of Clinical Pathology 60(5) 700 – 702.



Sol Bobst is the President and Principal Advisor of ToxSci Advisors LLC located in Houston, Texas. He received his PhD in Toxicology from the University of Texas Health Science Center-MD Anderson Cancer Center in Houston, Texas. He is also a Diplomate of the American Board of Toxicology. Dr. Bobst has over 18 years of experience as an expert in Forensic Toxicology. He is also an Adjunct Assistant Professor in Pharmacology & Toxicology at Wright State University in Dayton, Ohio, and the Department of Pharmacology & Toxicology at the University of Texas Medical Branch in Galveston, Texas. If you have any questions, Sol can be contacted at sol@toxsciadvisors.com or at his office at 832-581-2686 / cell 281-686-6363.

1 VALIDITY OF THE TUBE USED FOR COLLECTION

The tube should have a current date that is not expired for collection or storage, for the time it is used for collected, or the duration of its storage. The tube should have the expiration, batch, lot number printed on it. For forensic testing, the tube should be a “grey top” tube with the preservative Sodium Fluoride as a stabilizer and Potassium Oxalate as an anti-coagulant.

2 PROCEDURE OF BLOOD DRAW

Sometimes a blood draw is conducted at a hospital and sometimes it is conducted by trained EMS or law enforcement personnel. There should be training documents available from the entity and individual that conducted the blood test. One example of proper procedures for blood draw is the CLSI GP41.ⁱ

The guidance specifies that blood should be drawn using Iodine and not Alcohol for sterilization for alcohol testing purposes. Best practice is sanitation by making circular motions, and not swiping back and forth. If alcohol was used to sanitize before a blood draw for alcohol testing purposes, the alcohol used to sanitize can contaminate the sample. Also, if the puncture site for the blood draw was not sanitized properly, bacteria or yeast can impact the sample.

3 TIMING OF THE SAMPLE DRAW

It is important to note the time of an accident, or arrest, and the time that a blood sample is drawn. It is generally considered that beyond three hours, any interpretation of any testing value can be subject to many variable factors. Texas Transportation Code 724.019 references this time must be within 2 hours for a secondary sample. In Wisconsin, Stat 885/235(1g) is specific about the admissibility of the blood draw if it was not sampled within 3 hours.

4 CHAIN OF CUSTODY OF THE BLOOD DRAW

It is generally expected that a blood draw sample tube needs to be placed in cold storage (4°C)ⁱⁱ as soon as possible.ⁱⁱⁱ The specific reason for this is that at room temperature or greater, it has been known for decades that bacteria or yeast can metabolize glucose to form ethanol in a test tube^{iv}, and that improper storage not a controlled, calibrated, and documented temperature of 4 degrees Celsius can result in detectable ethanol being produced by yeast or bacteria in as little as 28 hours. Thus, if there is a case where storage and refrigeration documentation is missing, the reliability of the evidence can be challenged for possible contamination.

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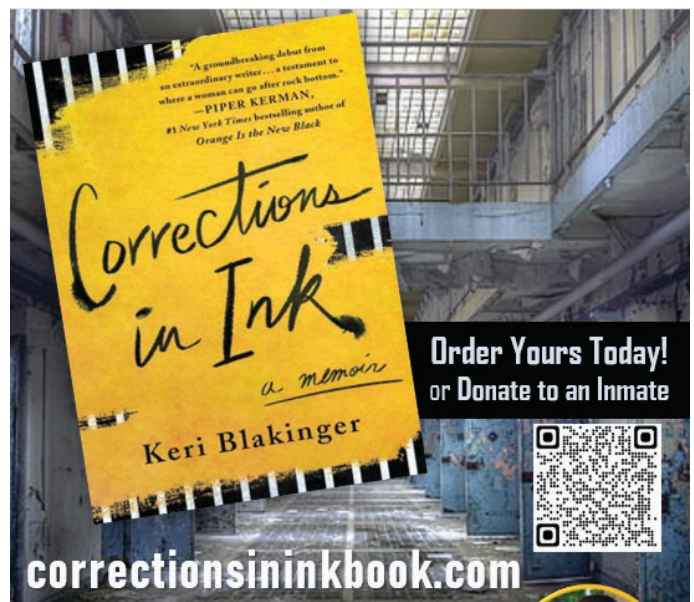
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