

# TEXAS LAWYER



Protesters take cover from tear gas fired by police outside the Kenosha County Courthouse, late Monday, Aug. 24, 2020, in Kenosha, Wis. Photo: David Goldman/AP

## **Bracing for the End: A Q&A on Rittenhouse Trial Strategy with Ford O'Brien's Kevin J. O'Brien**

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As the country anxiously awaits the verdict in the divisive Kyle Rittenhouse shooting case in Kenosha, Wisconsin, much is being made about how the media, the accused, the prosecutor, and the judge performed under pressure. Television cameras were allowed inside the courtroom during the trial, and this allowed broadcasters to show the exchanges between the two sides, live as they happened.

Texas Lawyer spoke last week with [Kevin J. O'Brien](#), a seasoned trial lawyer and partner at Ford O'Brien, based in New York City. He is a former assistant U.S. attorney for the Department of Justice and specializes in white-collar criminal defense, commercial and securities litigation on behalf of plaintiffs and defendants, regulatory enforcement cases, and arbitrations. He has tried over 25 court cases and numerous arbitrations to verdict.

*Here is our discussion of the case. The responses were lightly edited for style, clarity and length.*

### **What has the media gotten wrong about Rittenhouse?**

**Kevin O'Brien:** I think cable news got their depiction of Rittenhouse so wrong because they were misled.

It looked like Rittenhouse was looking for trouble when he was walking down the main boulevard proudly holding his gun, and that's how he was perceived. However, the testimony came out a little differently, and it was revealed that the victims had records of their own.

The prosecutors should have screened that. One man even pointed a gun at Rittenhouse before he shot at the victims. The victims now are less [sympathetic] as individuals, and in one or two cases, the evidence surrounding them was not very helpful to the prosecution.

The media likes "pure victims" ... and this is not a case with pure victims. But that does not mean those victims deserved to be killed, and that doesn't mean that Rittenhouse didn't do something wrong.

### **Was the prosecutor unprepared for this trial?**

No, but I do think they weren't prepared for how shape-shifting and clever Rittenhouse was. There is a tendency in the progressive media to portray Trump supporters as people who don't get vaccinated and are generally regarded as "hicks." But Rittenhouse is a very clever guy, and he likes to manipulate opinions, which he showed during the trial.

### **Has the question of Rittenhouse's self-defense been answered?**

The prosecutor was able to get Rittenhouse to admit that he intentionally used deadly force in every case. There was a quote from the trial, "did you intentionally use deadly force for each of the three victims," and Rittenhouse said "yes."

I don't think that behavior can be justified. I think the answer to the question of self defense is going to be in some cases, maybe, and in other cases, maybe not. But that's good enough for a conviction on some counts.

### **How damaging to the prosecution's case was it when the judge chided the chief prosecutor?**

I don't think the judge's actions were that damaging to the prosecution's case. Juries have a way of factoring out all of this personality stuff, and they probably have their own views about the judge.

Overall, I think it cuts both ways. On the one hand, there's sort of a Stockholm syndrome during a trial. Members of the jury are cooped up in a courtroom with this authority figure, the judge, and they tend to identify with him.

But on the other hand, this judge is an abrasive and somewhat arbitrary person, and I think jurors are sensitive to that. I've especially seen backlash against judges who are older white men who act as if they know everything.

So the jurors in this case may be more sensitive than we are to the fact that the judge is a bit of a loose cannon and does things that aren't fair. Maybe they will think he got carried away and shouldn't be taken seriously, or his view shouldn't be accepted. That's a plausible window into certain jurors' minds as to what's going on in the trial. In other words, they don't necessarily pay attention to the scolding.

That said, it was completely improper for the judge to do that in front of the jury. You never dress down a lawyer in front of the jury unless he's done something horrendous, which I don't think this prosecutor, Thomas Binger, did. I don't think he deserved to be reamed out in front of the jury. I also don't think the judge's behavior necessarily helps the defense.

### **What did you think of Rittenhouse being put on the stand, and is it ever advisable to do that with a defendant?**

No, it's never advisable to put the defendant on the stand. But from what I could tell, Rittenhouse did a really good job for the most part. He's a clever guy and a good actor, but he

did get caught a few times. There was one point when Rittenhouse essentially had to admit he intended to kill each one of the victims, and that's a soundbite the jury is going to hear over and over again.

On the one hand, Rittenhouse did a great job escaping from these wrestling holds, but he did get caught a few times. It's hard to say what the net score is.

**Will Rittenhouse be acquitted, or will the case be declared a mistrial so the prosecutor can have another chance?**

Rittenhouse could walk out a free man or win a mistrial, in which case they'll certainly try him again and learn from these mistakes. In that case, the prosecution will be better prepared for Rittenhouse's testimony and his shape-shifting.

But I'm not sure he's going to walk out a free man. Rittenhouse has to hit a home run for that to happen and defeat each charge. There are quite a few counts including lesser offenses for each. The prosecution can always scale down. If the jurors' aren't convinced it's an intentional homicide, it could be something else.

**Do you have any other observations you would like to share?**

For all the talk about mistakes and the judge's prejudicial behavior, Binger, the prosecutor, has done an effective job conveying the fundamental fact that you don't carry an AK-15-style weapon across state lines and parade it around for the cameras if you're merely intent on "protecting property," as Rittenhouse claimed.

Binger suggested [Rittenhouse provoked an attack in order to have a reason to fire his weapon] in his cross examination of the accused. And then the judge gave the prosecutor a provocation charge, which negates self-defense, which Binger can now drive home to the jury.

Similarly, much has been made of Rittenhouse's carefully modulated testimony and demeanor in court, complete with tears, professions of sympathy for his victims, and scholarly interest in all aspects of the case. Well, one can be too carefully modulated, something jurors have a sixth sense for. They will decide the question of Rittenhouse's sincerity.