Committee on Disciplinary Rules and Referenda

Supplement for February 2, 2022, Meeting

- Letter Dated February 1, 2022, from Jennifer E. Laurin, Neal Manne, Amanda J. Marzullo, Mike Ware, and Benjamin Wolff, Regarding Draft Proposed Changes to Rule 3.09, Texas Disciplinary Rules of Professional Conduct (Special Responsibilities of a Prosecutor) (Bates Numbers 000002 - 000005)

February 1, 2022

Committee on Disciplinary Rules & Referenda
State Bar of Texas
c/o Prof Vincent Johnson
1414 Colorado Street
Austin, TX 78701

Re: Texas Disciplinary Rule of Professional Conduct 3.09

Dear Members of the Committee of Disciplinary Rules and Referenda:

As a group of habeas litigators, academics, and policy experts we'd like to thank you for considering changes to Texas Disciplinary Rule of Professional Conduct 3.09. From our perspective this amendment is both necessary and long overdue. The comments below are intended to assist the Committee as you consider this important policy change that would safeguard the integrity of our justice system and the administration of the ultimate punishment.

1. **This Change Would Clarify a Prosecutor's Duties in All Cases, Regardless of When the Underlying Offense Occurred.**

As other groups have noted in their comments to the Committee, the Michael Morton Act directs prosecutors to disclose "any exculpatory, impeachment or mitigating document, item, or information in possession, custody, or control of the State," that is discovered at "any time before during *or after trial*."[1] By its express terms, then, the Michael Morton Act does create a post-conviction disclosure duty. However, many Texas prosecutors have taken the position that this obligation applies only to offenses that occurred after the Act went into effect on January 1, 2014. As a result, exculpatory evidence has been and continues to be withheld from Texas inmates and their attorneys.

This problem even extends to high-profile cases that receive extensive media coverage and public scrutiny. Death row inmate Rodney Reed made national headlines in the fall of 2019 when two thirds of the Texas Senate, 50 members of the Texas House of Representatives, five United States Representatives, and Senator Ted Cruz called for cancellation of his execution in light of mounting evidence of his innocence.

Mr. Reed was convicted of murder and sentenced to death for killing Stacey Stites in April1996. For over 20 years, Mr. Reed has maintained his innocence, asserting that he was having an affair

[1] Tex. Code Crim. Proc. art. 39.14(h) & (k) (emphasis added).

with Ms. Stites, and that the sole evidence connecting him to the crime—3 intact spermatozoa that were recovered from Stites's body—were deposited during consensual intercourse over a day before she went missing. In response, the state argued to the jury that Stites and Reed were strangers and that no witness connected them.[2]

Yet on June 25, 2021, just two weeks before an evidentiary hearing in the case, the State disclosed witness interview summaries from 1998 in which a friend and co-worker of Ms. Stites's told the State that she saw Mr. Reed and Ms. Stites together at the HEB where Stites worked, and that Mr. Reed and Ms. Stites were "friendly, giggling, and flirting."[3] This information was relayed to the State shortly after Mr. Reed's arrest in 1997. It is clearly exculpatory, as it directly undermined the state's theory that Stites and Reed were strangers, but it was not disclosed to the defense until last year, more than seven years after the Michael Morton Act took effect (on January 1, 2014).

If the Michael Morton Act has nevertheless left any doubt in the minds of prosecutors about their obligation to disclose exculpatory evidence after trial, Proposed Rules 3.09(f) & (g) are important mechanisms for alleviating that confusion and avoiding arbitrarily disparate treatment of defendants convicted before and after the Act took effect.

2. The Proposed Rule 3.09(g) Should be Amended to Eliminate Any Reference to "Credible and Material Evidence" and Reflect the Text of the Michael Morton Act.

This change would provide consistency across the Texas Disciplinary Rules and the Texas Code of Criminal Procedure. As the Texas Court of Criminal Appeals recently held in *Watkins v. State*, in enacting the Michael Morton Act the Texas legislature intended that the word "material," circumscribing what the state must disclose, means having "some logical connection to a consequential fact," and rejected a definition that would call for prosecutors or courts to evaluate evidence in relation to "its impact upon the overall determination of guilt or punishment."[4] As the Court of Criminal Appeals observed, the legislature believed "that uniform discovery would make discovery more efficient; reduce discovery disputes; and save taxpayer money by reducing appeals, incarceration, and possible compensation for wrongful convictions."[5] The same logic applies to the post-conviction context, and counsels against a rule that invites prosecutors to individually determine what evidence is sufficiently "credible and material" to disclose.

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[2] Request for Grant of Application for Writ of Habeas Corpus at 2, *Ex Parte* Reed*,* No. WR-10,961-11 (Tex. Crim. App. 2021).
[3] *Id*. at 18-19.
[4] Watkins v. State, 619 S.W. 3d 265, 269 (Tex. Crim. App. 2021), reh'g denied (Apr. 14, 2021).
[5] *Id.* at 289.

Relatedly, eliminating the proposed "credible and material" language would also help line prosecutors from inadvertently running afoul of the rule. As Hon. Scott Brumley noted in his letter dated October 21, 2021, prosecutors are human. They make mistakes and are subject to implicit bias in the same manner as everyone else. Thus, as parties to a case—even after a trial has ended—they should not be called upon to make their own decisions about the credibility and materiality of evidence before disclosing that evidence to a defendant or a court, as the current proposal provides.

This is not merely a theoretical concern. The draft rule's current language tracks an analysis that prevented Texas prosecutors from disclosing important information to defense counsel for decades. For example, in a hearing in *Ex Parte Temple,* 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016), former Assistant District Attorney Kelly Siegler testified that:

> she did not have an obligation to turn over evidence that was, based on her assessment, 'ridiculous.' She claimed that, when it came to what constituted Brady evidence, her opinion is what mattered. [She] stated, when asked, that if information does not amount to anything, the defense is not entitled to it.

Id. at *7. However, as the Court of Criminal Appeals noted in *Temple,* prosecutors are not the final arbiters of what should be turned over the defense and that Siegler's "misconception regarding her duty under *Brady* was 'of enormous significance.'" *Id.* at *8 (emphasis added).

Thus, we urge you to adopt language that mirrors the Michael Morton Act's directive to disclose exculpatory, impeachment or mitigating information without passing judgment on the evidence's credibility or materiality to the case. To do otherwise, risks continuing miscarriages against the wrongfully convicted.

3. An Obligation to Disclose Information Upon Discovery Is Not Overly Burdensome.

The current language does not direct prosecutors to troll through their files in search of exculpatory information, as suggested by some opponents of the rule. Instead, it merely requires that prosecutors turn over information that they encounter in the regular course business. Examples include when reviewing files in response to a Public Information Act request from an inmate's attorneys, or upon learning of system-wide errors in the analysis of forensic evidence.[6] These are real-world examples of when prosecutors can and have disclosed information to an inmate's counsel long after a trial has ended without shouldering unreasonable additional workload burdens.

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[6] Kevin Petroff, *The Changing State of DNA analysis,* Texas District & County Attorneys Association (July-Aug. 20216), https://www.tdcaa.com/journal/the-changing-state-of-dna-analysis/ (noting that "TCDAA issued a letter to prosecutors on how to notify defendants and defense attorneys with cases potentially affected by the issue).

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In conclusion, we do not submit this information to disparage prosecutors. Many of us have valued, longstanding relationships with the Texas District and County Attorneys Association and we applaud their commitment to seeing that justice is done and to continually supporting and improving the practice of prosecution in the state. We believe, however, that this rule change is necessary to create uniformity in post-conviction practice, to protect the innocent, and to prevent future miscarriages of justice.

We hope this letter was helpful to you as you consider an important vote. Thank you for your time and consideration.

Sincerely,

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