

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 646**

November 2014

QUESTION PRESENTED

As a condition for allowing criminal defense lawyers to obtain information in the prosecutor's file, may a prosecutor require defense lawyers to agree not to show or provide copies of the information to their clients and agree to waive court-ordered discovery in all of the lawyers' cases?

STATEMENT OF FACTS

A district attorney requires criminal defense lawyers to sign a confidentiality agreement as a condition to granting lawyers access to the prosecutor's file (a so-called "open file" arrangement). The agreement allows lawyers to obtain discoverable information in the prosecutor's file in exchange for their agreeing not to share copies of that information with anyone else, including the lawyers' clients, and their agreeing not to seek court-ordered discovery in any of their clients' cases.

DISCUSSION

Professional Ethics Committee Opinion 619 (June 2012) addressed the question of whether a prosecutor may require and defense counsel may agree "that documents the prosecutor produces to defense counsel may be shown to the defendant but that copies of the documents may not be given to the defendant[.]" The opinion observed: "Although the prosecutor has an obligation under Rule 3.09(d) [of the Texas Disciplinary Rules of Professional Conduct] to disclose to the defense all exculpatory or mitigating evidence, the Rule is silent as to the disclosure of other evidence and as to restrictions that may be placed on evidence and information disclosed." This committee concluded in Opinion 619 that the Texas Disciplinary Rules of Professional Conduct permit such agreements, provided that, before signing such an agreement, defense lawyers must comply with their duties under Rule 1.03(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Since this committee issued Opinion 619, the legislature passed and the governor signed the Michael Morton Act, codified at Tex. Code Crim. Proc. art. 39.14. Effective January 1, 2014, the Act amended article 39.14 of the Texas Code of Criminal Procedure to require that prosecutors disclose all information in a prosecutor's file except the prosecutor's work product and other information (such as information about victims and children) that is made confidential by law. Among other things, article 39.14 permits discovery and copying of all witness statements, not just the defendant's statement. *Cf.* Tex. R. Evid. 615(a) (requiring production of a statement of a witness other than the defendant only after the witness has been passed for

cross-examination during trial). Furthermore, article 39.14 does not require (or permit a prosecutor to require) any concession by criminal defense lawyers or their clients in order to receive such discovery nor must defendants seek a court order to secure the discovery mandated by that article. Article 39.14(a) requires the disclosure of the prosecutor's file "as soon as practicable after receiving a timely request from the defendant"

Comment 1 to Rule 3.09 states that "a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor." Furthermore, Rule 8.04(a)(12) provides that a lawyer shall not "violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law."

Because article 39.14 requires an "open file" policy by prosecutors without pre-conditions, prosecutors would violate Rule 8.04(a)(12) if they refused to produce and permit the inspection of their file in accordance with the provisions of article 39.14 unless defense lawyers first agreed to waive certain rights of their clients. Under article 39.14—and, therefore, under Rule 8.04(a)(12)—prosecutors are required to produce and permit the inspection of their files, subject only to the limitations set forth in article 39.14. Thus, prosecutors would violate Rule 8.04(a)(12) if they attempted to impose conditions not found in article 39.14 before making the required disclosures.

The committee concludes that the Michael Morton Act has rendered Opinion 619 obsolete because the act requires an "open file" policy by all Texas prosecutors without requiring defendants or their lawyers to agree to any restrictions on their use of materials in the file except as provided in the act.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct require prosecutors to comply with the Michael Morton Act, Tex. Code Crim. Proc. art. 39.14, including making disclosures required by the act. Therefore, prosecutors may not, as a condition for providing information in their files they are obligated to disclose, require that criminal defense lawyers agree not to show or provide copies of the information to their clients, nor require that criminal defense lawyers agree to waive court-ordered discovery in all of their clients' cases.