

ETHICS FROM A PROSECUTOR'S POINT OF VIEW

Prosecution Ethics

"It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." Texas Code of Criminal Procedure, Art. 2.01

Although all attorneys are covered under the Texas Disciplinary Rules of Professional Conduct, only ONE group of attorneys are singled out for disciplinary rules specific to that group: prosecuting attorneys. As pointed out in Comment 1 to Rule 3.09, "A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations."

Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct is entitled "SPECIAL RESPONSIBILITIES OF A PROSECUTOR" and requires that a prosecutor "shall"

- (a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
- (b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pretrial, trial, or post-trial rights;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

The adversarial model contemplated by the rules pits the defense attorney against the prosecuting attorney, with both of the attorneys governed by the rules of court and the disciplinary rules. While the newer rules also represent an effort to discourage abusive adversarial tactics, the adversarial model continues to be firmly established in the juvenile court as well as the other courts. This is somewhat at odds with the historical context and purpose of the juvenile court. The juvenile court had been created separate from the adult court with the ideals of "rehabilitation" of the juvenile and "protection" of the public as worthy goals. (See the "Purpose" set out in Ch. 51.01 in the Texas Family Code). All parties, the state, the judge, the parents, the juvenile social worker, everyone in the process, are presumed to have the same goal and interest in the child's welfare. Also the nature of the "defendant" juvenile is such that the law has recognized certain protections and privileges that are not accorded to adult defendants. Thus the lawyers, defense, as well as prosecution, are required to be aware of these special protections accorded the juvenile and apply them in the context of the other rules and procedures.

A few of these protections (you can probably think of others) are:

- (1) Confidentiality of records. F.C. 58.005 Limits who may be permitted to access and inspect juvenile court files and records. Also, F.C. 58.007 Limits access to records and files regarding juveniles. Covers court files and prosecutor's files, as well as probation department files and law enforcement records. Provides that information in law enforcement files and records shall not be disclosed to the public. F.C. 58.007(c).
- (2) The court can limit public access to hearings. F.C. 54.08. For good cause shown, the public can be excluded from a juvenile court hearing. Provides closed hearings for children under 14.
- (3) Limitations on who can collect and keep information regarding juveniles, and what they can do with the information. F.C. Chapter 58
- (4) While not exempted from registration as a Sexual Offender, juveniles have some protection from who has access to the information he must provide when he registers. See C.C.P. Chapter 62. Also there are some new provisions regarding sex offender registration that are special for juveniles, such as judicial discretion to excuse registration or order non public registration.

Prosecutors need to be aware of not only the Rules of Court and the Dicipinary Rules, but the special provisions in the Texas Family Code that govern their dealings with the various parties and persons involved with a juvenile case. These rules and provisions affect not only the prosecutor's dealing with the defense attorney and the judge, but also his or her dealing with parents (who are "parties"), law enforcement, probation, victims, and even jurors!

Ethical Problems Confronted by Prosecutors

Here is a "top ten" list of disciplinary rule situations that are raised with respect to prosecutors. Usually either the prosecutor has been accused of violating the rule, or the prosecutor finds him/herself in a situation where they wonder if their conduct would constitute a violation:

- (1) Suppression of exculpatory evidence. See Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct; Brady v. Maryland, 373 U.S. 73 (1963). Note that "mitigating" evidence must be disclosed as well. The evidence need not establish innocence to be "exculpatory".
- (2) Improper statement to the press. See Rule 3.07. This includes public criticism of judges controlled by Rule 8.02. Prosecutors enjoy "prosecutorial immunity" for statements made in the courtroom (Marrero v. City of Hialeah 625 F.2d 499(5th Cir. 1980) cert. denied 450 U. S. 913 (1981)), but only "qualified immunity" for other public statements within the scope of their duties (see Marrero (supra); Wyse v. Dept. of Public Safety, 733 S.W. 2d (Tex.App.-Waco 1986, writ ref. N.R.E.). There is NO immunity for statements not within the scope of duties, and none for incorrect out-of-court statements motivated by bad faith or malice. (see Wyse supra.)
- (3) Ex parte communication with the trial court. Rule 3.05(b);and Canons 3(A)(5) and 8(K), Code of Judicial Conduct.

- (4) Prosecuting or threatening to prosecute a case unsupported by probable cause. Rule 3.09(a).
- (5) Knowing use of false evidence. Rule 3.03(5)
- (6) Communications with a party represented by counsel concerning the subject of that representation. Rule 4.02(a). In juvenile court, "parents, spouses, guardians, and guardians ad litem" are parties under the definition in F.C. 51.02(10).
- (7) False statements of material fact. Rules 3.03 (concerning statements made to the court) and 4.01(a) (statements made to anyone else).
- (8) Threats of criminal prosecution or grievance proceeding intended to discourage a person's service as a witness. Rule 4.04.
- (9) Comments made to harass, or "embarrass" or influence the future jury service of a juror who has made the "wrong" decision. Rule 3.06(d).
- (10) Being so eager to "win" or so angry because you didn't, that you allow your judgement to fail and you lose sight of "seeing that justice is done" and done properly.

Ethical Problems Special to Juvenile Prosecutors

These hypotheticals are intended for discussion:

- (A) What do you (THE PROSECUTOR) do when you discover that you have an attorney on a case who doesn't know what he is doing in juvenile court?
1. Help him by instructing him on the law?
 2. Just tell him what to do?
 3. Take advantage of him?

(Does it make a difference if he comes to you, admits he doesn't know the law and asks for your help? Do you have a self interest here in keeping him from doing something totally wrong? How much are you obligated?)

SUBTOPIC: DOES THE ATTORNEY KNOW WHAT HE'S DOING??

1. What about when you ask for your file back and he tells you "his client isn't finished reading it"?
2. What about if he takes your file to the clerk and gets him to make a copy of it?
3. What about when you ask for your file back and he says "I don't know where it is"? (You know you gave it to him!)

- (B) What happens when several of the "parties" have lawyers and you (THE PROSECUTOR) are caught in the conflict?
1. Child and parent each have an attorney and they both want something different.
 2. One (or both!) parent(s) has an attorney who is there to be sure the kid isn't sent home to them.
 3. The parents have come in and filed their own pleadings in the case asking the court to terminate their parental rights and place the child in the custody of the state.

(C) Plea Bargaining

1. The defense attorney wants you to agree to some disposition that is outside the dispositions contemplated by the "Sanction Levels".
2. The defense attorney wants to plead for probation (and this is appropriate within the sanction levels) BUT he wants you (THE PROSECUTOR) to agree to some condition of probation that is not allowed. (Such as: his kid doesn't have to register as a sexual offender or the court will not notify the DPS on a drug case). Can you do it? What if the judge does not agree, can he put the condition on anyway?

(D) How do you deal with the lying Complainant/Witness?

1. The Victim/Witness who gets up to testify and tells a completely different story. Surprise!!
2. You become aware, prior to any hearing, that the Victim/Witness is not credible.
 - a. You KNOW he's lying or planning to
 - b. You SUSPECT he's lying or planning to
3. Other variations:
 - a. The Victim from Hell
 - b. The Family member victim, who after letting the kid sit in detention for 3 months, wants to drop charges.
 - c. The Victim who only filed to get money.

(E) Your case is set for a plea and you find out your Victim/Witness:

1. Is Dead
2. Has left the country
3. Has a terrible criminal history
4. Can't be located at the number he gave the police.

What is your obligation as far as notifying the defense attorney? The court?

(F) What do you do when you find out that your witness has been "messed with"?

1. By the defense attorney
 - a. The attorney told the witness not to come, his client was going to plead guilty, and then he announces "ready" for trial.
 - b. The attorney told the victim he was "appointed by the court to investigate the offense", he just neglected to tell the victim he represented the defendant juvenile.
2. By the juvenile defendant
3. By the juvenile defendant's friends.

What if the friends are gang members?

(G) DEALING WITH THE NIGHTMARE CASE:

1. The juvenile is Mentally Retarded, Mentally Ill and Dangerous! (He's also 11 years old and pitiful!)
2. The Handicapped child.
3. The juvenile defendant is someone you REALLY feel sorry for.
4. The necessary witness - a police officer - ...has been fired for professional misconduct unrelated to this case. ...has been killed in the line of duty.