

SHAREN WILSON
Criminal District Attorney
Tarrant County

March 14, 2018

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RQ-0215-KP

Honorable Ken Paxton
Office of the Texas Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion clarifying the legal obligations of the Criminal District Attorney under Tex. Code of Criminal Procedure Art. 39.14, in relation to its civil legal obligations.

Dear General Paxton:

Pursuant to Texas Government Code § 402.042, I hereby request a Texas Attorney General Opinion concerning the following questions:

- 1) Does Texas Code of Criminal Procedure Article 39.14 require disclosure to a criminal defendant of evidence and information obtained by an Assistant Criminal District Attorney acting in a civil capacity and representing an individual seeking a protective order under Texas Family Code § 81.007?
- 2) When representing the Department of Family and Protective Services in a civil action in accordance with Texas Family Code § 264.009, is information obtained by an Assistant Criminal District Attorney in the course of this representation subject to disclosure under Texas Code of Criminal Procedure Article 39.14 in a related criminal prosecution?
- 3) For the purposes of Texas Code of Criminal Procedure Article 39.14, does an Assistant Criminal District Attorney who is acting purely in a civil capacity and representing an individual qualify as "the state" such that information acquired during this civil representation must be disclosed to criminal defendants?

Background

The Tarrant County Criminal District Attorney's Office is obligated to prosecute cases criminally in addition to acting as civil counsel for governmental entities, officials,

employees, and some specific individuals. *See* Tex. Const. art. V, § 21; Tex. Gov't Code § 44.320 (outlining duties of the criminal district attorney of Tarrant County). Numerous other counties throughout Texas are similarly situated. *See* Tex. Gov't Code §§ 44.101-44.351. Pursuant to this representation, the Tarrant County Criminal District Attorney's Office seeks clarification in three specific scenarios where this Office's criminal prosecution and civil representation obligations intersect.

First, this Office represents individuals seeking protective orders. *See* Tex. Family Code § 81.007(a). In the course of representing individuals seeking protective orders, Assistant Criminal District Attorneys ("ACDA") establish attorney-client relationships with those seeking protective orders, thus rendering communications between the client and the ACDA confidential. Tex. R. Evid. 503 (enacting the attorney-client privilege). It is not unusual for criminal prosecutions to arise out of the same set of facts that led an individual to seek a protective order. Thus, the individual who the ACDA represents civilly becomes a criminal complainant and the person against whom a protective order was sought becomes a criminal defendant whom the Tarrant County Criminal District Attorney's Office seeks to prosecute. As a result, this Office faces the question of whether information provided to our ACDAs, who in a civil capacity represented the individual seeking a protective order, is required to be tendered to criminal prosecutors, accused criminal defendants, and the criminal defendant's legal counsel pursuant to Texas Code of Criminal Procedure Art. 39.14, irrespective of laws protecting the confidentiality or privileged nature of the information received by the ACDA in their civil capacity. In particular, this Office seeks clarification on whether Article 39.14(a) & (h) require the disclosure to the defendant of exculpatory, impeaching, or mitigating evidence obtained during the course of representing persons seeking protective orders, or whether the attorney-client privilege forbids disclosure of this information.

The Ninth Court of Appeals held in an unpublished opinion granting a writ of mandamus that material protected by the informer's privilege under Texas Rule of Evidence 508 was not subject to disclosure under Article 39.14(a). *In re State*, No. 09-15-00192-CR, 2015 WL 7566519 (Tex. App.—Beaumont Nov. 25, 2015, no pet.) (not designated for publication). The Court noted that article 39.14(a) requires the production of things that are "not otherwise privileged[.]" *Id.*, at *2. However, this opinion did not address article 39.14(h)'s language which requires disclosure "[n]otwithstanding any other provision of this article," of "any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody or control of the state[.]"

Second, the Tarrant County Criminal District Attorney's Office represents the Department of Family and Protective Services in actions brought under the Family Code.

Tex. Fam. Code § 264.009(a) (“[I]n any action under this code, the department shall be represented in court by the county attorney of the county where the action is brought, unless the district attorney or criminal district attorney of the county elects to provide representation.”). For example, ACDAs represent the Department of Family and Protective Services in proceedings to terminate the parent-child relationship brought under section 161.001 of the Family Code. In a termination case, an ACDA will have access to reports, documents, and other evidence which are generally confidential for all other purposes. *See* Tex. Fam. Code § 261.201(a). It is a common occurrence for the criminal division of this Office to pursue criminal prosecutions related to the same facts and circumstances that led to the initiation of parental termination proceedings. In such a scenario, this Office seeks to clarify whether ACDAs representing the Department of Family and Protective Services in a civil action under the Family Code are treated as “the state” for purposes of Code of Criminal Procedure Art. 39.14 such that documents and other information acquired through the civil action must be disclosed to the criminal defendant by ACDAa pursuing a related criminal prosecution. Put another way, this Office asks for an opinion regarding whether documents, knowledge, and information acquired by civil ACDAs while representing the Department of Family and Protective Services are imputed to ACDAs in the criminal division of this Office for purposes of Code of Criminal Procedure Art. 39.14.

Finally, the Tarrant County Criminal District Attorney’s Office is obligated to represent Tarrant County’s various offices and officials in civil matters. Tex. Gov’t Code § 44.320(a) & (b) (“[She] shall represent Tarrant County in any court in which the county has pending business. [. . .] The criminal district attorney has all the powers, duties, and privileges in Tarrant County that are conferred by law on county and district attorneys in the various counties and districts[.]”).

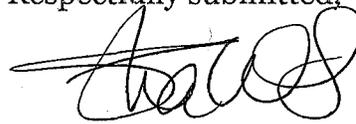
For instance, should a former employee file a lawsuit against a county official alleging unlawful termination, the ACDAs who practice civil law of the Tarrant County Criminal District Attorney’s Office are obligated to defend the county official against the lawsuit. If allegations of criminal conduct are discovered during the course of this representation, evidence and information of the kind contemplated by Code of Criminal Procedure article 39.14 may come into the possession of the civil ACDAs. Should a criminal prosecution ensue, this Office seeks clarification on whether the civil ACDAs qualify as “the state” under article 39.14 such that the information acquired during the course of their civil representation of the county official is subject to disclosure.

In this era, the ethical bar for prosecutors demanded by the public is rightfully high and there is laudable demand for openness to the possibility of the innocence of every

accused. We want to fully carry out our prosecutorial duties, but also conform to the established civil legal duties. To ensure that we are proceeding consistent with Texas Code of Criminal Procedure Art. 39.14, yet also zealously executing the civil obligations of our office, your guidance is key.

We respectfully request your opinion regarding application of these statutes in the circumstances described above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sharen Wilson', written over a horizontal line.

SHAREN WILSON
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS