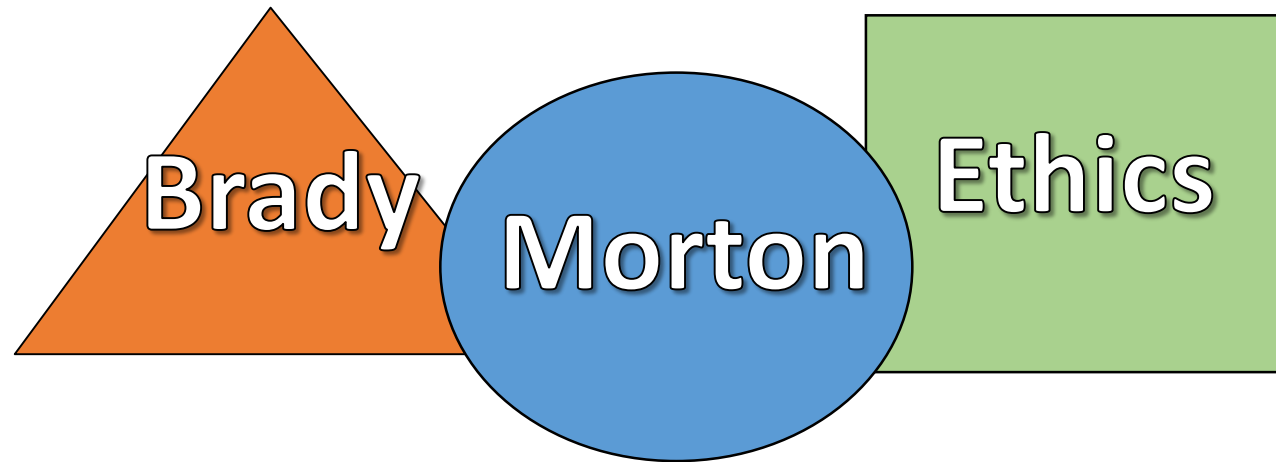


DIFFERENCES **in the** **DUTY to DISCLOSE**



Emily Johnson-Liu

Richard Segura

Roadmap

- **Hypos about Prosecutorial Disclosure**
 - Illustrating Major Differences in Duties
 - More Involved Examples
- **Defense Lawyer Hypos**
 - Ethics Rule 3.04 (duty not to conceal)
 - Morton Act violation

Should the State Disclose?

If you're asking, disclose it.

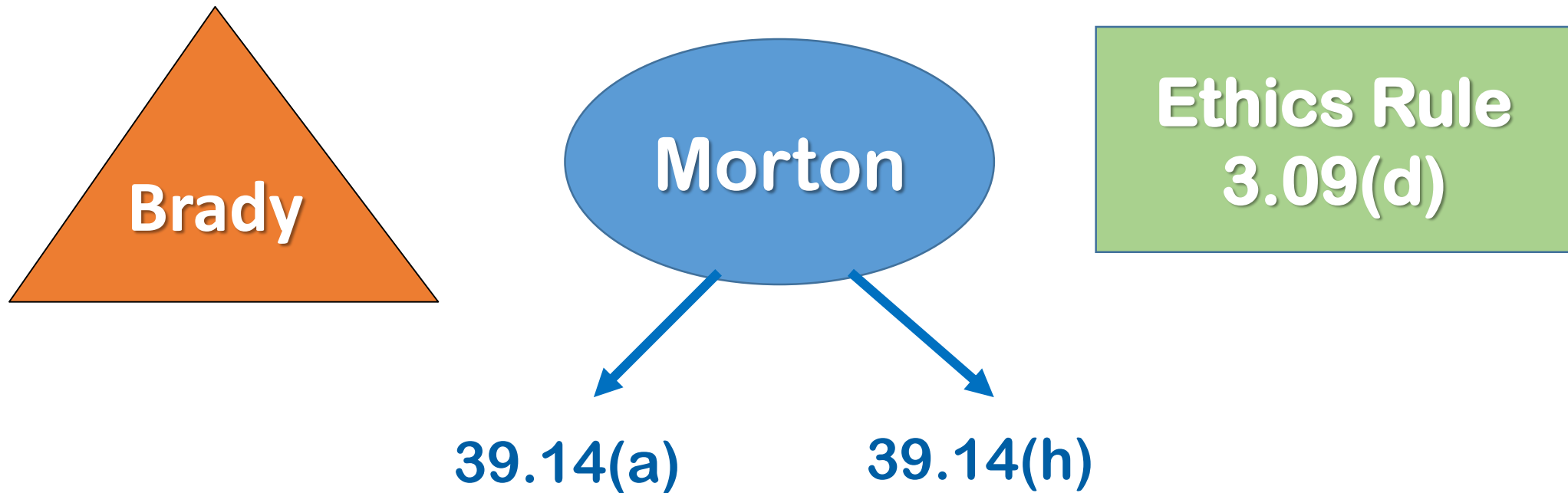


Should the State Disclose?

VS

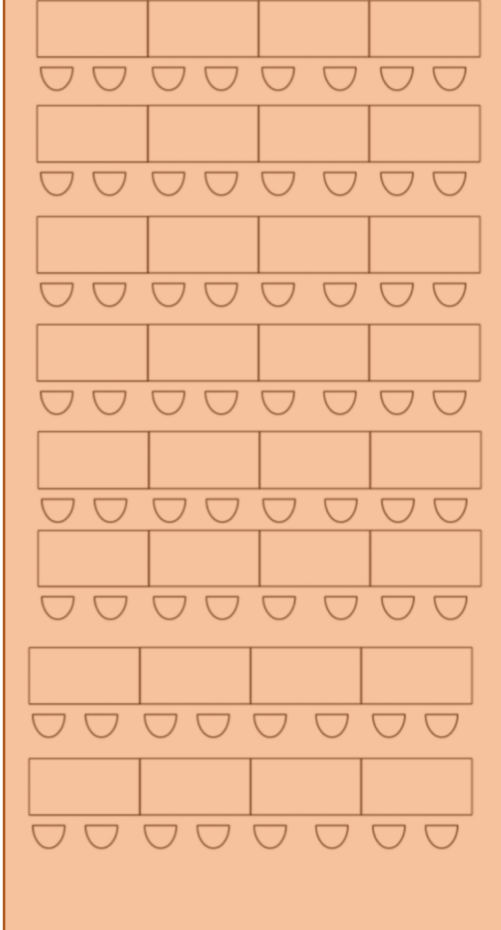
**Is it a violation of a particular duty
when the State has failed to disclose?**

Primary Sources of Duty to Disclose

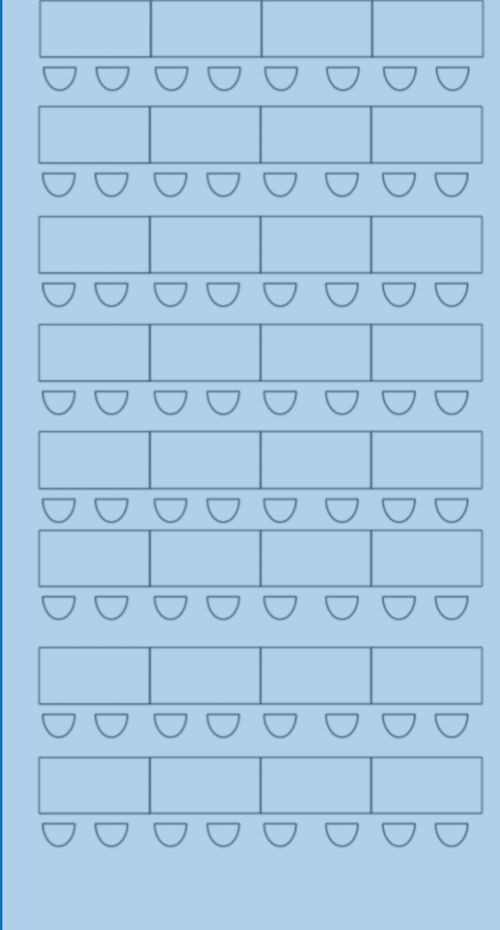


Room Layout—Divide into Groups

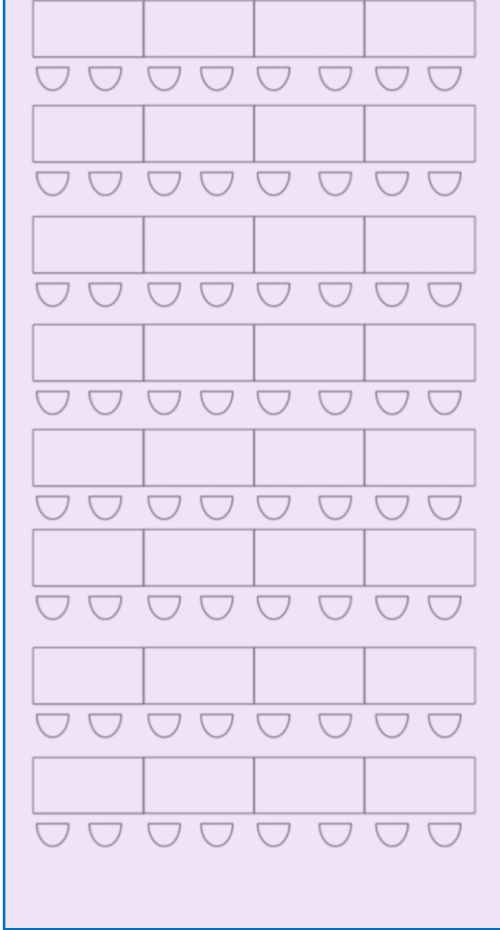
Brady



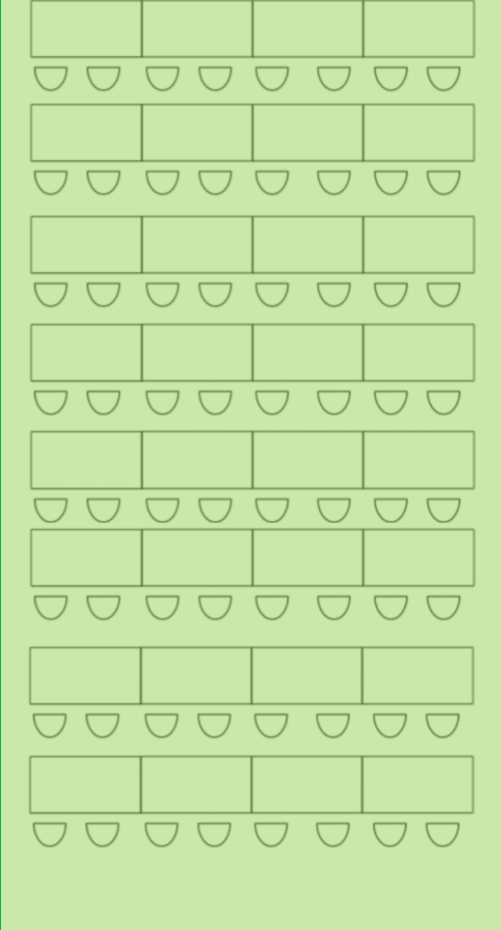
39.14(a)



39.14(h)



3.09(d)



Brady (and progeny)

- **Disclose information that is**
 - **Favorable**
 - **Material**
 - **Known by the prosecution team**
- (Prosecutor's good/bad faith irrelevant)**

Art. 39.14(a)

Disclose:

- **offense reports**
- **designated documents**
- **written/recorded witness statements**
- **defendant's statements**
- **designated books, accounts, letters, photographs, or objects**

**that are material to any matter involved in the action
in possession/custody/control of State**

Art. 39.14(h)

Disclose:

- **exculpatory**
 - **impeachment**
 - **mitigating**
- document / item / information**

in possession, custody, or control of the state

that tends to negate guilt

or tends to reduce punishment

Ethics Rule 3.09(d)

Make timely disclosure:

- all evidence or information
- known to the prosecutor
- tends to negate guilt / mitigates offense

For sentencing, disclose

- unprivileged mitigating information
- known to the prosecutor
- unless trial court order

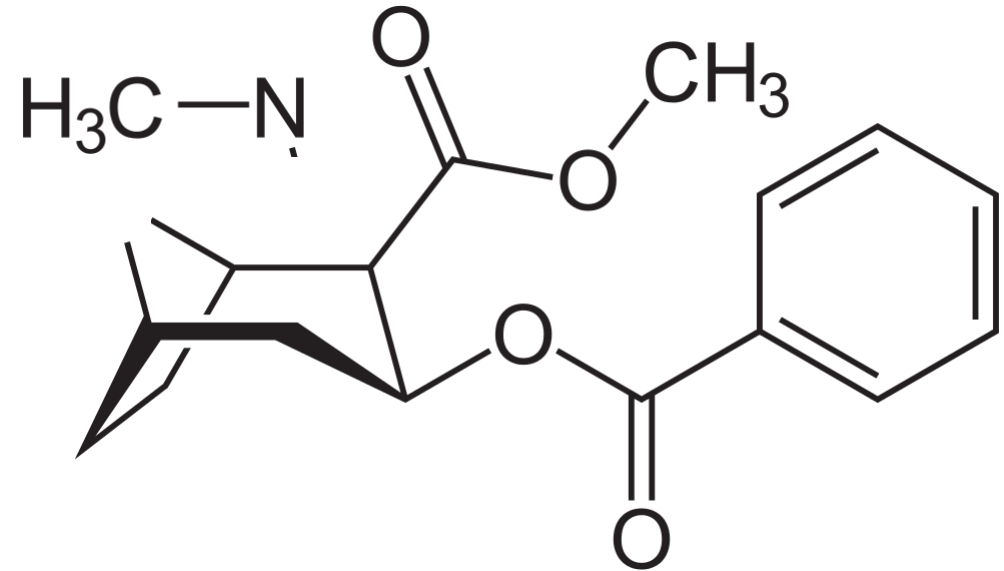
1

Circumstance:

Typical cocaine
possession case

Failure to disclose:

lab report showing
the substance is
indeed cocaine



**Raise
your
Hand**



If Your Provision—

Brady	39.14(a)	39.14(h)	3.09(d)

—Has Been Violated

2

- **State voluntarily provided discovery pretrial**
- **Defense never made request**
- **Midtrial, State learns of exculpatory evidence**
- **But doesn't turn it over**



**Does the Failure to Disclose,
In Absence of Defense Request,
Violate Your Provision?**

Failure to disclose violates:

Brady

- No request to trigger

39.14(h)

- No request to trigger

3.09(d)

- No request to trigger

3

- **Murder trial**
- **Detective (but not prosecutor) knows eyewitness failed to pick D out of lineup.**
- **Not disclosed, despite request**



**Does the Failure to Disclose
Violate Your Provision?**

Failure to disclose violates:

Brady

- Actions of police imputed to prosecutor

39.14(a)

- In State's possess/custody/control
- Or any person under contract w/ state

39.14(h)

- In State's possess/custody/control

3.09(d)

Must be "known to the prosecutor"



**Assume Detective discloses
the lack of ID to the prosecutor
But Prosecutor doesn't
disclose to the defense until a
month later (still before trial).**

Violation of Your Provision?

**What factors determine whether
there is a violation of your provision?**

What factors determine whether your provision is violated by the delay?

Brady

Can defense
still make
effective use
of it at trial?

39.14(a)

“as soon as
practicable”

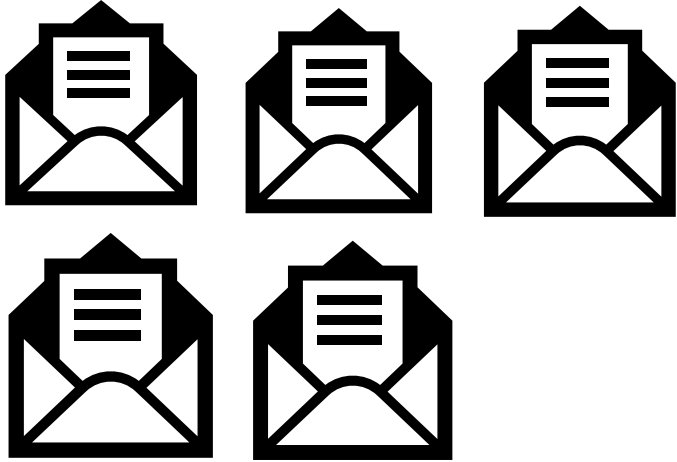
39.14(h)

No built-in
time frame

3.09(d)

Make
“timely”
disclosure

4



- **D assaults guard on camera.**
- **5 Anonymous letters are sent to DA's Office saying "D was in Aruba that day."**
- **Letters identical, except addressee.**



4 are disclosed, Elected reads hers & tosses it.

Does Elected's Failure to Disclose Violate Your Provision?

**(Assume defense made request for
disclosure)**

Is Elected's failure to disclose a violation?

Brady

Not
reasonable
probability
of different
result

39.14(a)

? ? ?
*material to
any matter
involved in
the action*
? ? ?

Watkins
PD-1015-18

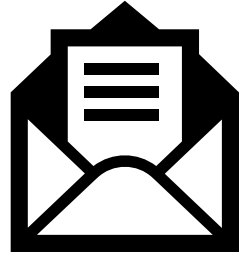
39.14(h)

Materiality is
irrelevant

3.09(d)

(if he knows
of the letter)

Materiality is
irrelevant



What if??

**Same scenario except: it's
only one letter, written &
signed by Defendant?**

***Brady?* 39.14(h)?**

Brady

**No duty to
disclose what
Defendant
already
knows
(he wrote
letter)**

39.14(h)

? ? ?



Test Your Combined Knowledge

5

- **D assaulted girlfriend outside a bar**
- **Police interview 1 witness, a passer-by who corroborates V**
- **Prosecutor learns from V that bar-owner also witnessed assault**



Bar owner says, for first time, he saw assault on video

- **Account of assault confirms rest of State's evidence**
- **Not surprisingly, bar owner says, by this time, video has been recorded over**

**Does *Brady* / 39.14(h)
require a disclosure?**

**FAVORABLE
to the
DEFENSE**

Does 39.14(a) require disclosure?

- **His description of assault**
- **Fact that video is gone**

Art. 39.14(a)

the state shall produce . . . any offense reports . . .

written or recorded statements of . . . a witness,
including witness statements of law enforcement
officers,

but not including the work product of counsel for the
state in the case and their investigators and their
notes or report,

**What if Prosecutor wrote down witness's
statements?**

**What if only a 39.14(a)
objection was preserved?**

**Does 39.14(a) apply to
intangible fact that video
was recorded over?**

Art. 39.14(a)

- offense reports
- designated documents, papers
- written/recorded statements of witness or defendant
- designated books, accounts, letters, photographs, or objects
- or other **tangible** things

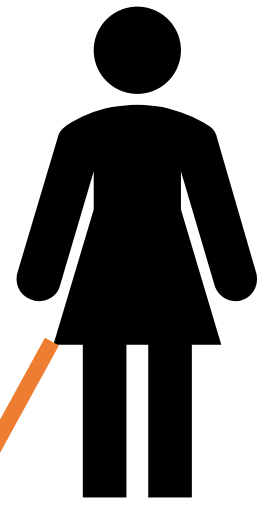
The state may provide to the defendant electronic duplicates of any documents or other **information** described by this article.

Hypo

CPS
prosecutor



**Injury-to-child
prosecutor**



**If DA's office implements a
"walling off" policy, is info
in CPS file in "custody...of
the State" under 39.14(a)?**

Still in State's custody

Tex. Atty Gen. Op. KP-0213, 2018 WL 4697344



Defense

39.14(a)

Brady

39.14(h)



State

Fam. Code §264.408
records confidential

+

§261.201 court-
ordered disclosure

Fam. Code § 261.201(b)

A court may order disclosure if:

-motion / hearing / in camera review OR

-court's own motion

AND

- Essential to the administration of justice +**
- Won't endanger participants' safety**

**As to exculpatory
material, which prevails?**

***Brady* / 39.14(h) or Fam. Code**

In camera review

What about as to everything else?

261.201
Order



Confidentiality
Other avenues

Essential to admin
of justice

Defense Hypos

Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.



Ethics Hypothetical #1:



Andy Attorney's local newspaper recently reported an Aggravated Robbery with Deadly Weapon that occurred on 6th St. last weekend.

The victim in the case has identified the assailants as a gang of females wielding semi-automatic pistols. The assailants' pistols are being described as being pink and semi-automatic. The assailants were wearing bandanas over their faces.

Hypothetical (continued)

Jane Outlaw schedules an initial office visit at Andy's law office and tells the legal assistant that an Austin Police Department detective has left a business card on Jane's front door stating that he needs to talk to her.



After the initial client data form has been filled out, the prospective client goes into Andy Attorney's office and tells the attorney about the detective's business card on her front door and the detective's request to speak to her as soon as possible.



As Andy is explaining the terms of his representation to Jane, Andy's legal assistant is performing the regular duties of initial client intake including a compilation and review of Jane's social media postings. The legal assistant compiles all electronic links to Jane's social media into an electronic folder.

After calling the detective, Andy finds out that Jane is indeed one of the prime suspects in last weekend's 6th St. Aggravated Robbery along with her 4 other of her sorority sisters.

Jane confides in Andy that she is indeed a person of interest and that she does not desire to talk to law enforcement.

After Andy explains the pros and cons of making a statement to law enforcement officers, Andy's legal assistant performs a review of Jane's Facebook postings.

The legal assistant brings in the laptop and shows Andy the following postings:



Several of Ms. Outlaw's postings are of concern to Andy and are rather revealing of Ms. Outlaw's character for peacefulness and law abidingness.



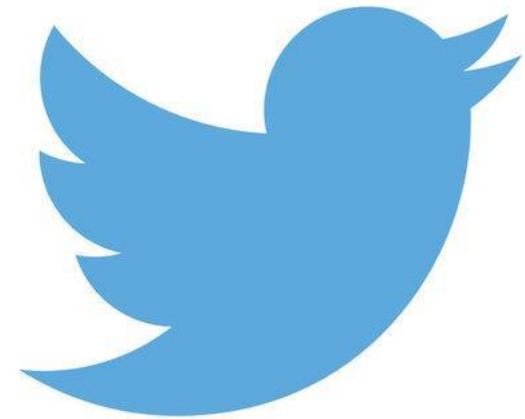




kt235167 www.fotoresearch.com



The legal assistant also advises Andy that there appears to be a recent tweet from Ms. Outlaw's twitter account announcing the following:



Gangsta Girlz Hit a Lick!

There is also a video of what appears to be a gang initiation involving an assault with bodily injury by several females upon a young female pledge that is readily enduring a severe assaultive initiation.

Question:

How does Andy Attorney ethically & effectively advise Jane?

Andy explains that the possession of the pistols are ***direct evidence*** of the robbery and could lead to 5-99 years

Andy also explains that Ms. Outlaw should not possess of any criminal instrument including pistols used in a robbery. Andy explains that possession of criminal instruments used in first degree felonies could lead to 2-20 years

Andy tells Jane Outlaw that the photos of the pistols and depictions of bandana wearing and tweets are ***circumstantial evidence*** of the robbery and could lead to a possible search warrant of her property and prosecution for aggravated robbery.

Andy explains that the tweeted statement “Gangsta Girlz Hit a Lick” could be construed as an ***evidentiary statement against interest***

Rule 3.04(a) violation?

Does advising Jane to get rid of the pistols and bandana by throwing them into Lake Travis violate rule 3.04?

Rule 3.04(a) violation?

Does advising Jane to *delete* the incriminating photos of the bandana and the pink pistol violate rule 3.04?

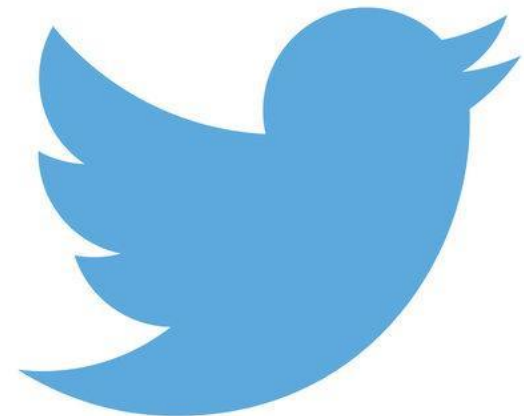
Rule 3.04(a) violation?

What do you think about Andy advising Jane to redact the photos off of Facebook but keep them stored on her hard drive?



Rule 3.04(a) violation?

- How about the ethics of advising Jane to delete the “Hit a Lick” tweet off Twitter?



Rule 3.04(a) violation?

How do feel about advising Jane to merely turn her privacy settings on private and restrict the public from her social media accounts?

Texas Code Criminal Procedure

Article 37.07 Sec. 3

Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a)(1) [evidence may be offered.....as to any matter the court deems relevant to sentencing.....

[including] *any other evidence of an extraneous crime or bad act* that is shown beyond a reasonable doubt by evidence to have been committed by the defendant

Rule 3.04(a) and Code of Criminal Procedure Article 37.07

Does advising Jane Outlaw to take down the FaceBook gang initiation video violate rule 3.04(a)?

“anything the judge deems relevant”

Article 37.07(3) Texas CCP?



Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully **obstruct** another party's access to evidence; in anticipation of a dispute unlawfully **alter, destroy or *conceal*** a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

Porter v. State, 513 S.W.3d 695, Houston 1st (Jan 10, 2017)

William Porter charged with murder. Porter contends trial court erred admitting testimony from Porter's former attorney about **attorney's removal and secretion of bullet from the crime scene** claiming privilege under the attorney-client privilege.

Marshall Shelsy, a Houston attorney, arrived at scene of crime; Shelsy performed a walk-through at the defendant's house with witnesses.

Porter v. State, 513 S.W.3d 695, Houston 1st (Jan 10, 2017)

Witness led Shelsy to living room, told Shelsy she witnessed Porter shoot decedent while decedent was sitting on the living-room couch. She pointed out the middle cushion where decedent had been seated.

Shelsy found a bullet hole in the back of the couch close to the floor. Shelsy reached into the hole and pulled out a .45 caliber bullet. Shelsy placed the bullet into his pocket and said to Witness, "Never speak of it again."

Porter v. State, 513 S.W.3d 695, Houston 1st (Jan 10, 2017)

TRCE 503(2) *Special Rule in a Criminal Case.* -- In a criminal case, a client has a privilege to prevent a lawyer representative from disclosing any fact that came to the knowledge of the lawyer by reason of the attorney-client relationship.

Attorney's conduct does not fall within the attorney-client relationship and thus does not fall within the privilege.

Affirmed

Ethics Hypothetical #2:

Robbery with Deadly Weapon occurred, complaining witness states: The accomplice kept on referring to the leader as “Mr. Big.” Witnesses visual identification is very weak for the State.

Unbeknownst to the State, Defendant in the case has a big tattoo on his forearm that identifies him as “Mr. Big.”

Rule 3.04(a) violation?

How do you feel about advising “Mr. Big” to use laser removal technology *to erase* the tattoo in light of the ethical rule?

Rule 3.04(a) violation?

What do you think about advising, “Mr. Big” to wear an ace bandage on his arm ***for the purpose of*** hiding the tattoo during trial?

Rule 3.04(a) violation?

What do you think about advising, “Mr. Big” to wear long sleeved shirts *for the purpose of* hiding the tattoo during trial?

Richard Joseph Martin v. State 11-17-00040-CR -11th Court of Appeals,
Eastland (February 28, 2019)

- During the guilt-innocence phase, State permitted to introduce photograph of defendant's tattoo
- Tattoo reflected details & circumstances surrounding shooting
- Tattoo, appeared to be depiction of the murder, was relevant to prove that Appellant was involved in murder of decedent
- The tattoo was highly probative because its details depicted many circumstances surrounding the shooting.

Rule 3.04 Fairness in Adjudicatory Proceedings

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully ***alter, destroy or conceal*** a document or other material that a competent lawyer would believe has ***potential or actual evidentiary value***; or counsel or assist another person to do any such act.

Texas Penal Code § 37.09

Tampering With or Fabricating Physical Evidence

(a) A person commits an offense if, knowing that an **investigation** or official proceeding is pending or **in progress**, he:

(1) **alters, destroys, or conceals** any *record, document, or thing* with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding;

Felony of the third degree

Texas Penal Code § 37.09

Tampering With or Fabricating Physical Evidence

(d) A person commits an offense if the person:

(1) knowing that an offense has been committed, **alters, destroys, or conceals *any record, document, or thing*** with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense;

Felony of the third degree

Hypo #3

39.14(f) C.C.P.



N.Y.C. client came to Austin for SXSW
Arrested for a crime.

“Come on Vacation Leave on Probation”

39.14(f) Texas Code of Criminal Procedure

The attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, may allow a defendant, witness, or prospective witness to view the information provided under this article, ***but may not allow that person to have copies of the information provided***, other than a copy of the witness's own statement.

Email client the O/R?



Use Skype/Oovoo/Facetime and allow client to take notes?



FaceTime



Allow client to “take notes” from O/R while lawyer gets coffee?



How to Handle O/R “Viewing”

- Allow client to read the O/R in front of you
- Not permitted to take notes or pictures



* It is your responsibility to monitor, because it is YOUR access to O/R information that can be revoked for violation of 39.14(f) – can affect your ability to represent future clients