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Ethics and the Law: Hide & Seek - By Robert Pelton

[1]Features
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Joseph Connors has submitted this issue for discussion with the Ethics Committee. The issue is a recurring problem?prosecutors not disclosing evidence to the defense. The following is the question and responses from Keith Hampton, Larry McDougal, and Joseph Connors. Lawyer Connors has also provided motions that he files.

Question:
Sexual Assault Team ADA does not trust particular criminal defense attorney X (who has got-ten a dismissal or not guilty in 5 of 7 serious sexual assault indicted cases after 2013), so ADA fails in Defendant A?s case to provide Defendant A?s defense attorney X with information that the current case?s child victim ?out cried? to same ADA of a new felony accusation against Defendant A, since ADA does not ?trust? defense attorney X?after CPS officials ruled out that same accusation when ADA referred that accusation to CPS for investigation. ADA was on stand and testified, ?We do not trust [defense attorney X], so I did not disclose any information about that ruled-out accusation against Defendant A.? Since the ruled-out accusation can be classified as a ?false accusation,? did ADA violate any ethical rules or *Brady v. Maryland* and its progeny, given that certain false accusation testimony is admissible in Texas?

Above occurred in the last 30 days. DA?s team sees no problem here. What say thou?

- Joe Connors III

Answers:
I understand that the same child accuser made an accusation subsequent to the current accusation that CPS ?ruled out.? You want to know if the subsequent accusation and the fact that CPS ruled it out is *Brady.* Yes, it is. It was also a violation of Rule 3.09(d).

- Keith Hampton

Same child accuser made accusation for which Defendant A was indicted. Later, same child accuser is interviewed by ADA in preparing for trial. During that one-on-one interview (with no one else present), child made an additional sexual assault accusation against Defendant A regarding different date, time, and place than made the subject of the indicted offense and ADA?s file e-tendered Defendant A?s counsel under current Article 39.14, C.C.P.

Since CPS ?ruled out? that subsequent accusation, ADA intentionally failed to inform counsel for Defendant

A, since DA?s team does not trust that defense counsel, even after CPS ?ruled out? and ADA no longer personally believes the most recent above additional sexual assault accusation is ?true,? and since the child needs to be protected on ?ruled-out? incident during cross-examination by Defendant A?s counsel.

Your writing about this ?often occurring? issue will educate defense bar and district judge who read the *Voice.*

Remember other reasons that ADAs claim that the State need not disclose such above information is either because it is immaterial to case?s issues and is thus inadmissible under Tex. Evid. Rules 401 and 402, or because that ADA does not personally believe that new Rule 404(b) incident information is credible to that ADA.

What remedies does competent ethical defense attorney have?

Let presiding judge know?
Let elected DA know?
Let State Bar Grievance Committee know?

Then when the DA?s office starts to retaliate against that same defense lawyer, what options does that defense lawyer have when DA?s office threatens that defense attorney in another case (in the future after above child abuse case is disposed) with criminal prosecution for the slightest error in another case, starts giving terribly unfair plea bargain offers, refuses to make any plea bargains, clearly treating that same defense attorney differently than the treatment given other criminal defense attorneys practicing in that same county?

DA?s motto to remember: ?What goes around comes around.? ?If you stick my nose in the dirt, expect your nose to be stuck in the dirt first chance I get.?

- Joe Connors III

I was on the Bar Committee when 39.14 came out. The CDC takes *Brady* violations very serious. There is nothing in any rule or statute that has a ?I do not trust the defense attorney? exception to *Brady*. My view is this is clearly covered under 39.14 under what must be produced. My recommendation is for Attorney X to file a grievance on the ADA.

- Larry P. McDougal

Motion from Larry McDougal can be found [3]here.

Courts have held that if a complainant has made a prior false allegation of sexual assault, in some situations these statements may be admissible even though specific acts of misconduct are generally inadmissible. *See Lopez v. State,* 18 S.W.3d 220, 225?26 (Tex. Crim. App. 1991); *Hughes v. State,* 850 S.W.2d 260, 262?63 (Tex. App.?Fort Worth 1993, pet. ref?d); *Rushton v. State,* 695 S.W.2d 591, 594 (Tex. App.?Corpus Christi 1985, no pet.).

In *Ex parte Miles,* 359 S.W.3d 647, 669 n.22 (Tex. Crim. App. 2012), the court granted an 11.07 petition for writ of habeas corpus based on State?s violation of *Brady v. Maryland,* after saying:

We note that the undisclosed reports could have also led to other admissible evidence favorable to Applicant. While the State usually does not have a duty to turn over inadmissible evidence, the analysis might not end there. The Fifth Circuit has held that, if inadmissible evidence would give rise [**58] to the discovery of other admissible evidence or witnesses, the State does have a duty to disclose that evidence. *United States v. Brown,* 650 F.3d 581, 588 (5th Cir. 2011); *United States v. Sipe,* 388 F.3d 471, 485 (5th Cir. 2004); *Sellers v. Estelle,*

651 F.2d 1074, 1077 n.6 (5th Cir. 1981).

- Joe Connors III
