

# Ethical Challenges for Lawyers Post Conviction

## The Michael Morton Act (effective 1/1/14)

- ▶ Post-trial disclosures:
  - ▶ 39.14 (k): any exculpatory information discovered after trial must be “promptly disclosed” to the defendant or the court
    - ▶ What is the penalty for non-compliance?
    - ▶ What do the ethics rules say?

## TDRPC 3.09(d)

The prosecutor in a criminal case shall:

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.

## Commission litigation (2016)

- ▶ Came to light after D's guilty plea to PCS that chemist had falsified lab reports in other cases
- ▶ Defendant grieved the DA/ADA alleging untimely disclosure (one year) and CFLD filed suit
  - ▶ Trial court dismissed:
    - ▶ R 3.09(d) does not impose any post-conviction duty on prosecutors

## Commission litigation (2016)

- ▶ Fourteenth Court of Appeals affirmed:
  - ▶ R 3.09(d)'s plain language ("the accused")
  - ▶ R 3.09(d) was modeled after ABA's Model Rule 3.8
    - ▶ In 2008, ABA amended MR 3.8 to add a post-conviction duty of disclosure, acknowledging that the former rule contained no such requirement
  - ▶ No TX case had ever applied 3.09(d) this way
  - ▶ HOLDING: No violation

## Commission litigation (2016)

- ▶ **BUT:** "Our holding should not be misinterpreted as a conclusion that prosecutors owe no duty to disclose exculpatory information post-conviction...." (!!!)
  - ▶ Holding limited to specific facts
  - ▶ Based on what a reasonable lawyer would have understood his/her duty to be **at the time**
- ▶ Enactment of MMA may change the analysis for future cases:
  - ▶ Interpretation of the ethics rules informed by "laws defining specific obligations of lawyers and substantive and procedural law in general"

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