

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 631**

July 2013

QUESTION PRESENTED

Does a district attorney violate provisions of the Texas Disciplinary Rules of Professional Conduct by publishing the names of persons charged with driving while intoxicated?

STATEMENT OF FACTS

A district attorney proposes to publish on his office's website the names of persons charged with driving while intoxicated ("DWI") during a holiday period. It is proposed to announce the decision at a press conference called by the district attorney that will be widely publicized. The stated purpose for posting the names is to serve as a general deterrent to discourage individuals from operating a motor vehicle while under the influence of alcohol or drugs.

DISCUSSION

Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct specifically imposes special responsibilities on prosecutors in criminal cases and requires prosecutors to do more than simply be advocates in adjudicatory proceedings. Prosecutors are required "to see that justice is done[.]" Comment 1 to Rule 3.09. Prosecutors are also subject to the requirements of Rules 3.03 through 3.08, which are applicable to all lawyers, with respect to protecting the fairness of adjudicatory proceedings. In the circumstances considered, even though the district attorney's stated purpose is to influence the public in general and to discourage illegal activity, the potential effect on accused persons and on the district attorney's responsibilities must be considered.

Rule 3.09(a) requires that a prosecutor "refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause[.]" Rule 3.09(e) requires a prosecutor to "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." Rule 3.07(a) prohibits lawyers, including prosecutors, from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding." Subparagraphs (1) and (4) of Rule 3.07(b) provide that ordinarily a lawyer will violate the general standard of Rule 3.07(a) if a publicly disseminated statement refers to the character or reputation of a suspect or expresses any opinion as to guilt or innocence of a

defendant in a criminal case that could result in incarceration. However, Rule 3.07(c)(8) provides that ordinarily disclosure of the identity of the accused in a criminal proceeding will not constitute a violation of Rule 3.07(a).

Thus, the proposed posting by the district attorney's office of the names of persons charged with a crime does not generally violate Rule 3.07 or Rule 3.09. However, the manner in which the information is posted must also be considered to determine if the posting is in violation of Rule 3.07 because it has the likelihood to materially prejudice the accused or to be interpreted as a statement of opinion as to the accused person's guilt.

Rule 4.04(a) prohibits lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person" The publication of the names of those charged with DWI during a holiday period in order to publicly embarrass the accused and so deter members of the general public from driving while under the influence of alcohol or drugs does not violate Rule 4.04(a). In the circumstances here considered, the stated purpose of the disclosure is to discourage people from operating a motor vehicle while intoxicated rather than merely to embarrass those charged. To avoid violation of Rule 4.04(a), the publication of names must be carried out in a manner that furthers the purpose to discourage persons in the community from driving while intoxicated. Under this standard, there might be a violation of Rule 4.04(a) if the names of one or a few individuals charged, rather than the names all persons charged, were singled out for publication.

CONCLUSION

A district attorney does not violate the Texas Disciplinary Rules of Professional Conduct when his office publishes the names of all those charged during a holiday period with driving while intoxicated, provided that the charges are based upon probable cause, the publication of names is done for the purpose of deterring others from driving while intoxicated, and the publication of names is not carried out in a way that would be likely to affect adversely the criminal process for those charged.