

April 19, 2023

Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 13287
Austin, TX 78711

Dear Sir or Madam:

As a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, I am fulfilling my ethical duty to inform the appropriate disciplinary authority pursuant to Rule 8.03(a) of the Texas Disciplinary Rules of Professional Conduct.¹

BACKGROUND

In 2020, Jose Garza ("Garza"), an attorney licensed by the State Bar of Texas,² was the Democratic Party's nominee for Travis County District Attorney. He campaigned as a Democrat-Socialist³ and was substantially funded by political groups advocating radical criminal justice reforms.⁴ Garza told voters that he would "reimagine" the criminal justice system and promised specific policies he would implement if elected, including (1) eliminating cash bail for defendants;⁵ (2) referring all allegations of misconduct against law enforcement officials to grand juries;⁶ and (3) refusing to prosecute all drug crimes involving one gram or less of illegal drugs.⁷

¹ Texas Disciplinary Rules of Professional Conduct, as amended January 31, 2022 (hereinafter cited as "Texas DRPC").

² Jose Pompa "Jose" Garza, Bar Card No. 24050646. Garza's online listing was last certified on August 25, 2021, more than one year ago. The listing is factually wrong as it represents his firm as Workers Defense Project. (Site last visited on April 18, 2023.) Attachment 1. A member of the Bar is required to provide certain information and to update it annually. TX Gov't Code §§ 81.115(b), (d). Misrepresentation and failure to keep information current violates Rule 7.01, Texas DRPC.

³ Attachment 2. Democrat Socialists of Austin identified Garza as a DSA member when he won the Democrat nomination.

⁴ Overwhelmingly, campaign contributions to Garza came from political action committees, including Real Justice PAC, in San Francisco, and Texas Justice & Safety PAC, in Dallas. George Soros funded the TJ&S PAC. [Texas Justice & Public Safety PAC \(DISSOLVED\) - Texas Committee - Transparency USA](#).

⁵ Attachment 3. District attorneys have no authority to abolish bail for criminal defendants as it is a constitutionally-protected right. Eliminating the right to bail means eliminating the condition which gives rise to the right: pre-trial incarceration.

⁶ Attachment 4.

⁷ Attachment 5.

On November 3, 2020, Travis County voters elected Garza and on January 1, 2021, Garza took the legally required oath of office⁸ and assumed duties as district attorney. Subsequently, Garza adopted policies he had advocated as a candidate.

A summary of cases released by Garza in January 2021 identifies all officer-involved use of force or investigations then pending.⁹ Even cases still under investigation were to be presented to a grand jury when concluded, without exception. On April 13, 2021, Garza informed the public that “[w]e will continue to fulfill our promise to you to take all officer involved excessive force cases to the grand jury....”¹⁰ Significantly, he noted, “we do not expect every case that we present to result in an indictment, however we do believe it is important that it is the grand jury who decides.”¹¹

On January 29, 2021, Garza announced policies related to drug cases, bail and a “do not call to testify” list.¹² On drugs, Garza stated that his office had a blanket nonprosecution policy for some drug offenses, specifically, “not prosecuting people who are in possession of a state jail amount of drugs.” Cases of distribution of “small amounts” of drugs also would not be prosecuted “unless there is a threat to public safety, apparently only those where violent conduct is involved. These policies make no distinction for the drugs involved, including fentanyl which can be lethal in very small amounts.”¹³

Under the caption “Civil Rights,” Garza announced the creation of a “do not call to testify” list for law enforcement officers. According to the statement, Garza is placing law enforcement officers on this list when his office has “evidence that an officer’s conduct calls into question the integrity of any case they have previously handled.” There is no distinction between negligent or intentional conduct or remote versus recent conduct in question and no consideration of the impact excluding relevant and credible evidence on a case under investigation. Officers placed on the list only have a right to be heard *after* they are on the list.¹⁴

On June 24, 2022, Garza released a statement on the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*¹⁵ reversing *Roe v. Wade*¹⁶ and *Planned Parenthood of*

⁸ Attachment 6.

⁹ https://www.traviscountytx.gov/images/district_attorney/docs/Press_Releases/2021/pr-210114-case-summaries.pdf. Since January 1, 2021, 74 cases against police officers have been presented to a grand jury. A no true bill was returned in 43 of those cases as of April 5, 2023.

https://www.traviscountytx.gov/images/district_attorney/docs/Press_Releases/2023/PR_Officers_Baroody_Buck_Camps_Molina_Klinger.pdf.

¹⁰ https://www.traviscountytx.gov/images/district_attorney/docs/Press_Releases/2021/pr-210413-100days.pdf.

¹¹ *Id.*

¹² https://www.traviscountytx.gov/images/district_attorney/docs/Press_Releases/2021/pr-210129-da-community-letter.pdf. Regarding his promise to abolish bail, Garza clearly could not and did not abolish bail.

¹³ Fentanyl is an opioid drug. All opioid drugs are narcotics. <https://www.cdc.gov/opioids/basics/terms.html>.

¹⁴ https://www.traviscountytx.gov/images/district_attorney/docs/Press_Releases/2021/pr-210129-da-community-letter.pdf. The right to due process, a civil right, is protected by both the U.S. and Texas Constitutions. Generally, the state must afford persons notice and an opportunity to be heard *before* life, liberty or property interests are deprived.

¹⁵ 597 U.S. ____ (2022).

Southeastern Pennsylvania v. Casey.¹⁷ Garza implored people to flout state abortion laws and act “no matter what the law says.”¹⁸ He assured the public that abortion laws would not be enforced in Travis County in the interest of “public safety.”¹⁹ Using the power and prestige of his public office, Garza intended and expected the public to rely on his representations as district attorney.²⁰

On July 2, 2022, Garza discussed his policy on abortion cases in a television interview.²¹ The interviewer reported that Texas district attorneys critical of the *Dobbs* decision announced that they would determine whether to prosecute abortion cases on a case-by-case basis. He assumed Garza’s position was the same and inquired as to what factors he would weigh in making these decisions. Garza rejected the premise of the question, asserting “we will not be prosecuting those cases.” When given the opportunity to clarify his response, Garza remained resolute and reiterated that no one would be prosecuted in Travis County. There was no equivocation whatsoever.

The difference between case-by-case decisions and a blanket nonprosecution policy is the distinction that makes all the difference.²² Garza’s policy is astoundingly broad. Not only is he refusing to prosecute post-*Dobbs* state law violations but even violations of state abortion laws in place consistent with pre-*Dobbs* abortion precedents.

Recognizing that Garza’s policy conflicts with acts of the legislature, the television interviewer asked Garza if he anticipated any “blowback” from it. Garza’s response reveals that he *knowingly* opposed the legislature: “I think there is deep concern on the part of the legislature

¹⁶ 410 U.S. 113 (1973).

¹⁷ 505 U.S. 833 (1992).

¹⁸ https://www.traviscountytexas.gov/images/district_attorney/docs/Press_Releases/2022/Statement-Supreme-Court-Abortion.pdf.

¹⁹ *Id.* Although Garza states he fears the law will end so-called “safe” abortions and cause women to seek out dangerous alternatives, Garza explicitly encourages women to get unlawful abortions—those not excepted by statute—and encourages abortionists to terminate pregnancies without fear of prosecution. Such encouragement may result in a greater manifestation of the very risk he claims to fear. The “trigger” abortion law Garza responded to, however, does not prohibit termination of pregnancy when a woman has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places her at risk of death or poses a serious risk of substantial impairment of a major bodily function.

²⁰ Garza’s advice to his constituents in Travis County is incomplete and misleading. While Garza seeks to induce persons to act in reliance on his refusal to enforce laws by not prosecuting violations, abortion providers are potentially subject to other legal consequences outside Garza’s power to avoid. The law to which Garza refers specifically provides a significant fine, not less than \$100,000, for each violation at the discretion of the attorney general, not the district attorney. Additionally, licensing authorities are authorized to revoke the license of any health care professional who violates the law. Thus, reliance on Garza’s advice can have serious, harmful, consequences.

²¹ <https://youtu.be/Hf6xYoFjOqA>; Attachment 7.

²² *Warren v. DeSantis*, case no. 4:22cv302-RH-MAF, at 15.

(https://storage.courtlistener.com/recap/gov.uscourts.flnd.442724/gov.uscourts.flnd.442724.150.0_1.pdf) (Florida Governor DeSantis suspended elected State Attorney Warren on the ground that Warren had a blanket policy not to prosecute abortion cases. After *Dobbs*, however, Warren had stated that he would exercise discretion in *every* abortion case just like any other case and continue to follow court rulings on the lawfulness of Florida’s abortion statute.) The court distinguished a blanket nonprosecution policy as misconduct from Warren’s case-by-case decisions. *Id.* at 18-19. Contrary to Warren, Garza confirmed his policy is a blanket nonprosecution policy.

that they are increasingly out of touch with the overwhelming majority of people who live in our state.”

The interview makes clear that the remarks were not casual, haphazard, misstatements. Garza confided that he had already spoken with law enforcement leadership in Travis County about the nonenforcement policy. A policy consistent with his on-air statements had been firmly established by Garza before the interview.²³

APPLICABLE ETHICAL AND LEGAL STANDARDS

The Texas Constitution establishes three branches of state government and explicitly establishes a separation of powers. District attorneys are members of the judicial branch of state government.²⁴ District attorneys must be licensed attorneys.²⁵ The district attorney for Travis County, the 53rd Judicial District, exclusively represents the State of Texas and prosecutes criminal defendants on behalf of the State of Texas.²⁶

Because a district attorney is an elected official, there is a natural tension between a district attorney’s political representation of constituents and legal representation of the State of Texas. To serve as district attorney, however, a person must meet certain qualifications and respect constitutional and statutory limitations. Qualifications and limitations of the office take precedence over personal and political interests of district attorneys. A failure to satisfy qualifications, or conduct inconsistent with lawful duties, are grounds for removal from office regardless of electoral support.

Duty As Licensed Lawyer

To be licensed in Texas, a lawyer must swear or affirm an oath:²⁷

I, _____, do solemnly swear (or affirm) that I will support the Constitutions of the United States, and of this State; that I will honestly demean myself in the practice of law; that I will discharge my duties to my clients to the best of my ability; and, that I will conduct myself with integrity and civility in dealing and communicating with the court and all parties. So help me God.

²³ On July 1, 2022, the day before the interview aired, I sent Garza a letter critical of his blanket nonprosecution abortion policy and recommended that he reverse it. Attachment 8.

²⁴ Tex. Const. art. 5, § 21.

²⁵ Tex. Gov’t Code § 41.001.

²⁶ Tex. Gov’t Code § 43.132; Tex. Code Crim. Proc. art. 2.01; *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (“Although the duties of the county and district attorney are not enumerated in article V, section 21, our courts have long recognized that, along with various civil duties, their primary function is “to prosecute the pleas of the state in criminal cases.”).

²⁷ Texas Gov’t Code § 82.037.

An attorney has a professional responsibility to act ethically. Fundamentally, lawyers are “guardians of the law.”²⁸ It is a lawyer’s duty to uphold legal process.²⁹ According to the State Bar of Texas, “[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of attorney.”³⁰ An attorney who commits professional misconduct is subject to discipline.³¹

Duty As District Attorney

In addition to being licensed and elected, district attorneys must swear or affirm an oath of office:³²

I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

As a member of the judicial branch of Texas government, Garza must not violate the separation of powers mandated by the Texas Constitution. As a state official, Garza may not violate the United States or Texas Constitution. Because he represents the State of Texas in Travis County, Garza acts as an agent of the state.³³ As an attorney representing the interests of the State of Texas, he has ethical obligations to the State of Texas.³⁴

Notwithstanding election to office, the State of Texas provides for the removal of state officers, including district attorneys, by petition and trial.³⁵ A district attorney may be removed for “official misconduct,” defined as

intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law.³⁶

²⁸ *Id.* at Preamble.

²⁹ *Id.*

³⁰ Texas DRPC, Rule 8.04, Comment 4.

³¹ Texas Rules of Disciplinary Procedure (including Amendments Effective June 15, July 1, and August 27, 2021).

³² Article XVI, § 1 of the Texas Constitution requires all elected or appointed state and local officers to take the official oath of office found in section 1(a). <https://www.sos.texas.gov/statdoc/forms/2204.pdf>.

³³ *Cf. Berger v. United States*, 295 U.S. 78, 88 (1935) (The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

³⁴ The Texas DRPC applies to government lawyers and expressly accommodates legal responsibilities imposed by law. Texas DRPC, Preamble, par. 13. Rule 1.12(a) provides that a lawyer employed by an organization represents the entity. The duty defined in this rule applies to governmental organizations. Rule 1.12, Comment 9.

³⁵ Tex. Local Gov’t Code §§ 87.015, 87.018.

³⁶ Tex. Local Gov’t Code § 87.011(3).

The State of Texas' definition of "official misconduct" and provisions for removal of a district attorney for neglectful or intentional failure to perform a duty imposed by law is evidence that an elected district attorney's discretion is *not* unlimited.

MISCONDUCT

All Cases of Law Enforcement Officials Presented to a Grand Jury

Garza presents every allegation of excessive use of force or misconduct by law enforcement officials to a grand jury without exception. Allegations against all other persons are not all presented to a grand jury.

Grand juries inquire into offenses and determine whether there is sufficient evidence to indict an accused or suspected person.³⁷ Grand jury proceedings are *ex parte* and secret.³⁸ The Texas Rules of Evidence, with few exceptions, do not apply to grand jury proceedings.³⁹ the prosecutor exclusively determines what evidence to present to a grand jury.⁴⁰

A district attorney has prosecutorial discretion whether to present allegations of criminal conduct to a grand jury. Once a decision is made to present allegations to a grand jury, an indictment is not difficult to obtain as reflected in the oft repeated claim that a prosecutor can get a grand jury to indict a ham sandwich. The full power of the state is brought to bear against an accused.

It is unethical for a prosecutor to present all cases to grand juries without regard to the merits of prosecution. Here, referral of all law enforcement persons to a grand jury is prejudicial and necessarily includes persons against whom allegations lack probable cause. Garza admits some cases he automatically presents to a grand jury will not result in an indictment notwithstanding the ease with which one can ordinarily be achieved.

A prosecutor in a criminal case shall refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause.⁴¹ Garza's policy that requires all charges involving a particular class of persons to be presented to a grand jury necessarily means cases are being presented whether or not probable cause exists.

Furthermore, discretion on a case-by-case basis must be exercised without discrimination to be ethical and constitutional. Identifying a class of persons for different treatment (i.e., automatic versus discretionary referral of charges to a grand jury) denies members of that class the same

³⁷ Tex. Code of Crim. Proc., Art. 20A.051; Art. 20A.301.

³⁸ *Id.* at Art. 20A.202.

³⁹ Texas Rules of Evidence, Art. 1, Rule 101(e)(2).

⁴⁰ Tex. Code of Crim. Proc., Art. 20A.104.

⁴¹ Rule 3.09. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. Texas DRPC, Preamble, par. 4.

treatment afforded others similarly situated. Thus, Garza’s policy of presenting all law enforcement persons accused or suspected of wrongdoing to a grand jury is discriminatory.

Government officials have a legal duty to not violate constitutional requirements when acting in their official capacity. The Texas Constitution and United States Constitution guarantee due process and the equal application of laws.⁴² Garza’s discriminatory policy is unlawful. Garza’s policy violates his official duty, memorialized by both the attorney oath and oath of office, to uphold the Constitutions of the United States and Texas and is unethical.

Blanket Nonenforcement of State Laws

Garza unambiguously refuses to prosecute any person in Travis County who violates certain state laws which apply statewide. Based on Garza’s representations, criminals in Travis County are effectively immune from prosecution for crimes that all other Texans are not. Garza, however, has no legal authority to immunize all persons in Travis County from prosecution prospectively. Garza’s policy not to enforce state laws for an entire class of persons—all persons in Travis County—denies any prosecutorial discretion relating to individual offenders. All offenders are prejudged to be equally entitled to escape prosecution.

Because of Garza’s official conduct in Travis County (albeit ultra vires), laws of the State of Texas do not apply equally. State law is applied discriminatorily based on geography. A Texan outside Travis County must obey the law or risk prosecution whereas a Texan inside Travis County who commits the same conduct does not. There is no legitimate government purpose served by such discrimination by the state and no rational basis for it.

Garza’s action also violates the state’s constitutional guarantee of separation of powers. The legislative branch of Texas has sole authority to make laws for the people of Texas. Garza, an official of the judicial branch, has no authority to make or repeal laws. Garza’s policies, however, have effectively nullified the applicability of state laws in Travis County.

The separation of powers provision may be violated in one of two ways. First, it is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more “properly attached” to another branch.⁴³ Second, it is violated when one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers.⁴⁴ The separation of powers doctrine requires that “any attempt by one department of government to interfere with the powers of another is null and void.”⁴⁵

⁴² Tex. Const. art. 1, §§ 3, 19; U.S. Const. amend. XIV.

⁴³ *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (1991).

⁴⁴ *Id.* (citing *Rose v. State*, 752 S.W.2d 529, 535 (Tex. Crim. App. 1987)).

⁴⁵ *Meshell v. State*, 739 S.W.2d at 252.

There is no express authority for district attorneys to refuse enforcement of state laws but, historically, prosecutors have been trusted to exercise discretion in decisions to prosecute. Discretion typically turns on factors related to individual cases, such as probative evidence, contemporaneous and past criminal record of the accused and interests of victims. In any case where the interests of justice are served, prosecution may reasonably be declined. Ethically, a Texas prosecutor should not seek to indict anyone without probable cause. In these instances, a decision not to prosecute is based on the facts of each case.

In contrast, policies that exclude from prosecution an entire category of crimes or an entire class of offenders are not equivalent exercises of prosecutorial discretion. First, such policies are the opposite of discretion in that they deprive prosecutors the opportunity to consider the facts of individual cases. Arguably, the interests of justice are defeated by such policies. Repeat offenders, for example, are treated no differently than first-time offenders. Worse, the most egregious offenders are treated no differently than nonoffenders. All cases are *prejudged* to be unworthy of prosecution. The state's interest in rehabilitation is deprived when state review of those cases is denied, including the identification, intervention, and diversion of appropriate cases for alternative dispositions from prosecution.

Garza's blanket nonprosecution policies constitute abuses of power—power without authorization—and replaces the rule of law with the rule of man. By fiat, Garza explicitly substitutes his legislative preferences for those of the elected legislature of the state he has a legal and ethical duty to represent.⁴⁶

Because there is no legal means for the state to compel Garza to enforce laws he chooses not to enforce and because there is no other official with authority to prosecute, Garza believes he can act with impunity under the guise of prosecutorial discretion. Not only has Garza adopted an adversarial relationship with the state, his use of public office to advocate for nonenforcement of laws and encouraging violation of Texas laws undermines respect for law and the administration of justice generally in contravention of his ethical responsibility as an attorney to support the role of law in society.

CONCLUSION

As a lawyer with a duty to represent the State of Texas and as district attorney having a duty to faithfully preserve, protect and defend the Constitutions and laws of the United States and Texas, Garza acts unethically and unlawfully when he discriminates against a class of Texans, violates due process and refuses to enforce state laws categorically. Accordingly, the State Bar of Texas should sanction Garza as a licensed Texas attorney.

⁴⁶ Garza's blanket nonprosecution policies were not preceded by public hearings or deliberations such as those that preceded the legislature's adoption of laws Garza ignores.

Respectfully submitted,

A handwritten signature in black ink that reads "Martin A. Harry". The signature is written in a cursive style with a large, prominent initial "M".

Martin A. Harry

Attorney

Bar Card No. 00792239