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Bribery, Coercion, Abuse: Look Inside the Allegations Against Ken Paxton

While the criminal accusations against Texas Attorney General Ken Paxton are serious and warrant an investigation, criminal law experts cautioned that prosecuting Paxton would not be a slam dunk.

By Angela Morris | November 18, 2020



Texas Attorney General Ken Paxton. Photo: Diego M. Radzinski/ALM

The whistleblowers who have accused Texas Attorney General Ken Paxton of crimes in office have raised serious allegations, but any prosecution based on their complaint is likely to face an uphill battle, according to criminal law experts.

Pages and pages of details of the criminal allegations became public last week when four of the seven former top executives sued Paxton's office under the Texas Whistleblowers Act, alleging Paxton retaliated against them and fired them after they reported his conduct to law enforcement.

Texas Lawyer asked three criminal law experts with decades of experience as prosecutors and criminal defense lawyers to read the lawsuit and analyze the criminal allegations against Paxton.

While the allegations are hefty enough to warrant a full investigation, lawyers said that prosecuting Paxton would be difficult. The criminal law statutes at issue contain vague definitions that could enable Paxton to escape prosecution.

Also, the whistleblowers' lawsuit is missing a crucial allegation about what type of benefit Paxton allegedly received for taking official actions to help one of his friends and campaign donors. Arguing that he was just using his discretion as attorney general could help Paxton beat a conviction, the lawyers say.

"I think they are alleging things that potentially could be crimes," said Houston attorney Rusty Hardin, founding partner in Rusty Hardin & Associates. "The petition cites evidence and things that would be a great problem for the AG if they turn out to be true."

Hardin, who was an assistant district attorney in Houston for 15 years before founding his firm, where he defends high-profile defendants in criminal cases, said he would be shocked if there were not already an ongoing criminal investigation into Paxton's alleged conduct.

Kayleigh Date, a spokeswoman in the attorney general's office, didn't respond to an email seeking comment.



Rusty Hardin.
Photo: John Everett

Whistleblower lawsuit

The whistleblowers who sued Paxton's office are: Blake Brickman, a former deputy attorney general for policy and strategy initiatives; David Maxwell, a nonlawyer who was director of the law enforcement division; Mark Penley, a deputy attorney general for criminal justice; and Ryan Vassar, a deputy attorney general for legal counsel.

Their allegations of criminal conduct by Paxton relate to an Austin real estate investor, Nate Paul, who owns World Class Holdings. Paxton met regularly with Paul this year, and in 2018, Paul donated \$25,000 to Paxton's campaign, the petition said.

Paul has been in legal trouble since 2019, as federal agents raided his home and offices, his companies went through bankruptcies, he's been embroiled in litigation with a local charity, and he made criminal complaints against federal agents, officials and others, said the petition.

Michael Wynne, who represents Paul, didn't respond to a request for comment before deadline.

The whistleblowers claimed in their lawsuit that Paxton abused his office to help Paul, and he pressured the plaintiffs to use their authority and the resources of the attorney general's office to help Paul.

Paxton's allegedly illegal conduct

Open records

The attorney general's office decides whether Texas agencies can withhold records from people under the Texas Public Information Act. The whistleblowers claimed Paxton pushed his staff to release documents in three disputes over Austin real estate investor Nate Paul's records requests from the Texas State Securities Board, Texas Department of Public Safety and the attorney general's office.

Lawsuit intervention

The attorney general's office is able to intervene in litigation that involves public charitable nonprofits. Paxton made his staff intervene in litigation between Paul and an Austin-based charitable nonprofit foundation that had invested in entities connected to Paul's company, the petition said. Paxton went against the advice of his staff, which said the office shouldn't waste resources in a case in which it had no interest.

Foreclosure opinion

The attorney general's office issues advisory legal opinions when other public officials ask for an interpretation of Texas law. The whistleblowers

The lawsuit contains enough allegations to merit an investigation, said white-collar criminal defense lawyer Michael McCrum, who used to be an assistant U.S. attorney.



Michael McCrum. Photo: Jay Janner/Austin American-Statesman

“There is a level of complexity in this situation. I think it can take up to a year,” said McCrum, owner of The McCrum Law Office in San Antonio.

If Paxton gets charged with crimes, the prosecutor in the case could find a road block to getting a conviction, he noted.

McCrum in 2014 was the special prosecutor to investigate and indict former Texas Gov. Rick Perry after he vetoed funding for the Travis County District Attorney’s Office public integrity unit.

McCrum won a grand jury indictment against Perry

claimed that Paxton directed the conclusion of an opinion about whether foreclosure sales should proceed during the pandemic. Paul used the opinion to stop foreclosure sales of his properties, said the petition.

Criminal investigation

The office has a division that investigates criminal complaints referred from other agencies. The Travis County District Attorney’s Office referred a complaint that Paul filed that alleged a U.S. prosecutor tampered with search warrants concerning his properties. He accused federal and state law enforcement, a federal magistrate judge and an assistant U.S. attorney of violating his rights. David Maxwell and Mark Penley investigated and recommended to close the complaint because “no credible evidence existed to support any state law charges,” said the petition. Paxton wouldn’t close it. He then hired a special prosecutor to investigate Paul’s complaint but did not follow the right procedure or gain agency approval to hire the outside attorney, said the petition. The special prosecutor obtained 39 subpoenas from a grand jury, alleged the complaint. The whistleblowers alleged the subpoenas were using the power of the attorney general’s office to punish Paul’s adversaries.

(<https://www.law.com/texaslawyer/almID/1202667077655/special-prosecutor-speaks-after-grand-jury-indicts-gov-rick-perry/>) for abuse of official capacity and coercion of a public servant, two of the three charges that the whistleblowers are alleging against Paxton. But the Texas Court of Criminal Appeals dismissed the charges (<https://www.law.com/texaslawyer/almID/1202751425042/>).

“Those particular statutes are worded so broadly that a public official has an escape hatch to escape prosecution. You just blanket yourself with, ‘Well, this is part of my official duties, to look into these matters for a concerned citizen,’” said McCrum. “Once they blanket themselves with that official cloak, given the vagueness of the statute, it becomes more difficult to prosecute. Rick Perry did it. We saw it in the impeachment hearing of Donald Trump—he used the exact same defense. I can foresee Ken Paxton doing the same thing.”

Beaumont solo practitioner Lum Hawthorne said that he believes there will be a lot of room for Paxton to argue he was just using his discretion as attorney general when he asked his staff to take the actions that helped Paul.

"I think there is enough room to argue that that is what his true belief was when he asked his employees to do this. That he believed there should be this kind of action. After all, he is the attorney general, and he is the one who makes the decisions," said Hawthorne.

Charges the whistleblowers have alleged

Bribery

The Texas Penal Code defines bribery by a public official as intentionally soliciting or accepting any benefit in order to either take some action as a public servant, or to violate your duty as a public servant. This charge would be a second-degree felony.

Coercion of a public servant

This offense means a person used coercion to influence or try to influence another public servant to exercise his power or perform his duty, or to violate his known legal duty. The charge would be a Class A misdemeanor.

Abuse of official capacity

Texas law says that a public servant has committed this offense if he intended to obtain a benefit and then knowingly misused government property, services or personnel to obtain the benefit. This charge would be a state jail felony.

That could help him beat charges of coercion of a public servant and abuse of official capacity, because a prosecutor would need to prove that all of the actions that Paxton allegedly took on Paul's behalf were actually improper, instead of just an exercise of the attorney general's discretion.

What's the benefit?

The absence of details of the exact benefit that Paul gave to Paxton is also a problem in the whistleblowers' lawsuit, said Hawthorne.

"I am not sure that based upon what the petition says that there is actually a violation of the law," said Hawthorne, a criminal-defense attorney who previously worked as an FBI agent, assistant U.S. attorney and assistant district attorney. "I just think they would have difficulty in proving, beyond a reasonable doubt, that the elements of all of these offenses were committed by Paxton."

For example, for the bribery violation, the whistleblowers' petition only alleges that Paul in 2018 donated \$25,000 to Paxton's reelection campaign.

Hawthorne explained that the bribery law says that a political donation doesn't count as a benefit, unless Paul and Paxton had an express agreement that the contribution would result in Paxton's official actions. Also, the law requires a prosecutor to have direct evidence of the express agreement.

Hawthorne said, "I wouldn't want to consider a prosecution in this case unless there was some kind of evidence of a quid pro quo, that is, some kind of payment for the expected services of the attorney general."

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(<https://www.law.com/texaslawyer/2020/11/13/new-trouble-for-ken-paxton-meet-the-lawyers-suing-him-on-behalf-of-fired-staffers/>)

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