

2012 Land Use Planning Conference

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Ethics Jeopardy

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ETHICS JEOPARDY: You Choose the Answer

SCENARIO 1:

Transferring Files after Disqualification

Facts: Paul Plaintiff is suing Biggus Corporation using the Able law firm. Defendant, Biggus is represented by the Baker firm. Early into the litigation Biggus finds out that the attorneys representing the Plaintiff were formerly attorneys at Biggus' previous law firm, and they had actually worked on the matters for Biggus that will be subject to scrutiny in this lawsuit.

Thus, Biggus and the Baker firm files a Motion to Disqualify the Plaintiff's firm and the Plaintiff's firm, Able, locates NewFirm, LLP, which is willing to take over the case. But Biggus asserts, "You can't give NewFirm your file: It's tainted with confidential information you got while you represented us!"

Question: Assuming that there is a presumption of tainted material, how much of the file is Able permitted to send to NewFirm under Texas Law?

- A. Nothing. In Texas, there is an irrebutable presumption that the file is tainted under these circumstances. New firm will have to reconstruct the file with publicly available pleadings.
- B. Some of it. Although the pleadings and correspondence file may be transferred to new firm, the attorney notes and other work product are tainted by an irrebutable presumption of conflict.
- C. The burden of proof is on the Movant, Biggus Corporation, to prove what the nature of the conflicts are which they assert and obtain an order forbidding it's transfer. Able firm may respond that none of those matters are contained in their proposed file transfer.
- D. Pleadings and correspondence may be transferred, but the withdrawing firm must overcome a rebuttable presumption that their work product is tainted, by providing logs and inventory of each file or work product sought to be transferred to NewFirm.

SCENARIO 2:

Receipt of Misdirected Communication

Facts: You are sitting at your desk and you receive a fax from your opposing counsel, giving his client advice on the settlement range he recommends for the case you are pursuing against him. You then get a fairly panicked call from him, asking if you received it? After you confirm you did, he instructs you, "PLEASE return it, as it was a privileged document, and he claims "inadvertent disclosure."

Question: What may you do when you mistakenly receive an email communication from the opposing party intended for the opposing counsel's client, which contains obviously privileged comments?

- A. Return or destroy the communication, and confirm that to the opposing party. After all, under Rule 1.06, you may not share any "clearly confidential information" with your client.
- B. Destroy the document, but you may share any valuable information received by producing your own document speculating on that information with your client.
- C. The opposing party is protected if there is an appropriate disclaimer on the communication, because to share the same violates federal laws against interception of email. You may not share the information contained therein with any third party and you must either return/destroy/delete the document.
- D. As long as it is not officially part of an inadvertent disclosure covered by Texas Rule 193.3(d), you don't have to do anything. It is 100% the opposing party's problem.
- E. Tell him you'll destroy it, but hint to him that the settlement range is "acceptable to your client, provided it happens quickly."

SCENARIO 3:

Previous Clients

Facts: Homeowner A comes to you and wants to sue his contractor over some construction defects. You know the owners of that construction business because you handled the President's divorce, but that was 12 years ago and you're pretty sure that your former client has sold the business.

Question: What duties do you have under the conflict of interest rules?

- A. You have to disclose the potential conflict to your new client and secure the clients knowing waiver and permission to proceed.

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