

Ethics

Jeopardy

Keeping a Proper Ethical “Lookout”

Claude Ducloux

Hill, Ducloux, Carnes & de la Garza

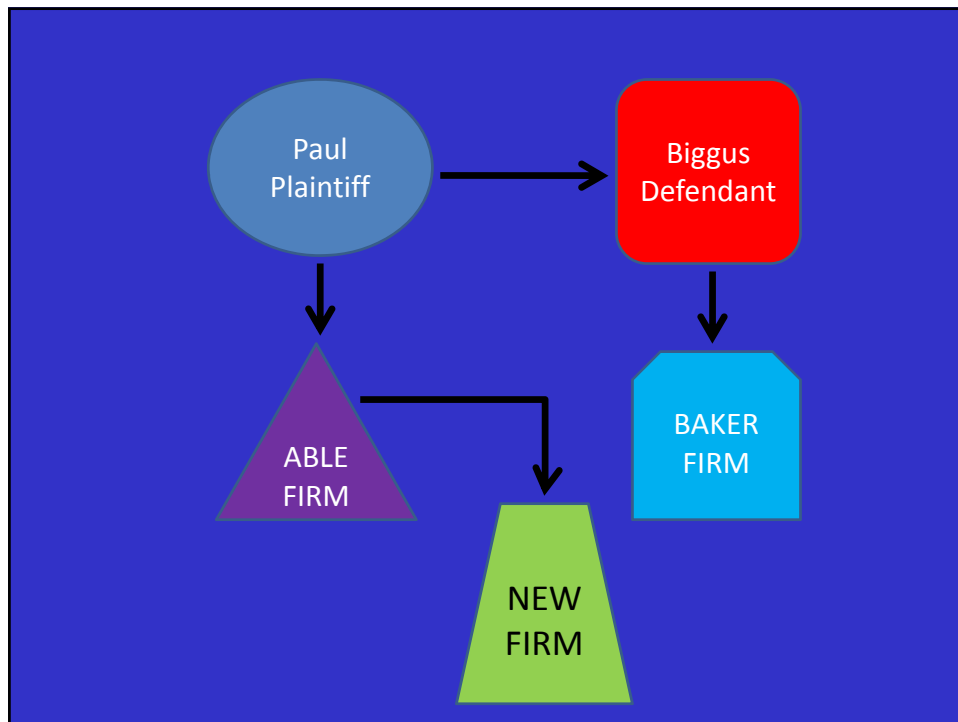
Austin, Texas

March 2012

1. Transferring Files after Disqualification:

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!”



How much of the file may Able send to Newfirm?

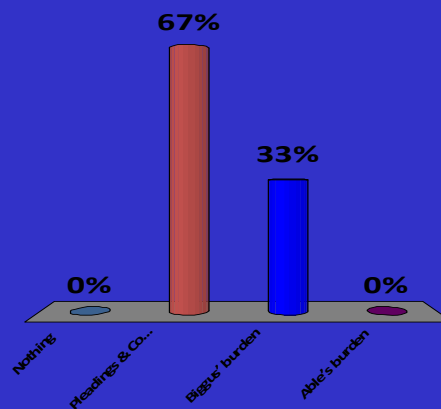
- A. Nothing. In Texas, there is an irrebutable presumption that the file is tainted under these circumstances. New firm will have to reconstruct the file with publicly available pleadings.
- B. Some of it. Although the pleadings and correspondence file may be transferred to new firm, the attorney notes and other work product are tainted by an irrebutable presumption of conflict.

How much of the file (cont'd)?

- 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 descriptions of each file or work product sought to be transferred to NewFirm.

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
- B. Pleadings & Corresp.
- C. Biggus' burden
- D. Able's burden



Answer: D

The case in point is *In Re: Kenneth George*, 28 S.W.3d 511 (Tex. 2000) – Texas adopts the rebuttable presumption test putting the burden on the withdrawing attorneys to make a complete inventory of work product and make that available for inspection.

Texas rejects the irrebutable presumption test because it deprives the party of the value of its hard earned dollars spent on creating the work product.

Texas likewise rejects placing the burden on the Movant as that may require disclosure of secrets just to confirm that the other side doesn't know about them.

Texas likewise rejects a fourth standard called "the balancing act" whereby the Court actually has knowledge of the confidential information, but decides that it is not significant enough to deprive the substituting law firm from the advantage of having the work product.

Thus, the transferring firm may rebut the presumption of taint by providing a list of files and their general contents, and the court may review in camera.

2. Receipt of Misdirected Communication

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 the attorney asking "did you receive it?" After you confirm you did, he asks you, "PLEASE return it, as it was a privileged document," and he claims "inadvertent disclosure."

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Ethics Jeopardy: Keeping a Proper Ethical “Lookout”

Also available as part of the eCourse

[Ethics Jeopardy with Claude Ducloux](#)

First appeared as part of the conference materials for the
2012 Land Use Planning session

"Ethics Jeopardy"