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To Blab or Not To Blab

Presentation by

Bernard E. (“Barney”) Jones

Rita Alister

Ruth Ann Stiles

Paper by

Bernard E. (“Barney”) Jones

Presenter Contact Information:

Bernard E. (“Barney”) Jones

Attorney at Law

Houston, TX

bjpub@bejlaw.com

713-621-3330

Rita Alister

State Bar of Texas

Austin, TX

Rita.Alister@texasbar.com

737-704-8059

800-532-3947 (Ethics Helpline)

Ruth Ann Stiles

Harris County Probate Court One

Houston, TX

ruthannstiles@gmail.com

832-927-1407

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Table of Contents

| | |
|---|----------|
| To Blab or Not To Blab | i |
| To Blab or Not To Blab | 1 |
| Bernard E. (“Barney”) Jones | 1 |
| I. Introduction | 1 |
| A. <i>CCI Authorities</i> | 1 |
| 1. Rules of Ethics | 1 |
| 2. Ethics Opinions | 2 |
| 3. The Texas Rules of Evidence | 3 |
| 4. Other Resources | 3 |
| B. <i>CCI Overview</i> | 3 |
| 1. CCI Defined | 3 |
| 2. Privileged Information | 3 |
| 3. Waiver of Privilege | 3 |
| 4. Authorized Disclosure of Privileged CCI | 4 |
| 5. Waiver of Confidentiality & Authorized Disclosures of CCI | 4 |
| 6. Privileged vs. Confidential | 4 |
| II. Scenarios – Q&A | 5 |
| A. <i>Preliminary Communications</i> | 5 |
| 1. Tim & Sue at a party. | 5 |
| 2. Tim & Sue #2 | 7 |
| 3. Rocky the plaintiff’s lawyer, & Laura | 7 |
| B. <i>Couples Representation</i> | 8 |
| 1. Bob and Suzanne. | 8 |
| 2. Ward & June. | 9 |
| 3. Mike & Carol. | 11 |
| 4. Ted & Joanna. | 12 |
| C. <i>Requests for Information & Documents</i> | 13 |
| 1. Frank’s file. | 13 |
| 2. Good Will’s daughter Brenda | 15 |
| 3. Good Will’s daughter Edwina | 16 |
| 4. Good Will’s daughter Felicia | 17 |
| 5. Deed for daughter Dora | 19 |
| 6. Deed for daughter Dora #2 | 20 |
| D. <i>Abuse</i> | 21 |
| 1. Bad Charles | 21 |
| 2. Bad Damien | 21 |
| E. <i>[Potentially] Incapacitated Client; Guardianships</i> | 22 |
| 1. Declining Edward | 22 |
| 2. Good Maria; bad Bobby | 24 |
| 3. Amelia with a record | 24 |
| 4. Amelia part 2 | 25 |
| F. <i>After the Client’s Death</i> | 27 |
| 1. Pre-probate disclosures to named executors | 27 |
| 2. Pre-probate disclosure to named successor executor | 29 |
| 3. Disposition of Will of deceased person | 29 |
| 4. Sharing copies of probated Will—with 308 notice recipients | 30 |
| 5. Sharing copies of probated Will—with others | 31 |
| 6. Jud is dead; let’s talk | 31 |
| 7. Jud is dead; you’re being deposed | 32 |
| 8. Jud is dead; you’ve been subpoenaed | 32 |
| 9. Out of control executor | 32 |

To Blab or Not To Blab

Bernard E. (“Barney”) Jones

Disclaimer: This paper is intended to motivate Texas estate planning and probate attorneys to rethink their assumptions and practices regarding client confidentiality and related ethics issues, and revisit selected rules of ethics with a fresh perspective. Many of the opinions expressed in this paper are contrary to my opinions. Many of the arguments lack substantial authority (inasmuch as there frequently isn’t any) and are designed to provoke as much as inform. Do not simply rely on the conclusions or “best answers” contained in this paper; instead, consult the applicable authorities and reach your own independent conclusions. If this paper motivates you to do so it will have accomplished its purpose.

--Barney Jones

I.

INTRODUCTION

This paper is a focused study of the attorney’s right and duties with respect to “CCI”, meaning *confidential client information*, including *privileged CCI* and *unprivileged CCI*. (References in this paper to simply “CCI” include both privileged and unprivileged CCI). It is *not* a thorough treatise. Rather, it is a very brief overview followed by a series of selected scenarios in question and answer format addressing three fundamental questions faced by attorneys:

- When is the disclosure of CCI *prohibited*?
- When is the disclosure of CCI *permissive*?
- When is the disclosure of CCI *required*?

A. CCI Authorities

Here is a list of many – but not all – of the authorities relevant to any discussion of CCI.

1. RULES OF ETHICS

a. *The Texas DR’s*

The primary source of ethics rules for Texas attorneys is the [Texas Disciplinary Rules of Professional Conduct](#) (the “TDRPC” or the “DRs”). (To download a PDF of the DR’s go Texasbar.com and search for “Disciplinary Rules.”) Most of the DRs rules pertaining to confidentiality are in Rule 1.05, Confidentiality of Information.

b. *The ABA Model Rules*

A valuable secondary source for ethics rules is the American Bar Association Model Rules of Professional Conduct (the “MRPC”, the “ABA Model Rules” or the “Model Rules”). Most of the Model Rule’s rules pertaining to confidentiality are in Rule 1.6, Confidentiality of Information. According to the ABA’s “Model Rules of Professional Conduct” webpage:

The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most jurisdictions. Before the adoption of the Model Rules, the ABA model was the 1969 Model Code of Professional Responsibility. Preceding the Model Code were the 1908 Canons of Professional Ethics (last amended in 1963).

(https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/)

The Model Rules are highly influential and frequently cited favorably by Texas authorities. They were “adopted” by Texas in 1989. But the Model Rules are just that: *model rules*. The *actual rules* in Texas are the DR’s, which differ from the Model Rules in numerous details.

c. *ACTEC Commentaries*

An invaluable ethics resource for estate planning and probate attorneys is produced (and generously shared with the public) by the American College of Trust and Estate Counsel (“ACTEC”): The ACTEC Commentaries on the Model Rules of Professional Conduct Fifth Edition 2016 (the “ACTEC Commentaries”). According to the “ACTEC Commentaries” webpage:

The ACTEC Commentaries on the Model Rules of Professional Conduct continues ACTEC’s tradition of providing guidance particular to estate and trust practitioners. The Fifth Edition update to the Commentaries takes account of amendments to the Model Rules adopted since the 2005 Fourth Edition, including those proposed by the American Bar Association Commission on Ethics 20/20 as adopted by the ABA in 2012 and 2013.

In addition to these updates, ACTEC Fellows have added Commentary and Annotations to four more of the Model Rules: MRPC 1.10, 5.3, 7.1, and 8.5, after concluding that these rules have a special kind of impact on trust and estate practice that justified including them.

This edition also takes into account related ABA developments beyond the Model Rules that affect estate and trust practitioners. In particular, we have updated the Commentaries and Annotations to take into account the work of the Financial Action Task Force (FATF) and the ABA’s response to that work as they affect trust and estate practice.

<https://actecfoundation.org/trust-and-estate-professional-resources/professional-conduct-rules-for-trust-and-estate-practitioners/>

(Note: The Sixth Edition of the ACTEC Commentaries, which should be released in the very near future, includes various updates and refinements. However, so far as the scope of this paper is concerned, it does not appear it will make any significant substantive revisions. Unless otherwise expressly indicated, all references in the paper to the ACTEC Commentaries are to the Fifth Edition.)

2. ETHICS OPINIONS

a. *Texas Ethics Opinions*

An excellent source for in depth discussions of specific ethics issues are the opinions of the Texas Committee on Professional Ethics (the “Texas Ethics Opinions”). You can locate Texas Ethics Opinions by Opinion # or by keyword search on the Texas Center for Legal Ethics website, <https://www.legalethictexas.com/Home>. According to their “Opinions” webpage:

The Committee on Professional Ethics issues opinions pursuant to Tex. Gov’t. Code §81.091-81.095. [Section] 81.091(a) states that “[t]he committee shall, either on its own initiative or when requested to do so by a member of the state bar, express its opinion on the propriety of professional conduct other than on a question pending before a court of this state.” The nine members of the Committee are appointed by the Supreme Court of Texas.

<https://www.legalethictexas.com/Ethics-Resources/Opinions>

b. *ABA Ethics Opinions*

Like the ABA Model Rules, the ABA Formal Ethics Opinions (the “ABA Ethics Opinions”) are respected, influential and frequently cited favorably by Texas authorities but do not quite rise to the level of *Texas* ethics rules (until they are cited favorably in a Texas Ethics Opinion or case). You can find them on the ABA’s Ethics Opinions webpage, https://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/, which notes: “ABA ethics opinions are copyrighted and may be reprinted and/or reproduced by permission only. In some cases, a fee may be charged.” No ABA Ethics Opinions are reprinted or reproduced in this

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