

Ethics

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1

1

Did You Do Something Wrong?

1. You represent Company A and sue its affiliate Company B, which has the same health care provider and uses the same email servers as Company A, but suit has nothing to do with healthcare or servers.
2. Defendant moves to dismiss for improper venue based on an affidavit swearing it sells no products in the district and then in researching your opposition you interview a defendant's employee who says it sells in the district, and you include that evidence in your opposition
3. You conclude opposing defense counsel isn't forwarding your settlement offers to his "client" and so you tell your "client" to email a proposal directly to her and he does so.
4. Opposing counsel emails you and CCs the president of her client proposing settlement terms, and then you reply-to-all.

2

Getting to the Answers

- The Role of Ethical Rules and Choice of Law
- Current Client Conflicts of Interest
 - Basic principles, including client identity and proper termination.
 - Recognizing and resolving conflicts including through engagement letters.
- Proper and Improper (“Ex Parte”) Contacts with Represented Persons
 - Basic principles, including who and when a person is “represented by counsel.”
 - Resolving uncertainties about whether a contact is proper.

The Role of Ethics Rules

- Do the ethics rules control, have weight, or even matter?
 - Discipline: controlling.
 - Malpractice: varying effect.
 - Disqualification: Varying effect.
 - Contract enforcement (fee agreements; fee splitting): varying effect.

Choice of Law

- Choice of ethics rules:
 - Generally, if a suit is pending before a tribunal, its rules will control.
 - Many federal courts adopt state ethics rules – be sure to check because ethics rules still vary among each other, so forum state's may be different from your home state (by text or interpretation).
 - However, even if matter is pending in state court...
 - if your conduct has its predominant effect in another state, that state's rules *might* apply. See Rule 8.5.
 - And...

Federal Courts: Varying Weight to State Rules

- If matter is pending in some federal courts (Fifth, Tenth Circuits, and some others):
 - Forum state's rules do not control even if district court has adopted them in its local rules;
 - Model Rules may or may not control; and instead
 - "National standards" determined by "federal law" controls.
 - *In re Dresser* (conduct allowed by Texas rules unethical under federal law).

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Title search: Recurring Ethical Issues in Patent Practice

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