Ethics Update

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Ethics Update

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I. INTRODUCTION

This paper discusses current issues in ethics. It includes a discussion regarding ethical issues confronted by attorneys working as in-house counsel. It also addresses the areas of wrongful disclosure, duty to disclose controlling authority, spoilation, ex parte temporary restraining orders, and attorney disqualification.

II. ETHICAL ISSUES FOR IN-HOUSE COUNSEL

As in-house legal departments continue to grow, the number of ethical concerns surrounding this area of practice also increases. In-house lawyers face unique legal concerns as lawyers who are full-time employees of corporations.

A. Attorneys' Fees

In *Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc.*,754 S.W.2d 764 (Tex.App.—Houston [1st Dist.] 1988, writ denied), the court of appeals held the award of attorneys fees for the work of in-house counsel did not violate public policy or the code of professional responsibility. In *Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398 (5th Cir. 1989), the Fifth Circuit accepted the reasoning in *Tesoro*, and held the same applied to a law firm represented by one of its own attorneys.

B. Insurance Staff Attorneys

In *Am. Home Assur. Co., Inc. v. Unauthorized Practice of Law Committee*, 121 S.W.3d 831 (Tex.App.—Eastland 2003, pet. granted), liability insurers sought a declaratory judgment against the state's unauthorized practice of law committee to determine that the use of staff attorneys to represent insured was not the unauthorized practice of law. The trial court entered a judgment in favor of the committee and insurers appealed.

On appeal the committee contended the use of staff attorneys violated the Texas rules of professional responsibility for three reasons: "(1) no attorney can serve two masters; (2) the insurance companies' right to control and direct staff counsel violates the lawyer's professional code of ethics because he cannot exercise his independent judgment; and (3) therefore, the use of staff counsel should be prohibited because the employee-lawyer is subject to an irreconcilable conflict between his employer and the insured." *Id.* at 835-36.

The court of appeals reversed, holding the staff attorney's status as an employee did not create an irreconcilable conflict. It determined the question of whether the staff attorneys served one or two masters spoke only to ethical conflicts, not to whether the corporation was engaged in the unauthorized practice of law (the issue in the case).

It further held the insurance companies were not engaged in the unauthorized practice of law. It reached this conclusion although corporations may not practice law in the state of Texas, and the staff attorneys as agents of the insurance corporations practicing law on behalf of the insured.

See also, Unauthorized Practice of Law Committee v. Nationwide Mut. Ins. Co., 155 S.W.3d 590 (Tex.App.—San Antonio 2004, reh'g overr.).

C. Attorney-Client Privilege

In re Valero Energy Corp., involved an action for breach of fiduciary duty involving a joint venture. Valero claimed the trial court abused its discretion by ordering the company to produce documents prepared by in house counsel that were protected by attorney-client privilege. The Court explained Valero and its fellow joint venturer were not joint clients. Therefore, Valero was "entitled to seek confidential legal advice from its in-house attorneys concerning its duties as pipeline operator, even though it owed a fiduciary duty to the joint venture." *Id.* at 459.

III. WRONGFUL DISCLOSURE

Texas Rule of Civil Procedure 193.3 provides that a party may withhold privileged material or information which is otherwise responsive to discovery requests provided it follows the steps for withholding laid out by subsection (a) of the rule. Subsection (d) of the rule, also known as the "snap-back provision," applies when a party inadvertently produces privileged documents to an opposing party. TEX. R. CIV. P. 193.3(d); *Warrantech Corp. v. Computer Adapters Servs.*, 134 S.W.3d 516, 525 (Tex.App.—Fort Worth 2004, no pet.). It allows a party to snap-back materials inadvertently produced within ten days after the producing party discovers the production was made. Comments on the rule explain that the rule focuses on the intent to waive the privilege rather than the intent to produce the material or information. TEX. R. CIV. P. 193.3(d) cmt. 4.

A. Disclosure to Testifying Experts

In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434 (Tex. 2007), involved a medical malpractice action where the defendant hospital sought to recover privileged documents mistakenly provided to their designated testifying expert witness. Thus, the court was required to examine the interrelation between the snap-back provision and Texas Rule of Civil Procedure 192.3(e)(6), which provides that all material provided to a testifying expert must be produced. The court concluded: "Rules 192.3(e)(6) and 192.5(c)(1) prevail over Rule 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production." Accordingly, once a testifying expert receives privileged documents, those documents may not be retrieved if the party who designated the expert continues to rely upon that designation for trial.

B. Attorney Disqualification

In *In re Parnham*, —S.W.3.d—, 2006 WL 2690306 (Tex.App.—Houston [1st Dist.] Sept. 21, 2006, no pet.), a client sought a writ of mandamus to vacate the trial court's order sanctioning his attorneys with disqualification for attempting to copy and examined privileged documents inadvertently disclosed by opposing counsel. Specifically, counsel for the defendant in the underlying action arrived to review documents responsive to a limited set of discovery requests. Staff for the producing party inadvertently left the entire litigation file in the room where the review took place. After reviewing the file and taking notes, counsel for the defendant notified the producing party's staff of the copies they wished to order as was previously arranged. When the documents came back from the copy company the next day, counsel for the producing party realized opposing counsel had ordered his entire attorney-client correspondence file, as well as other privileged material, copied. He did not forward the documents to opposing counsel and immediately invoked privilege.

The parties attempted to reach an agreement regarding the use of the privileged information, but were unsuccessful. As a result, the producing party sought disqualification, which the trial court granted. The Court explained Rule 193.3 does not specifically restrict the use of the information, but acknowledged the information is privileged from use once the privilege is asserted. It held that "rule 193.3 does not provide authority for disqualification of counsel who review inadvertently disclosed materials during the course of discovery."

C. Waiver

In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907 (Tex.App.—Dallas 2006, mandamus denied) involved a city-initiated condemnation action to acquire property through eminent domain. During the course of discovery the producing party disclosed over a hundred documents, including correspondence with attorneys handling a related matter. After receiving the documents, the requesting party discussed them with the attorneys in the related matter and producing counsel, as well as, referred to some of the documents in a hearing where the producing party was present.

The producing party only attempted to snap-back the materials when the

receiving party attached one as evidence in support of its motion to dismiss four months later. The trial court allowed the producing party to snap back the documents. The receiving party moved for mandamus on grounds of waiver by undue delay, disclosure to a third party, the offensive use doctrine, and the crime-fraud exception.

Waiver via undue delay

The court of appeals recognized that the producing party did a poor job of screening documents. It noted rule 193.3 focuses on the intent to waive privilege, and that a party who fails to diligently screen documents before producing them does not waive privilege. It then refused to find

The offensive-use doctrine waives privilege when the party requesting discovery establishes: (1) the party asserting the privilege seeks affirmative relief; (2) the privileged material is such that, if believed by the trier of fact, in all probability would be outcome determinative; and (3) disclosure of the material is the only way the requesting party may obtain the evidence. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993) (orig. proceeding); *see also, Alford v. Bryant*, 137 S.W.3d 916, 921 (Tex.App.—Dallas 2004, pet. denied). This method of waiver applies to confidential, attorney-client communications. *Republic Ins.*, 856 S.W.2d at 164; *see Alford*, 137 S.W.3d at 921.

In *JDN* the reviewing court found the requesting party failed to produce any evidence the information could not be obtained from another source. 211 S.W.3d at 923. Consequently, it held the trial court did not abuse discretion by determining the producing party did not waive the ability to assert privilege pursuant to the offensive-use doctrine. *Id.*

waiver based on undue delay explaining the moving party's evidence only established poor screening and did not evidence an intent to waive privilege.

Waiver via disclosure to third-parties

The court of appeals further held disclosure to the third party attorneys in the related matter did not waive privilege. It explained the attorney-client privilege is not waived if the communication is shared with a third person who has a common legal interest with respect to the subject of the communication. *See In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992).

Waiver via offensive-use doctrine

Crime-Fraud Exception

Once a party establishes the applicability of a privilege, the burden shifts to the requesting party to establish an exception to privilege. *Marathon Oil Co. v. Moye*, 893 S.W.2d 585 (Tex.App.—Dallas 1994, no writ). Texas Rule of Evidence 503 provides there is not a privilege if the services of the attorney were sought or obtained to enable or aid a person to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. TEX. R. EVID. 503(d)(1). In order to apply the exception, the moving party must establish a *prima facie* case of contemplated fraud, and that there is a relationship between the requested document and the *prima facie* proof offered. *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).

The requesting party in *JDN* only offered general assertions alleging the elements of the crime-fraud exception were satisfied. 211 S.W.3d at 924-25. The court of appeals disagreed and held the trial

court did not abuse its discretion on those grounds.

IV. DISCLOSURE OF CONTROLLING AUTHORITY

Texas Disciplinary Rule of Professional Conduct 3.03(a)(4), governing candor to the tribunal provides that a lawyer shall not knowingly "fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4). "Legal argument based on a knowingly false representation of law constitutes dishonesty to the tribunal." *In re Colonial Pipeline Co., Texaco Inc.*, 960 S.W.2d 272, 273 (Tex.App.—Corpus Christi 1997, no writ).

The rules do not require attorneys to make a "disinterested exposition of the law," but does require them to alert a court to authority controlling in the jurisdiction. *Id.* Attorneys have this duty even when the opposing party has not alerted the court to the adverse authority. *Id.*

As the Corpus Christi appellate court explained in *Colonial Pipeline*, a failure to disclose directly adverse controlling authority is possibly a failure to deal in good faith with the court and a breach of professional ethics. 960 S.W.2d at 273. It noted that the Texas Rules of Appellate Procedure give appellate courts the authority to impose just sanctions on parties not acting in good faith. *See* TEX. R. APP. P. 52.11.

See also, Ibarra v. State, 782 S.W.2d 234 (Tex.App.—Houston [14th Dist.] 1989, no writ) (holding that filing appellate brief in criminal case which does not distinguish published opinion filed in another case based on identical brief filed by defendant, violates Code of Professional Responsibility rule requiring counsel to inform court of

controlling precedent).

V. SPOLIATION OF EVIDENCE

The court has three considerations when determining whether a spoliation presumption is justified: (1) wether a duty to preserve the evidence existed; (2) whether the alleged spoliator breached the duty; and (3) whether the spoliation prejudiced the non-spoliator's ability to present its case or defense. *Trevino v. Ortega*, 969 S.W.2d 950, 954-55 (Tex. 1998).

A duty to preserve evidence arises when the party knows or reasonably should know there was a substantial chance a claim would be filed and the evidence it possessed or controlled would be relevant to that claim. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003). It basically requires a party to preserve what it knows or reasonably should know is reasonably calculated to lead to the discovery of admissible evidence, is relevant to the claim, is reasonably likely to be requested during discovery, or is the subject of a pending discovery sanction. *See Trevino*, 969 S.W.2d at 957 (Baker, J., concurring); *Adobe Land Corp. v. Griffin, L.L.C.*, 236 S.W.3d 351 (Tex.App.—Fort Worth 2007, no pet.).

Adobe Land Corp. v. Griffin, L.L.C., 236 S.W.3d 351 (Tex.App.—Fort Worth 2007, no pet.), involved farmers who brought negligence, products liability, and breach of warranty actions against a herbicide manufacturer after their alfalfa crops were destroyed by defective herbicide. The farmers requested samples from the herbicide lot used on their plants, but the manufacturers responded the sample was no longer available, having likely been destroyed about six months after litigation began. The manufacturers then moved for no-evidence summary judgment on the claims, and the trial court granted the motion over the farmer's request for a spoliation instruction.

The court of appeals found the manufacturers had a duty to preserve the sample because the farmer's petition put them on notice the herbicide product was potentially defective. It further found the manufacturers breached the duty to use reasonable care to preserve the evidence. The court found the manufacturer's failure to preserve was not justified "simply because the evidence was destroyed pursuant to its corporate policies." *Adobe Land Corp.*, 236 S.W.3d at 360. Finally, it held the farmers were entitled to a spoliation instruction as "the discarded sample clearly constituted material evidence, and the record reveal[ed] no other comparable evidence which would enable the parties to discover" the true nature of the sample. As such, the court reversed the trial court's ruling and remanded the matter.

In *Capital One Bank v. Rollins*, 106 S.W.3d 286 (Tex.App.—Houston [1st Dist.] 2003, no pet.), the class representative brought a cause of action against the Defendant bank which issued credit cards for breach of contract on late and over limit fees. The bank admitted destroying the envelopes in which customers sent their payments, and the representative sought a spoliation instruction to show the Bank failed to create records showing the time a particular payment was received. The court of appeals affirmed, explaining spoliation is "the *destruction* of evidence, not the failure to *create* evidence." *Rollins*, 106 S.W.3d at 298.

In *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003), the trial

court granted the plaintiff's request for a spoliation instruction after the defendant destroyed a decorative reindeer which fell on the plaintiff's head. Despite the fact the plaintiffs immediately reported the incident to store supervisors, who made a report and took notes. Defendant admitted not having the reindeer at issue during discovery and offered to provide a reasonable facsimile. Plaintiffs, refused the facsimile.

At trial, the parties testimony regarding the weight and make of the reindeer drastically differed. The trial court gave the jury a spoliation instruction requested by the plaintiffs prior to deliberations. The court of appeals affirmed, but the supreme court reversed. It found the plaintiffs' immediate incident claim to one of Defendant's supervisor did not put the Defendant on notice the reindeer would be relevant to a potential claim. Thus, Defendant did not have a duty to preserve the reindeer.

VI. EX PARTE TRO ORDERS

Texas Rule of Civil Procedure 680 provides: "No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." TEX. R. CIV. P. 680. A temporary restraining order granted without notice must meet several requirements, including , stating why it is irreparable and why the order was granted without notice. *Id.*

In Dallas County, local rule 2.02(a) requires counsel presenting an application for a TRO to notify the opposing party or counsel for the opposing party, providing a copy of the application and proposed order, at least two hours before the presentation to the court. Dallas (Tex.) Civ. Ct. Loc. R. 2.02. According to local rule 2.02(b) compliance with the two hour notice rule is not required if "a verified certificate of a party or a certificate of counsel is filed with the application."

Under subsection (b) the party must show "1) That irreparable harm is imminent and there is insufficient time to notify the opposing party or counsel; or 2) That to notify the opposing party or counsel would impair or annul the court's power to grant relief because the subject matter of the application could be accomplished or property removed, secreted or destroyed, if notice were required."

In re Tex. Natural Resources Conservation Com'n, 85 S.W.3d 201 (Tex. 2002), involved a city's dispute with the state Natural Resources Conservation Commission over the amendment of another city's water rights. The city obtained a TRO against the commission after a hearing with notice. On application of the city, the court extended the TRO by forty-five days after another contested hearing. The Supreme Court of Texas held Rule 680 did not permit more than one extension of a TRO for longer than fourteen days, regardless of whether the TRO was obtained with or without notice. It further held that mandamus is available to remedy TROs that violate the rule's time limitations.

VII. ATTORNEY DISQUALIFICATION

Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct bars a lawyer from representing a current client against a former client in a matter that (1) questions the validity of the earlier representation, (2) involves a reasonable probability that confidences will be violated, or (3) is substantially related to the earlier representation. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a). This disqualification also applies to other members of the disqualified lawyer's current firm in all three situations. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(b). Other members of the disqualified lawyer's prior firm are only disqualified in the first two situations. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(c).

In re Mitcham, 133 S.W.3d 274 (Tex. 2004), involved a confidentiality agreement between a plaintiff's law firm and an asbestos defendant. The agreement arose when a the plaintiff's firm sought to hire a newly licensed attorney who previously worked as a legal assistant at another firm handling asbestos claims against the defendant at issue. The two firms entered into an agreement that neither would participate in future asbestos suits against the defendant or share any information about them. Four years later, the attorney who caused the conflict left employment, and her immediate previous employer initiated a law suit against the defendant who was the subject of the confidentiality agreement. The Supreme Court held the confidentiality agreement operated to disqualify the immediate past employer from representing asbestos plaintiffs against the defendant.

It should be noted there are different standards for attorneys and their legal assistants. In the case of attorneys there is an irrebuttable presumption they obtain confidential information on all cases in the firm they work for. *Nat'l Med. Enter., Inc. v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996). The presumption attorneys share that information with members of a new firms is also irrebuttable. *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex. 1995). However, with legal assistants, there is only an irrebuttable presumption that they gain confidential information on the case which they work, and a rebuttable presumption they will share that information with a new employer. *See Phoeniz Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994). While the court in *Mitcham* considered these rules when evaluating the potential conflict, it decided they were irrelevant to the controversy because confidentiality agreement directly stated the firm would refrain from pursuing litigation against the defendant. *Mitcham*, 133 S.W.3d at 276-77.

In re Cerberus Capital Mgmt., L.P., 164 S.W.3d 379 (Tex. 2005), involved a written waiver of any potential conflict of interest. The court held the corporation at issue knowingly waived a conflict of interest where a potential conflict from work on draft asset purchase agreement was fully and accurately disclosed. The court noted that disqualification is a severe remedy because of the effect it can have on parties and the course of litigation. It explained "[m]ere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice to merit disqualification." *Id*. at 382 (internal citation omitted).