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Ethics & The Law: Caution: Danger Ahead - By Robert Pelton

[1]Features
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I can still hear my mother telling my brother and me to BE CAREFUL every time we left our house. As lawyers and in daily life, those words are very important. The following recent case is an example of not being careful. It is not wise to talk about cases in elevators or in the hallway. Terry Gaiser and I had a recent case where we had told our client to be careful?and be quiet. In the hallway he was cursing the officers who arrested him, the judge, and the prosecutor. He thought only his family and our witnesses were hearing this. In the courtroom after the state had put on the major witness, they then called a police officer who who had been in civilian clothes in the hallway. There is no doubt after hearing what the officer said he heard that the years moved up on what we had thought the sentence would be. The following summary is a good example of not being careful.

> *Morrison v. State* (Murder)(Lamar)(06-17-00159-CR)(March 27, 2019). OPINION: Justice Burgess. Because billing records exist to secure an indigent defendant?s right to the appointment of counsel, the prosecutor?s ?affirmative obligation? requires a prosecuting attorney to refrain from reviewing indigent defense billing records during the case against the defendant, regardless of how the prosecutor may acquire that information and regardless of whether any privilege attendant to those records was waived by public disclosure; a defense attorney who (a) creates detailed billing records disclosing confidential client communications and attorney work product, (b) fails to protect strategic defense information from public disclosure during the payment process, or (c) fails to take remedial actions after learning that the prosecuting attorney has reviewed his billing records provides ineffective assistance of counsel; and because the State violated the first principle, and because defense counsel violated the second principle, the defendant?s Sixth Amendment right to counsel and her Sixth Amendment right to be free from State intrusion into the attorney-client relationship were violated, and the defendant is entitled to a new trial.

Here are examples of calls or emails we received on the Hotline.

> **HOTLINE QUESTION:** I have recently had requests from federal clients for the discovery from their file. I know that certain documents such as offense reports cannot be given to clients, but I don?t know which, if any, documents can be given to clients and the law governing the dissemination of federal discovery.
>
> **ANSWER:** We are talking only about discovery that was received from the government under Fed. Rule Crim. Proc. 16.
> ?First, see if the government will agree to releasing all or part of the discovery to the client. Some AUSAs don?t care about parts or all of the discovery. Get that agreement in writing (email is fine).
> ?Second, if you cannot obtain an agreement for any part of the Rule 16 discovery, ask the court for permission and get a court order. See attached for such a motion I filed and the court?s order. Once a court orders that you cannot turn over certain documents to the client, you will be protected from a grievance. *See Voice for the Defense Online for Lawyer Mowla?s Motion and Order.*

Ethical issues are best presented directly to TCDLA?s Ethics Committee phone hotline or by email to that committee?s chairpersons, Robert Pelton or Michael Mowla. Article 39.14, C.C.P., is the only limitation on what you can send a client who has asked for ?all? his file created while you represented the client in a criminal case. At your expense, your ex-client is entitled to promptly receive from you all contents of his paper and digital file(s) in your office?except the e-discovery you received from the state?s DA. If you obtain a court order from the same court having jurisdiction over your client?s indictment, that court?s express order can permit your making judicially compliant additional disclosures to your client, and you can send the state?s e-discovery you got under Article 39.14., C.C.P. *Continue to ignore the client?s file request and you will lose at the grievance committee!* So beware.

QUESTION: I had a client I represented on a world of felony drug cases in two different counties last year. The client is drug-enhanced crazy (meaning the client was crazy to begin with) but is not quite incompetent. I managed to get good outcomes for him (he was facing decades in prison, but received multiple concurrent 7-year sentences, if memory serves). While his cases were pending, he visited me in my office and went over discovery on some of the cases?this was before his bond was yanked for failing drug tests while on ?pretrial probation? (in Smith County they do things like this and never mind the Constitution, the presumption of innocence, justice, or other quaint outdated notions in today?s modern world)?and I went over the remain-der of his discovery with him during multiple visits to the jail.

?My now-ex client sent me a letter a few weeks back demanding his file and everything in it, to include multiple discovery discs, many pages of police reports, witness statements, and multiple documents containing confidential information. The client saw all this on multiple occasions while his cases were pending. I consulted with a defense attorney about the issue and followed his advice: I did not reply.

?The ex-client has filed a ?Motion to Compel Attorney to Produce Client?s File? with the Smith County District Court that convicted him. Never mind a possible lack of jurisdiction, and never mind that the judge in that court probably doesn?t give a whit about the motion, but what exactly?legally and ethically?can I send to the ex-client? What, legally and ethically, if anything, am I required to send him? Am I obligated to pay for copies of whatever I can legally/ethically send him?

?I am concerned about violating rules about not releasing confidential information?to include phone numbers, addresses, and other sources of contact information for witnesses. On the other hand, I don?t want to get hammered by the Bar. I feel in a bit of a Catch-22 situation here?damned if I do and damned if I don?t.

ANSWER by Joseph Connors: It appears that attorney collected various items of evidence to use as substantive or impeachment evidence while representing client. Now that client?s case is over, does attorney have to return same to client or to the person from each item was separately obtained by defense counsel or his/her investigator?

1.?Keep everything and face and lose on some issue at attorney?s own grievance hearing.

2.?Return each item to the person from whom same was initially obtained on theory it was loaned to counsel and was never ?owned? by client.

3.?Give all to client and hope client does not misuse such potential evidence by threats, murder, etc.

4.?Attorney can study all attached and figure out the ethical and moral answers to this serious dilemma.

Special thanks to Michael Mowla, Joseph Connors, and Sharon Bass. See the Voice for the Defense Online for Motion and Order from Michael Mowla and files from Joseph Connors.

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