

I've Seen Fire and I'VE SEEN RAIN

MARTIN IS A LONG-TIME GENERAL PRACTITIONER whose clients are mostly individuals. His practice includes estate planning, criminal defense, consumer bankruptcy, and general civil matters. His office has a room where he keeps paper files, though he has been trying to transition to electronic files to save space.

Recently, his office was heavily damaged by an overnight fire. In addition to the fire damage, his office suffered extensive water damage from the firefighters' efforts to extinguish the fire. Many of his paper files were damaged or destroyed, and the onsite server where electronic documents are stored also was damaged. He was not able to access his bank accounts—including trust accounts—for a few days because he could only do so through the damaged computers in his office.

As he assesses the damage, he realizes that he needs to contact many of his present and former clients to let them know that their matters may be affected by the fire. Although he can reconstruct some of the missing files from other sources, he realizes that many other documents were lost or damaged beyond recognition. He has some retrievable backup documents on the server, but some of those also were lost. He does not have any documents stored on a remote server.

Upon completing his damage assessment, he contacts each of his affected clients and lets them know how it will affect their matter. He discloses the specific documents lost, but his disclosure is limited only to documents that are originals—such as original wills—and documents that he thinks are important or necessary to the representation of the client. He does not disclose documents that he regards as unimportant or unnecessary because of the sheer volume of those documents.

According to a 2018 Formal Ethics Opinion issued by the American Bar Association, which of the following were potential ethics violations?

- A. Failing to disclose all documents that were lost instead of just the ones he deems important
- B. Failing to maintain electronic copies of important documents at an offsite location
- C. Failing to prepare in advance for loss of access to bank accounts
- D. All of the above
- E. A and B only
- F. B and C only
- G. A and C only
- H. None of the above



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The Texas Center for Legal Ethics was created by three former chief justices of the Supreme Court of Texas to educate lawyers about ethics and professionalism. Lawyers can access the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer's Creed, and a variety of other online ethics resources by computer or smart device at legaethicstexas.com.

DISCLAIMER

The information contained in Ethics Question of the Month is intended to illustrate an ethics issue of general interest in the Texas legal community; it is not intended to provide ethics advice that applies regardless of particular facts. For specific legal ethics advice, readers are urged to consult the Texas Disciplinary Rules of Professional Conduct (including the official comments) and other authorities and/or a qualified legal ethics adviser.

ANSWER: ABA Formal Ethics Opinion 482 (2018) addresses a lawyer's obligations with respect to disasters. In that opinion, the ABA Standing Committee on Ethics and Professional Responsibility specifies actions that attorneys should take before and after disaster strikes. The opinion makes clear that lawyers should maintain an electronic copy of important documents in an offsite location and update it regularly. The opinion further states that attorneys should—in advance of any disaster—"take appropriate steps in advance to determine how they will obtain access to their [bank] accounts after a disaster." Martin did neither of these things.

With respect to lost or destroyed documents, the opinion divides them into three categories: (1) documents with "intrinsic value," such as original wills, trusts and deeds; (2) lost documents that have no intrinsic value or serve no useful purpose to the client (or, though destroyed, are backed up electronically); and (3) documents that "fall in the middle," which the opinion defines as those necessary for current representation or that serve some "useful purpose" to the client. The opinion does not recognize a duty to inform clients about lost documents in the second category.

Here, Martin's process for selective disclosure of his lost documents—i.e., not informing clients of documents with no intrinsic value or that serve no useful purpose to the client—was consistent with his ethical duties. The correct response is F.