

LITIGATION ETHICS: PART V (COURTS)

Hypotheticals

Thomas E. Spahn
McGuireWoods LLP

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Hypothetical 1

As your firm's ethics "guru," you receive numerous calls every day from your partners who are trying cases. This morning you received two similar calls from partners who need your immediate input.

One of your partners represents an individual plaintiff in a lease case about to be tried. Your partner called you this morning to say that the defendant appears not to have discovered her client's earlier criminal conviction for fraud and perjury. Your partner wonders about her obligations at the upcoming trial.

(a) Must your partner disclose her client's criminal conviction for fraud and perjury?

YES

NO

Another partner called you from the courthouse during a break in an ex parte TRO hearing. That partner's client had earlier been found liable for engaging in fraudulent mortgage transactions -- which would be material in the matter. Your partner needs to know immediately whether to disclose that earlier judgment.

(b) Must your partner disclose the earlier judgment entered against your client?

YES

NO

Hypothetical 2

You joined a law firm right after graduation from law school, while your roommate became a government prosecutor. Over the years, you have met periodically for lunch to discuss your careers. Yesterday you debated lawyers' possible duties to disclose unfavorable facts that the other side might not have uncovered. You tell your friend that you just dealt with this situation in a recent trial, and concluded that you did not have to disclose unfavorable facts. Your prosecutor friend insists that as a matter of ethics she must do so, and that her duty even continues after a criminal trial ends.

(a) As a matter of ethics, must prosecutors disclose unfavorable facts?

YES

NO

(b) If so, does the prosecutor's duty last beyond the end of a trial and appeal?

YES

NO

Hypothetical 3

You are defending a bank in a lawsuit going to trial next month. One of your newest colleagues checks on a daily basis court decisions dealing with the issues involved in your litigation. Your colleague just reported on several new decisions, and you wonder whether you must bring them to the trial court's attention in your case.

Must you advise the trial court of the following decisions:

- (a)** A decision by your state's supreme court directly adverse to the statutory interpretation argument you are advancing on behalf of your bank client?

YES

NO

- (b)** A decision by another trial court elsewhere in your state, which does not control your trial court's decision, but which is directly adverse to your statutory interpretation argument?

YES

NO

- (c)** Unfavorable dicta in a decision from your state's supreme court?

YES

NO

- (d)** A decision from a neighboring state's appellate court involving exactly the same facts as your case, and which is directly adverse to your statutory interpretation argument?

YES

NO

Hypothetical 4

You thought you understood your obligation to disclose unfavorable case law from the "controlling jurisdiction," but now you have several more questions as you begin to brief legal matters in a large case.

Can you be sanctioned for not disclosing directly adverse case law of which you were not aware when you filed a brief, but which you could have found by conducting some simple research?

YES

NO

Hypothetical 5

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

- (a)** A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

YES

NO

- (b)** A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

YES

NO

Hypothetical 6

You represent a defendant retailer which has been sued by a customer after an incident in which your client's guards briefly restrained the customer. The litigation has been ugly from the beginning, and you have filed a counterclaim against the plaintiff customer alleging various claims.

The plaintiff's inexperienced lawyer has apparently missed several pertinent state statutes, and you are deciding what to do as you prepare for trial.

- (a)** If the plaintiff does not do so, must you disclose to the court a state statute prohibiting one of the counterclaim theories you have asserted?

YES

NO

- (b)** If the plaintiff does not do so, must you disclose the statute of limitations that might bar (but which would not extinguish) one of the counterclaims you have asserted?

YES

NO

Hypothetical 7

The other side in a big case just filed its initial pleading in favor of a summary judgment motion. Amazingly, the other side missed an important case from your state's supreme court that directly supports its position (and therefore is directly adverse to your position). Under the briefing schedule, the other side will have two weeks to file a reply to your brief in opposition to its summary judgment motion.

Must you disclose the unfavorable supreme court decision in your brief (rather than wait to see if the other side includes it in its reply brief)?

YES

NO

Hypothetical 8

You remember from law school that both lawyers' and judges' ethics rules generally prohibit a lawyer's ex parte communications with a judge. However, a recent case has raised several more complicated questions.

(a) May you speak with a judge who initiates an ex parte communication about the merits of a pending case?

YES

NO

(b) May you communication ex parte with a judge about scheduling issues?

YES

NO

(c) If you speak ex parte with a judge about scheduling issues, must the judge (rather than you) advise the other parties about the communication?

YES

NO

Hypothetical 9

You are representing your brother-in-law in an assault case, even though you normally do not handle criminal matters. You and your brother-in-law believe that the "victim" made up the entire story, and you are looking for ways to establish that fact.

May you bring one of your neighbors (rather than your brother-in-law) to trial to sit with you, and hope that the "victim" identifies the neighbor as the man who assaulted her?

YES

NO

Hypothetical 10

You are involved in litigation in which one of your former legal assistants will be an adverse deposition and trial witness. You suspect that the legal assistant might be tempted to lie about key matters. In an effort to assure her honesty, you conspicuously place nine blank audio cassette tapes in front of the legal assistant on the table before you depose her. You suggestively label the audio tapes and refer to them during your questioning -- implying that you had recorded conversations with the legal assistant that could impeach and personally embarrass her. You also intermittently caution the legal assistant to answer truthfully or risk perjuring herself.

Does your tactic violate the ethics rules?

YES

NO

Hypothetical 11

Over the years, you have found that one of the most enjoyable aspects of practicing law is the wide circle of friends with whom you enjoy spending leisure time. You have just been offered a judgeship, and you wonder to what extent judges can continue to socialize with litigants.

If you become a judge, may you:

- (a)** Attend a church picnic with the defendant in a car accident case you are hearing?

YES

NO

- (b)** Play golf with the plaintiff in a commercial litigation matter, whom you have known for twenty-five years?

YES

NO

- (c)** Go hunting with a government official (such as the country's Vice President) who has been sued in his official (rather than personal) capacity in a case that will come before your court?

YES

NO

Hypothetical 12

Having just been appointed as a local judge, you need to make some decisions about cases which have been assigned to you.

(a) May you hear a case in which one of the litigant's lawyers is your best friend?

YES

NO

(b) May you hear a case in which one of the litigant's lawyers is your son-in-law?

YES

NO

(c) May you hear a case in which one of the litigant's lawyers is your brother-in-law?

YES

NO

(d) May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is a partner?

YES

NO

(e) May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is an associate?

YES

NO

Hypothetical 13

You joined a large law firm right out of law school, and practiced there for about 20 years before becoming a judge. You knew some of the lawyers at the firm very well during your tenure there, but as in any large firm there are some lawyers you hardly knew at all (and many you never met).

May you hear a case if a lawyer at your former firm represents one of the litigants?

YES

NO

Hypothetical 14

You have served on the bench for just a few weeks, but glancing ahead at your docket has raised some issues that require your attention.

- (a)** May you hear a case in which one of the litigant's lawyers is simultaneously preparing your personal estate plan?

YES

NO

- (b)** May you hear a case in which one of the litigant's lawyers is representing you in your official capacity (responding to a petition for writ of mandamus filed in another case)?

YES

NO

- (c)** May you hear a case in which one of the litigant's lawyers is in a law firm preparing your estate plan (the litigant's lawyer has nothing to do with that work for you)?

YES

NO

- (d)** May you hear a case in which one of the litigant's lawyers is representing your spouse in a small dispute involving the florist shop that your spouse operates?

YES

NO

- (e)** May you hear a case in which one of the litigant's lawyers represented you in your divorce (which was final ten years ago)?

YES

NO

Hypothetical 15

You practice in a state judicial district served by three judges -- two of whom are very conservative and one of whom is very liberal. Over the years, you and every other local lawyer has recognized the advantage that employment and personal injury plaintiffs have when drawing the liberal judge. Not surprisingly, you have considered various steps to increase the odds that your plaintiff's cases are assigned to the liberal judge. Your local court's docket control clerk assigns cases on a rotating basis.

May you take the following steps in an effort to increase the chances of drawing the liberal judge:

- (a)** Wait until you know that both conservative judges are out of town before filing a motion (such as a motion seeking a TRO) that requires immediate judicial attention?

YES

NO

- (b)** Have one of your associates wait at the clerk's office until it looks as if the next case filed will be assigned to the liberal judge, at which time your associate will file your client's case?

YES

NO

- (c)** File three essentially identical cases for your client, and then dismiss the two cases assigned to the conservative judges?

YES

NO

Hypothetical 16

One of your largest clients just hired you to defend a series of employment discrimination cases filed by several plaintiffs in Northern District of Alabama federal court. Your client also wants you to defend cases that your client expects other plaintiffs will file in the coming years. In previous employment cases, your client has been extremely unlucky before one Northern District of Alabama judge, and has asked you about possible ways to avoid that judge.

May you take the following actions -- if you are motivated by the desire to avoid having the unsympathetic Northern District of Alabama judge hear cases against your client:

- (a)** Move for a change of venue to the Southern District of Alabama (if there are legal grounds for doing so)?

YES

NO

- (b)** Retain as additional local counsel the judge's son?

YES

NO

- (c)** In preparing for a case that you plan to file against an employee in six months, retain as local counsel the judge's son to appear as counsel of record when you file the complaint?

YES

NO

- (d)** Retain as additional local counsel a law firm in which the judge's eldest daughter works?

YES

NO

(e) Retain as additional local counsel the law firm at which the judge previously worked?

YES

NO

Hypothetical 17

You just started hearing a criminal trial of a defendant charged with breaking into an elderly women's house and strangling her to death. This scenario brings back strong memories, because your mother was the victim of a nearly identical crime about ten years ago.

(a) Must you disclose this fact to the prosecution and the defense?

YES

NO

(b) Must you recuse yourself if requested by either the prosecutor or the defense lawyer?

YES

NO

(c) From what you have already heard about this defendant from both his lawyer and the prosecutor in various pretrial hearings, the defendant seems to be a real hot head -- must you recuse yourself if in the course of the trial the defendant brags about the crime, says that he knows your mother died in exactly the same way, and then makes an obscene gesture toward you in the courtroom?

YES

NO

Hypothetical 18

You have served for two years as a trial court judge, and realistically hope to soon receive an appointment to an appellate court. You are now in the middle of a newsworthy trial, and questions have arisen that require your immediate attention.

- (a)** In the trial, there is some dispute about when the defendant spoke with a court clerk about a filing deadline. May you call the clerk to find out when the defendant spoke to her?

YES

NO

- (b)** You suspect that the defendant could not have spoken to the court clerk on the date he claims, because he earlier stated that he would be out of the country during that time. May you check the defendant's social networking website to see where he was on that date?

YES

NO

- (c)** The trial also involves a young adult's reaction to a stressful incident. May you read and rely on articles about how young adults react under stress (which have not been admitted into evidence)?

YES

NO

- (d)** If you are appointed to the appellate court, may you read and rely on such articles?

YES

NO

Hypothetical 19

You represent the defendant in contentious litigation. You think that the judge's participation in settlement discussions might result in a favorable settlement for your client.

Can the presiding judge participate in settlement negotiations, such as caucused mediations?

YES

NO

Hypothetical 20

After many years on the bench, you have earned a well-deserved reputation for wisdom and evenhandedness. This has resulted in several invitations to interact with other branches of the government.

- (a)** May you testify in favor of increased funding for your state's special juvenile court?

YES

NO

- (b)** May you serve on a commission appointed by your state's governor studying changes in your state's drug laws?

YES

NO

Hypothetical 21

Before you went on the bench, you played a very active role in your law school's alumni group, including acting as its informal "general counsel." You also provided legal advice to a family-owned corporation primarily managed by your sister.

(a) Now that you are a judge, can you continue to act as the alumni group's lawyer?

YES

NO

(b) Now that you are a judge, may you continue to provide legal advice to your sister's company?

YES

NO

Hypothetical 22

You have been very active in your law school's alumni organization, and hope to continue some involvement with that group after your upcoming installation as a judge.

May you engage in the following activities after you become a judge:

(a) Serve as president of the law school alumni association?

YES

NO

(b) Serve as the head of the alumni organization's fundraising group?

YES

NO

(c) Send a letter to law school alumni seeking contributions to the alumni fund?

YES

NO

(d) Speak at a holiday dinner at which money will be raised for the law school alumni fund?

YES

NO

(e) Attend a summer picnic at which money will be raised for the law school alumni fund?

YES

NO

Hypothetical 23

After your installation as a judge last month, you have been studying your state's judicial ethics advisory committee opinions to make sure that you comply with all of the ethics rules. You have always been very active in your church, and you wonder about the permissibility of certain actions now that you are a judge.

May you engage in the following activities as a judge:

(a) Participate as a "lay reader" of a religious text during the service?

YES

NO

(b) Present the sermon at the service in which your church encourages its members to pledge 10 percent of their income to the church for the next year?

YES

NO

(c) Act as an usher during the service, which involves silently passing a collection plate during the service?

YES

NO

Hypothetical 24

You will soon be installed as a judge, and wonder about the propriety of accepting gifts from various people and groups.

Once you become a judge, may you:

- (a) Accept an expensive stereo for your office, which will be given to you at a dinner hosted by your former law firm?

YES

NO

- (b) Accept travel expenses and a free room for you and your husband at a CLE program to be held in Bermuda, and paid for by a local defense lawyer group?

YES

NO

- (c) Accept an honorarium from a plaintiffs' lawyer group for a talk on the administration of justice?

YES

NO

- (d) Agree to a congratulatory announcement in the statewide bar magazine by your former firm?

YES

NO

Hypothetical 25

Now that you have become a judge, you have tried to be extra careful in avoiding any appearance of prejudice or bias. However, several recent invitations have left you agonizing over what you can do.

May you accept an invitation to:

(a) Join an honorary society that does not admit minorities?

YES

NO

(b) Join an organization that does not allow women to hold certain positions in the organization?

YES

NO

(c) Attend a weekly lecture series at a country club which limits its membership to Protestants?

YES

NO

(d) Attend a wedding reception for your niece, to be held at a local private club which excludes minorities?

YES

NO

Hypothetical 26

You have been defending a large software company for several years in a government antitrust action. The judge handling the case has repeatedly granted interviews about the case and even the issues being litigated before him. You are not sure what to do about this, but you first want to know if the judge is running afoul of the judicial ethics code.

May judges make public comment on cases that they are handling?

YES

NO

Hypothetical 27

One of your partners and closest friends just became a judge. Over dinner, you and she discuss the dramatic changes that her selection will make in her professional life. For instance, she tells you that after handling high-profile litigation for the past two decades, it will be difficult for her to avoid talking about any cases. This starts a debate about what you both have long recognized as the general rule prohibiting judges from talking publicly about their cases.

(a) May a judge talk publicly about a case in which the judge herself is a private litigant?

YES

NO

(b) May a judge talk publicly about a case in which the judge herself is a litigant in her official capacity (such as a mandamus petition)?

YES

NO

Hypothetical 28

Although you like to relax at home watching TV with your family after a long day of work, you have begun to grow weary of the nearly non-stop "talking heads" commentary about a celebrity murder trial in California. Just as you are about to fall asleep in your easy chair while watching the commentary last evening, you realized that one of the folks being interviewed about the case is a sitting state court judge from New Jersey. Your husband (who is also a lawyer) asks you whether it is appropriate for a New Jersey state court judge to comment on a pending murder trial in California.

May a judge make a public comment about a case pending in some other state's court, and which will never come before the judge?

YES

NO

Hypothetical 29

You recently became a judge, and seem to be deluged with requests for letters of recommendation from neighbors and friends.

May you send the following letters of recommendation:

- (a) A letter recommending a local lawyer for a judgeship that soon will open up in your city?

YES

NO

- (b) A letter on court letterhead recommending your next door neighbor's daughter for admission to a local law school?

YES

NO

Hypothetical 30

You have been asked to participate in a commission charged with reviewing your state's judicial code of ethics. Among other things, you will be asked whether the judicial ethics code should totally prohibit judges from publicly commenting on matters of public policy -- even issues that will never come before the judge.

Should the judicial ethics code prohibit judges from publicly commenting on matters of public policy -- even issues that will never come before the judge?

YES

NO