

CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS

PART I

Hypotheticals

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Hypothetical 1

In an effort to expand your business, you want to start representing lawyers in defending against disciplinary charges and malpractice claims. As you start considering the issues, a few questions come immediately to mind.

(a) Can a lawyer be sued in a malpractice or other civil case for breaching an ethics rule?

YES

NO

(b) Is breach of an ethics rule admissible in a civil case against the lawyer?

YES

NO

Hypothetical 2

You tell one of your partners that you plan to begin representing lawyers in defending against disciplinary charges and civil actions. She asks you a simple question that you find yourself unable to answer.

Do the ethics rules apply to a lawyer's personal, nonprofessional activity?

YES

NO

Hypothetical 3

You have been asked to participate in a panel dealing with the recent wave of corporate scandals. You expect to be asked about the extent to which lawyers may be punished by their bars for conduct that does not directly relate to the lawyers' dealings with their clients. Of course, you want to be prepared with an answer.

What types of lawyer wrongdoing should be punishable by the bar even though the wrongdoing does not involve any clients?

Hypothetical 4

You represent the owner of a small suburban office building in her labor and employment matters (mostly relating to the small clerical staff she employs). You do not perform any real estate work for the owner. Your firm wants to open up a "satellite office" in the suburbs, and you just told your managing partner that the firm should consider leasing space from your client.

(a) May you lease office space from your client?

YES

NO

(b) Must your client be separately represented in the lease negotiations?

YES

NO

(c) Must you make any disclosures to your client or receive any consents from your client before entering into the lease?

YES

NO

Hypothetical 5

Your former college roommate was always trying to invent something that would make him a millionaire, but until recently he had failed time after time. He just called to tell you about his latest invention, and to ask whether you would be willing to represent him in all of the necessary legal work. Your client offers to give your firm a percentage of his proposed new company's stock in lieu of fees.

May your law firm accept stock in your client's company in lieu of fees?

YES

NO

Hypothetical 6

You have been a very successful lawyer, in large part because you develop such a close personal relationship with your clients. However, this very trait has led you to pose some questions to your firm's "ethics guru."

- (a)** May you solicit substantial gifts from your clients to fund a scholarship named in your parents' honor at a local law school?

YES

NO

- (b)** May you accept your client's offer to name you as a beneficiary in her estate (the bequest is \$250,000)?

YES

NO

- (c)** May you prepare a will for a client who has asked you to include a provision under which your daughter (for whom your client has been a "second mother" for her whole life) will receive enough money for a college education?

YES

NO

Hypothetical 7

You recently attended an ethics seminar, and learned that lawyers cannot prepare documents under which they receive some benefit from a non-family member client. You were startled by the harshness of the new rule, but recall that lawyers might be able to accept the money if someone else advises the client on the wisdom of making the bequest or gift. Now you wonder how such an arrangement would work.

- (a)** May you accept money from a non-family member client if one of your partners prepares the documents under which you receive that money?

YES

NO

- (b)** May you accept money from a non-family member client if the client is being advised by a financial advisor?

YES

NO

Hypothetical 8

You have represented a local dentist for several years, and consider yourself to be her close friend as well as her lawyer. The dentist called you this morning to discuss her estate planning.

- (a)** If the dentist suggests it, may you act as executor under a will that you draft for the dentist?

YES

NO

- (b)** May you raise the issue first, and suggest that you draft a will that names you as executor?

YES

NO

Hypothetical 9

As a favor to a law school classmate, you provided expert testimony on behalf of an ERISA consulting firm which had been sued. Your firm's largest client has now asked one of your partners to sue that consulting firm. The issue being litigated is closely related to the area on which you provided expert testimony for the consulting firm. For your career's sake, you hope that your expert testimony does not bar your law firm from being adverse to the consulting firm.

May one of your partners represent a client adverse to a company for whom you had acted as an expert witness on a related matter?

YES

NO

Hypothetical 10

As your client's Associate General Counsel, you are honored by the client's recent request that you serve on its board of directors. However, now you are wondering whether you can or should accept the offer.

(a) May you serve on a client's board of directors?

YES

NO

(b) If so, what special considerations should you keep in mind?

Hypothetical 11

The chairman of a locally-based publically traded company just invited you to join its board. You are flattered by the offer, but you want to explore how your presence on the board would affect your law firm's business opportunities.

(a) May your firm represent a company on whose board you serve?

YES

NO

(b) May your firm represent a party litigating against a company on whose board you serve, as long as you recuse yourself from participating in the matter both at the board and at your law firm.

YES

NO

Hypothetical 12

Both to supplement your income and -- especially -- to satisfy your urge to help the less fortunate, you have agreed to begin serving as a guardian ad litem for disadvantaged children. You think that you will receive the first call shortly, and a few questions have come to mind as you have considered your role in more detail.

- (a)** May you simultaneously act as a guardian ad litem for a child in dealing with the Department of Social Services and also represent the Department in unrelated matters?

YES

NO

- (b)** Given the prohibition in the witness-advocate rule on a lawyer both testifying and acting as an advocate, may you act as a guardian ad litem for a child in a court proceeding in which you might be called to testify in some way about the child or the child's situation?

YES

NO

Hypothetical 13

One of your best clients just asked you to be an escrow agent, holding funds that the client must pay in connection with a transaction.

(a) May you act as an escrow agent in a transaction you negotiated for a client?

YES

NO

(b) If you have acted as an escrow agent in a matter where you have not also represented a client, may you represent the client in a later dispute over the escrowed funds?

YES

NO

Hypothetical 14

For several years, you have represented a local farmer and his wife. They have become quite wealthy by selling parcels of land, and have become a good source of business for you. Two years ago, you also began to represent their daughter. Last year, the farmer died, leaving his widow as executrix and the main beneficiary of his estate. You have noticed that his widow (whom you still represent) is "slipping," and now you have become very concerned that she might not be able to care for herself. Her condition has grown worse recently (although she denies any problems, and insists on living independently), and you are considering what steps you should (or must) take. Not coincidentally, you received a call this morning from the daughter (your other client) about her mother's condition.

May you undertake the following steps (without the widow's consent)?

- (a) Reveal confidential information about the widow's behavior to her regular physician (in an effort to see whether you are overreacting to what appears to be a worsening problem)?

YES

NO

- (b) Reveal confidential information about the widow's behavior to an independent physician?

YES

NO

- (c) Represent the daughter in seeking a guardian for the widow (her mother) if the doctors confirm your suspicion about her prognosis?

YES

NO

(d) Seek the appointment of a guardian for the widow on your own?

YES

NO

Hypothetical 15

One of your partners just called to tell you that she is interested in seeking appointment to the board responsible for zoning decisions in your county. She knows that you and some of your colleagues appear before that board on behalf of clients, and she wants to make sure that you are "comfortable" with her serving on the board.

(a) May your partner serve on the zoning board?

YES

NO

(b) May your law firm represent a plaintiff suing the county based on a zoning board decision -- despite your partner's presence as a member of the board?

YES

NO

(c) May you continue to appear before the board, as long as your partner recuses herself from decisions in which you are acting as an advocate?

YES

NO

Hypothetical 16

You practice in a 20-lawyer firm in a medium-sized city. An out-of-state company just hired you to defend it in a commercial litigation lawsuit. The plaintiff is represented by a lawyer with whom you are working in a co-counsel relationship on a large case that takes up approximately 30 percent of your time each day.

Does this working relationship with the plaintiff's lawyer create a conflict of interest that requires disclosure and consent?

YES

NO

Hypothetical 17

After several years as an associate in a large New York firm, you have decided to move back to the small town where you were born and raised. A number of your high school classmates stayed in that town, and now you wonder whether your personal relationships that you expect to blossom upon your return will create any conflicts issues.

- (a)** Does a personal friendship with an adversary's lawyer create a conflict that requires disclosure and consent?

YES

NO

- (b)** May you begin to date an attractive high school classmate, who is now the office manager at a firm you expect to oppose in litigation and transactional matters?

YES

NO

Hypothetical 18

You and your husband graduated from law school together, and ended up practicing at the two largest law firms in your city. This did not create a problem at first, because your husband began his career as a transactional lawyer. However, he has just switched to the litigation section in the other law firm, and some obvious questions have now come to your mind.

- (a)** Must you obtain the clients' consent if you and your husband are on opposite sides of a litigated case?

YES

NO

- (b)** Must you obtain the clients' consent if your husband's law firm is on the other side of the case (even if your husband is not working on the case)?

YES

NO

Hypothetical 19

You just received a call from your firm's largest client -- which has been sued by a plaintiff represented by another firm in town that is approximately the same size as your firm. Coincidentally, last week your managing partner retained that other law firm to represent your firm in a malpractice case that arose from your alleged mistakes.

Must you disclose to your largest client that the plaintiff's law firm in that case is also representing your law firm in an unrelated matter?

YES

NO

Hypothetical 20

Your job as a large law firm's managing partner brings new challenges everyday, and yesterday was no exception. One of your young partners called to tell you that both he and his wife were injured when a load of lumber fell on them as they were shopping at a local home improvement store -- which is one of your firm's largest clients.

- (a)** May your young partner's wife (represented by another law firm) file a lawsuit against the home improvement store?

YES

NO

- (b)** May your young partner (representing himself) file a lawsuit against the home improvement store?

YES

NO

Hypothetical 21

One of your partners just walked into your office, closed the door behind her (always a bad sign) and asked for your advice on what she called an "awkward" situation. Your partner tells you that one of her best clients asked her to represent him in suing a restaurant where the client and his wife obviously received tainted food, as a result of which they both suffered severe food poisoning. The client wants to file a large lawsuit that undoubtedly would exceed the restaurant's insurance coverage. Your partner tells you that the situation is "awkward" because she is a 25 percent owner of the restaurant.

As long as the restaurant and the client consent, may your partner represent the client against the restaurant in a lawsuit alleging food poisoning?

YES

NO

Hypothetical 22

As your client's in-house general counsel, you have learned that one of the lawyers on your staff has become increasingly belligerent with clients, and beginning to act in a way that would justify firing her. Before you take that step, you want to determine if the lawyer could file a wrongful termination claim if you fire her.

May in-house lawyers file wrongful termination claims against their clients/employers?

YES

NO

Hypothetical 23

You majored in Civil War history in college, and you have maintained your interest in Civil War preservation work. Two months ago, you received an e-mail "alert" from a group dedicated to preserving Civil War battle sites, announcing the creation of an ad hoc group to resist development plans near a historically significant spot. You would like to help the group, but soon discover that your firm is representing the developer. Now you want to carefully assess what steps would be ethically permissible.

May you do the following in connection with the ad hoc group's efforts to stop the development?

(a) Represent the ad hoc group in litigation?

YES

NO

(b) Provide "behind the scenes" advice to the ad hoc group about possible steps it could take to derail the development?

YES

NO

(c) Lobby on behalf of the ad hoc group with your Congresswoman?

YES

NO

(d) Take a leadership role in the "ad hoc" group (without acting as its legal advisor)?

YES

NO

(e) Join the "ad hoc" group and pay a \$20 membership fee?

YES

NO

(f) Sign a petition supporting the "ad hoc" group's efforts?

YES

NO

(g) Attend a rally supporting the "ad hoc" group?

YES

NO

(h) If you do not believe that you could represent the developer because of your strong personal beliefs, is your individual disqualification imputed to the whole firm?

YES

NO

Hypothetical 24

As a classic type A "workaholic," you have never really set aside enough time for a social life. However, you are attracted to a number of women with whom you deal on a nearly daily basis, and you want to know if there are any ethical impediments to asking them out on dates.

(a) May you date a divorced woman you represent on various estate matters?

YES

NO

(b) May you date the in-house lawyer at a company for whom you do a substantial amount of work (she is the source of all of the work)?

YES

NO

(c) May you date a word processor who works at your firm's largest client?

YES

NO

Hypothetical 25

You are serving on a state bar committee which will recommend changes to your state's ethics rules. Your committee has vigorously debated what rule should apply to sexual relationships between lawyers and their clients.

What rule should govern sexual relationships between lawyers and their clients?