

LITIGATION ETHICS: COMMUNICATIONS, DISCOVERY, AND WITNESSES

Hypotheticals

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Hypothetical 1

You occasionally have lunch with your favorite law school professor, and enjoy a vigorous "give and take" on abstract legal issues that you never face in your everyday practice. Yesterday you spent the entire lunch discussing whether lawyers lose their First Amendment rights when they join the profession.

Should there be any limits on lawyers' public communications about matters they are handling (other than their duty of confidentiality to clients, duty to obey court orders, avoiding torts such as defamation, etc.)?

YES

NO

Hypothetical 2

Your state's chief justice just appointed you to a commission reviewing your state's ethics rules provision dealing with lawyers' public communications. You wrestle with some basic issues as you prepare for the commission's first meeting.

- (a) Should limits on lawyers' public communications about their cases apply to all lawyers, (rather than just lawyers engaged in litigation)?

YES

NO

- (b) Should limits on lawyers' public communications about their cases apply only to criminal cases?

YES

NO

- (c) Should limits on lawyers' public communications about their cases apply only to jury cases?

YES

NO

- (d) Should limits on lawyers' public communications about their cases apply only to pending cases?

YES

NO

- (e) Even if it would otherwise violate the limit on lawyers' public communications, should lawyers be permitted to issue public statements defending their clients from anonymous news stories containing false facts or accusations about their clients?

YES

NO

Hypothetical 3

You and your best friend in law school took totally different career paths -- you became a criminal defense lawyer and she became a prosecutor. Over drinks after work one day, you debate whether any limits on lawyers' public communications about their cases should apply equally to you and your friend.

Should prosecutors' public communications about criminal cases be more severely restricted than criminal defense lawyers' statements?

YES

NO

Hypothetical 4

A state bar commission issuing recommendations about lawyers' public communications has now turned to lawyers' criticism of judges. You have been giving some thought to this issue before the commission's next meeting.

(a) Should lawyers be totally prohibited from criticizing judicial opinions?

YES

NO

(b) Should lawyers be totally prohibited from criticizing judges?

YES

NO

(c) Should any limitations on lawyers' criticism of judges apply to nonpublic criticism?

YES

NO

(d) Should any limit on lawyers' public communications about judges be based on the lawyers' subjective belief in the truth of what she says (as opposed to an objective standard)?

YES

NO

(e) Should any limit on lawyers' public communications about judges apply only to the wording used (as opposed to the substance of the statement)?

YES

NO

Hypothetical 5

One judge in your local state court has received national notoriety for issuing controversial and unpopular decisions. As your local bar's ethics "guru," you have received several calls from lawyers anxious to know what they can say about this judge's recent decisions.

May a lawyer say the following about a judge's decision:

(a) "We respectfully disagree with the judge's recent decision"?

YES

NO

(b) "We think the judge got it wrong"?

YES

NO

(c) "We think the judge totally missed both the facts and the law presented at the trial"?

YES

NO

(d) "We were astounded at the judge's lack of understanding of basic legal principles"?

YES

NO

(e) "We obviously disagree with the judge's stupid decision"?

YES

NO

Hypothetical 6

As a defense lawyer, you frequently defend automobile accident cases brought by plaintiffs claiming serious debilitating injuries. In some cases, you suspect that plaintiffs are lying about the extent of their injuries.

May you arrange for an investigator to drive by a plaintiff's house, and videotape the plaintiff engaged in such outdoor activities as mowing the lawn, climbing a ladder to clean gutters, playing touch football, etc.?

YES

NO

Hypothetical 7

As a defense lawyer, you receive numerous proposals from private investigators about how to catch plaintiffs exaggerating or even lying about the extent of their personal injuries.

May you direct a private investigator to engage in the following activities from a van parked on a public street outside a plaintiff's home:

(a) Use a telephoto lens to videotape plaintiff's activities?

YES

NO

(b) Use a camera mounted on top of the van to look over a hedge on the plaintiff's property line?

(c) Use a camera to look through a window into the plaintiff's home to record plaintiff's activity in her home?

YES

NO

(d) Use a special infrared camera focusing on the plaintiff's bedroom to determine the validity of his "loss of consortium" claim.

YES

NO

Hypothetical 8

You are preparing for a large commercial litigation trial against Acme Company. You have been calling various hotels in a nearby city looking for a suitable spot to conduct a mock jury trial. The hotel event planner with whom you just spoke assured you that her hotel can handle such an event -- telling you that "we have a mock jury trial just like yours lined up this Saturday afternoon for Acme Company."

May you arrange for several of your law firm's secretaries and paralegals to "hang out" in that hotel's public lobby and hallways this Saturday afternoon (hoping to overhear conversations that might prove useful)?

YES

NO

Hypothetical 9

You represent a wife in a bitter custody battle. The client has tearfully told you how verbally abusive her ex-husband has been to her and the children when they meet every other Saturday morning at a McDonald's parking lot where he picks up the children.

May you suggest that your client wear a "body wire" during one of the Saturday morning exchanges to capture her ex-husband's abusive language?

YES

NO

Hypothetical 10

You represent the wife in a bitter custody battle. Her children have reported dangerous unsanitary conditions at her ex-husband's apartment. The children have also described having trouble sleeping at night when they stay with their father, because he refuses to lock the apartment door. Your client said that last Sunday she went to her ex-husband's apartment to pick up the children, but no one was there. She peeked in the window and noticed the dangerous unsanitary conditions inside. She has asked whether she can enter her ex-husband's apartment next time she finds herself in that position, and take pictures of the unsanitary conditions.

(a) May your client enter her ex-husband's apartment and photograph dangerous unsanitary conditions?

YES

NO

(b) May your client ask one of her children to photograph the dangerous unsanitary conditions?

YES

NO

(c) If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, may you use the photographs in the custody dispute?

YES

NO

(d) If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, is the court likely to use and rely on the photographs in making custody decisions?

YES

NO

Hypothetical 11

You and your partner have debated the ethical propriety of lawyers tape recording telephone calls, or directing their clients to do so.

May lawyers tape-record (or direct their clients to tape-record) telephone calls in the following situations:

- (a)** Without the other party's consent, in a state where both parties' consent is required?

YES

NO

- (b)** When the client (a young woman) wants to record her step-father's gloating admission that the step-father sexually abused her when she was a young girl?

YES

NO

- (c)** When a lawyer wants to record an abusive ex-boyfriend's threat to kill her?

YES

NO

- (d)** When a lawyer wants to record blatant lies by opposing counsel?

YES

NO

- (e)** When a lawyer wants to record a client's threat to withhold payment of the lawyer's bill?

YES

NO

Hypothetical 12

You are representing the defendant in litigation in which a nonparty witness will play an important role. You have determined that the nonparty witness (who seems to be hostile to your client) does not have a lawyer in the matter. You would like to arrange for someone under your direction to visit the nonparty witness's Facebook website, and seek to "friend" her -- thus obtaining access to information on her Facebook pages. The person contacting the witness would be entirely truthful in describing who she is, but of course would not describe the purpose of her interest in "friending" the witness.

May you engage in such an action?

YES

NO

Hypothetical 13

The outcome of a large commercial case might hinge on a neutral witness's credibility. You are considering ways to confidentially test his credibility.

May you:

- (a)** Bring to your deposition of the neutral witness a young associate in your law firm who has a psychology PhD and an uncanny ability to determine if a witness is telling the truth or lying?

YES

NO

- (b)** Install new software on your laptop computer which can analyze speech patterns and determine the likelihood that someone is lying -- and then bring your laptop to the deposition and view the results on the screen while you are deposing the neutral witness?

YES

NO

- (c)** Use the new speech pattern software to analyze the neutral witness's statements on the subject matter during a press conference that was broadcast on the local news station?

YES

NO

Hypothetical 14

You have chosen as your favorite pro bono project a local private group that fights housing discrimination. Over the years, you have learned that the only effective way to find and eliminate housing discrimination is to use "testers." These "testers" are prospective homebuyers with false backgrounds that are identical in every way but one -- their race or national origin.

(a) May you participate as a "tester" in an effort to find and eliminate housing discrimination?

YES

NO

(b) May you supervise your group's use of such "testers" without engaging in the practice yourself?

YES

NO

Hypothetical 15

You recently represented a furniture manufacturer in terminating its relationship with a large retailer. Your client and the retailer entered into a consent decree in which the retailer agreed to stop selling your client's furniture at its stores. You and your client have heard rumors that the retailer is violating the consent decree by buying your client's furniture from other retailers and selling it at their stores. From what you hear, the retailer does not advertise that it sells your client's furniture, but arranges for sales to consumers who ask about the furniture when they visit the retailer's stores.

May you arrange for one of your law firm's associates, a paralegal and your son-in-law to visit one of the retailer's stores and pose as consumers interested in buying your client's furniture?

YES

NO

Hypothetical 16

You have been placed in charge of a special prosecution unit focusing on illegal drug sales.

May you participate in setting up drug "sting" operations?

YES

NO

Hypothetical 17

Your largest client recently downsized its upper management. Unfortunately, now you find that you need the testimony of several retired senior executives. Perhaps a bit bitter about being laid off, several of them have demanded that you reimburse them for their travel expenses, and that you pay for their time.

(a) May you reimburse the executives for their travel expenses?

YES

NO

(b) One of the retired executives has started a consulting firm. May you agree to his demand that you pay for the time he spends preparing for his testimony at the hourly rate he charges his consulting clients?

YES

NO

(c) May you pay the same rate for the time that the retired executive spends actually testifying in a deposition or at the trial?

YES

NO

(d) Another retired executive moved to Florida and plays golf, fishes, or relaxes every day. Can you pay him an hourly rate for the time he spends preparing for his testimony?

YES

NO

(e) Another retired executive has found a job with a competitor. In addition to being reimbursed for his travel expenses, this fact witness has demanded \$5,000 "to tell the truth" when he testifies. Can you pay him \$5,000 to "tell the truth"?

YES

NO

Hypothetical 18

One of your company's retired executives initially wanted \$5,000 to "tell the truth" as a fact witness. When you balked at his request, he dropped his demand to \$2,500 -- and tells you that he won't insist on being paid unless you are successful in the trial.

May you pay a fact witness an amount contingent on the case's outcome?

YES

NO

Hypothetical 19

After practicing as a commercial litigator for several years, you began to represent white collar criminal defendants. You are considering filing several motions challenging the government prosecutor's actions.

(a) May you object to the government's payment to a fact witness of \$5,000 to "tell the truth"?

YES

NO

(b) May you object to the government's offer to reduce the criminal charges against an important witness if he testifies favorably against your client?

YES

NO

Hypothetical 20

You represent a wealthy individual in a child custody case. At your first meeting with the client, you begin to ask him background facts about how he treated his children. The client stops you and asks the following question: "Before I tell you how I treated my children, why don't you tell me the law governing child custody."

May you answer your client's question before examining him about the factual background?

YES

NO

Hypothetical 21

You are preparing your executive vice president to be deposed. She asks whether you will be able to discuss her testimony during deposition breaks.

May you discuss a witness's testimony during a deposition break?

YES

NO

Hypothetical 22

Your adversary has scheduled the depositions of your client's four most senior executives. Your client's in-house lawyer suggests that you represent the executives at their depositions.

Should you represent your client's executives at their depositions?

YES

NO