

CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS: PART II

Hypotheticals

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Hypothetical 1

You are starting your own law firm, and want to avoid some of the troubles that you have seen at larger law firms for whom you have worked. Among other things, you would like to have every lawyer joining the firm agree not to work for another law firm in the same city for two years after leaving your firm.

May you include such a provision in your partnership or employment agreements?

YES

NO

Hypothetical 2

As your firm's managing partner, you have asked for recommendations from a partnership committee about how to protect the firm and its clients from harm caused by lawyers suddenly leaving the firm (either individually or in groups).

May you include the following provisions in your partnership agreement:

- (a)** Partners must provide a sixty-day written notice of their departure, and forfeit all of their capital in the firm if they leave before the end of the sixty days?

YES

NO

- (b)** Partners who leave the firm and take clients with them must pay the firm a percentage of those clients' receipts for a one-year period after their departure?

YES

NO

- (c)** Partners who leave the firm will be responsible for their pro rata share of any lease payments for the law firm's offices (unless the firm is able to replace the departed lawyers with others to occupy the space)?

YES

NO

Hypothetical 3

One of your firm's founders just left your firm to open up a competing boutique firm just across the street. Her departure was ugly, and as your firm's managing partner you are now being pressured to adopt a partnership provision to withhold retirement benefits from any of your partners who leave under such circumstances and compete with your firm.

(a) May your law firm make the payment of retirement benefits contingent on the retirees' compliance with a non-compete?

YES

NO

(b) Does it matter at what age the retirement benefits begin?

YES

NO

Hypothetical 4

You just became your firm's managing partner, and now face one of the biggest crises that your small firm has ever confronted. Three of your firm's ten lawyers just left, and took all of your firm's paralegals and two of your best secretaries with them. It has become obvious from the way events have unfolded that the withdrawing group had planned all of this many months in advance. The remaining lawyers in your firm are urging you to file a lawsuit against those who left.

Is there any cause of action you can pursue against the lawyers and staff who left your firm?

YES

NO

Hypothetical 5

You have been very successful in your tenure at a high-tech company's in-house law department. You recently received an offer from another company to join its law department, at a substantial pay increase. That company sends you a proposed employment agreement that would: (1) prevent you from serving in the in-house law department of any of the company's competition for a period of one year after you leave the company; and (2) preclude your representation of any clients adverse to the company for a period of five years after you leave the company.

- (a)** May you sign an employment agreement under which you agree not to serve in a competitor's in-house law department for one year after you leave the company?

YES

NO

- (b)** May you sign an employment agreement under which you agree not to take any representations adverse to the company for a period of five years after you leave the company?

YES

NO

Hypothetical 6

You have successfully represented plaintiffs in several franchise lawsuits against an out-of-state franchisor. The franchisor's lawyer just called to offer an attractive settlement in the latest case that you brought. When you read the "fine print," you see that the franchisor wants you to agree not to bring similar cases against the franchisor on behalf of any other plaintiffs.

May you enter into a settlement agreement that contains such a provision?

YES

NO

Hypothetical 7

You defended your client in a number of product liability cases against the same plaintiff's lawyer, and you are looking for a way to prevent that lawyer from filing new cases against your client.

May you settle the next case only if the plaintiff's lawyer agrees:

(a) Not to solicit any new clients to bring similar cases against your client?

YES

NO

(b) Not to assist or cooperate with any other parties or their lawyers in pursuing cases against your client?

YES

NO

(c) To maintain in strict confidence the amount of the settlement and all pertinent documents?

YES

NO

(d) To either represent your client or act as a "consultant" for your client, which would prevent the plaintiff's lawyer from pursuing other cases against your client without its consent?

YES

NO

Hypothetical 8

You have practiced for nearly 40 years as a solo practitioner, and are ready to retire. Although you are willing to just "walk away" from the practice of law, you also want to explore the possibility of receiving some compensation for the goodwill that you have generated over your years of practice.

May you sell your law practice (including a component for goodwill) to another lawyer?

YES

NO

Hypothetical 9

You practice law in a state that recently enacted ethics rule changes that permit lawyers to sell their practice. This idea intrigues you because you have wanted to slow down a bit. In particular, you would like to sell your litigation practice, but maintain your trust and estate practice.

May you sell your litigation practice, and keep your trust and estate practice?

YES

NO

Hypothetical 10

You remember from law school that lawyers may not limit their liability to clients in advance of their work for those clients. Now you are wondering how that rule applies to the form in which you choose to practice.

May you and your colleagues enter into partnership or corporate arrangements that limit your liability (such as LLPs, LLCs, etc.)?

YES

NO

Hypothetical 11

A local businessman called you this morning to see if you could work on a few matters for him. You know that the businessman has used several law firms before approaching you, and your first meeting reinforces your impression that the client is a "hot head" who might be trouble in the future. You would like to make sure that you carefully define the exact scope of the work that you agree to do for him.

- (a) May your retainer agreement limit the scope of your work in one litigation matter to litigation in the trial court, and explicitly exclude any appeal work?

YES

NO

- (b) May your retainer agreement limit the scope of your work in another litigation matter to the filing of a defense, but exclude any analysis of the issues or description of the risks?

YES

NO

Hypothetical 12

After a decade of working at a large law firm, you decided to change career paths and begin serving the urban poor in your area. Several potential clients have expressed the worry that they cannot afford to pay you for handling an entire case -- but would like to hire you for certain parts of cases that they want to file against their landlords. In particular, two clients have asked whether they could hire you to take the deposition of their landlords, but not handle any other part of their case.

May you agree to limit your representation of a client to taking one deposition?

YES

NO

Hypothetical 13

You have been asked to represent a contentious and litigious local businessman, and want to assure certainty to your possible exposure ahead of time.

May you enter into a retainer agreement that limits your liability to return of the fees that your client has paid?

YES

NO

Hypothetical 14

You joined your client's law department about six weeks ago. At one recent conference of all corporate officers, it dawned on you for the first time that you are not covered by your client-employer's standard indemnification provision that covers all other officers.

May you arrange for an indemnification provision in your client-employer's bylaws that covers all in-house lawyers?

YES

NO

Hypothetical 15

Your law firm recently received a subpoena to produce the files from a matter you handled several years ago. It appears that the client has now disappeared, and one of his creditors hopes that your files will shed some light on both the former client's whereabouts, and perhaps other relevant matters. You know that your firm's file contains both privileged and non-privileged documents. It would take approximately ten hours of an associate's time to separate out the privileged documents.

Must you separate out the privileged documents before producing your firm's files to your former client's adversary?

YES

NO

Hypothetical 16

You represented a local car dealer in a landlord-tenant dispute until she fired you. The client fully paid all of your bills, but hinted that she might sue your firm for malpractice. Your former client has now demanded a copy of all of your file. Your partners are urging you to at least bill the former client for making a copy of the materials if you are obligated to send them to her.

(a) Must you give your former client the file?

YES

NO

(b) May you bill the former client for copying the file?

YES

NO

(c) May you retain a copy of the file over your former client's objections?

YES

NO

Hypothetical 17

You represented a local car dealer in a landlord-tenant dispute until she fired you. You probably should have seen this coming, because she did not pay the retainer she agreed to pay -- and actually has never paid any of her bills. Amazingly, the car dealer now wants the file that you created while representing her.

Must you give your former client the file you generated while representing her?

YES

NO

Hypothetical 18

You have been supervising a new associate in her handling of a relatively small case for a new client. You just realized that the associate forgot to include a potential cause of action in her complaint, and it is now too late to add a claim under your state's pleading rules. The forfeited claim would not have justified a large additional damage figure, and you wonder what obligations you have.

Must you advise the client of your firm's malpractice?

YES

NO

Hypothetical 19

A client recently fired your firm in the middle of a litigation matter, and hired replacement counsel to finish the discovery and try the case. You naturally followed the litigation out of curiosity, and you believe that your replacement counsel seriously mishandled the case. When your former client recently filed a malpractice action against your firm, you inevitably considered the possibility of seeking indemnity or contribution from your replacement counsel.

Can lawyers sued for malpractice seek indemnity or contribution from the lawyers that replaced them?

YES

NO

Hypothetical 20

As your law firm's managing partner, you realize that all large firms face malpractice actions -- but that does not stop you from becoming upset when a plaintiff sues your firm. The latest lawsuit raises a twist you have never faced before, because the plaintiff pursuing the malpractice action alleges that it is an assignee of your firm's former client.

May legal malpractice plaintiffs assign their malpractice claims?

YES

NO

Hypothetical 21

You have assisted a small businesswoman in substantially all of her business transactions for nearly 20 years. Although you have always considered your relationship with this client to have a "love-hate" element, you were shocked by the call you just received from her. She said that she intends to sue you for malpractice in an earlier transaction -- but she hopes that there are no "hard feelings" (she assumes that your carrier will ultimately bear all the financial costs). She also specifically asks whether you can continue to represent her in other transactions. At first you thought her call was a cruel joke, but when she explains that she is serious you begin to consider what to do.

If the client consents, may you continue representing the client in one matter while the client is suing you in another matter?

YES

NO

Hypothetical 22

A number of disgruntled former clients have sued your firm in fee disputes, and as your firm's new managing partner you would like to reduce these distractions. You have been reading about the advantage of arbitrating fee disputes with clients, and you wonder if such retainer letter provisions might be worth pursuing.

May you include a provision in your standard retainer letter requiring clients to arbitrate any fee disputes?

YES

NO

Hypothetical 23

Several years ago, your firm began to insist that all clients sign retainer agreements containing a provision requiring arbitration of fee disputes. Now you wonder if that provision can be expanded to cover malpractice claims a client asserts against your firm.

May you include a provision in your standard retainer letter requiring clients to arbitrate malpractice disputes?

YES

NO

Hypothetical 24

You recently botched a litigation matter for an elderly client. The client fired you, and now has to deal with her belief that you have committed malpractice. You would like to try to resolve the dispute before your former client talks to any other lawyers who might make your life even more miserable.

May you settle a malpractice claim by a former client who is not currently represented by another lawyer?

YES

NO

Hypothetical 25

Your law firm has for many years represented a dysfunctional wealthy family. You prepared the family patriarch's estate documents. He died several months ago, and you just heard this morning that two family members have filed lawsuits against your law firm based on the patriarch's estate documents.

- (a)** Is a named beneficiary likely to succeed in a malpractice case based on your failure to include a certain tax-saving provision, which cost the beneficiary \$250,000?

YES

NO

- (b)** Is a distant relative likely to succeed in a malpractice case based on your failure to include her in the estate planning documents (she claims that you should have known that the patriarch intended to leave her at least some amount of money)?

YES

NO

Hypothetical 26

You were a bit shaken by the results of researching a lawyer's possible liability to third parties for malpractice and intentional torts, and you are about to research a lawyer's possible liability to third parties under contracts that the lawyer has negotiated on a client's behalf. You assume that this research will result in some better news.

May lawyers be held liable under contracts that they negotiate on their clients' behalf?

YES

NO

Hypothetical 27

Your college roommate became a doctor, and for the past 20 years you and he have good-naturedly kidded each other about which profession faces a greater risk of lawsuits. Your doctor friend recently "rubbed your nose" in the fact that doctors can only be sued by their patients, while lawyers can be sued by non-clients. He bets you a drink on each type of liability to non-clients that he has listed.

May lawyers be sued by non-clients for the following intentional torts:

(a) Fraud?

YES NO

(b) RICO violations?

YES NO

(c) Fair Debt Collection Practices Act (FDCPA) violations?

YES NO

(d) Worker Adjustment and Retraining Notification (WARN) Act violations?

YES NO

(e) Age Discrimination in Employment Act violation?

YES NO

(f) Violations while acting as a guardian ad litem?

YES NO

(g) Violations of health document privacy laws by showing medical records to an expert?

YES

NO

Hypothetical 28

Your firm's managing partner just appointed you as the firm's first general counsel, and you are trying to determine what sort of liability your firm might face. Although it sounds fairly simple minded, you wonder why lawyers are not automatically sued as "aiders and abettors" every time that a plaintiff sues the lawyer's client for some wrongdoing.

Can a lawyer be sued for aiding and abetting a client's wrongdoing?

YES

NO

Hypothetical 29

You are defending a company in a lawsuit accusing it of conspiring with a closely related affiliate. Among other things, you have sought to dismiss the claims by arguing that the company and its affiliate cannot conspire with each other because they are so closely aligned. As you prepare for an argument on your motion, you wonder if the same theory would apply to clients and their lawyers accused of conspiring with one another.

May lawyers be sued for conspiring with their clients to commit an intentional wrongdoing?

YES

NO

Hypothetical 30

You represent a developer in a long-running dispute with an architectural firm which claims that your client owes substantial amounts of money for services the architectural firm allegedly rendered. The architectural firm recently obtained a judgment on one portion of the dispute. Its law firm immediately sent letters to a number of your client's joint venture partners, which caused some of them to abandon their projects with your client. Needless to say, your client has urged you to seek compensation for what you think is tortious interference. You are not sure that the architectural firm's lawyers have the assets or the insurance sufficient to satisfy the judgment you hope to receive from them, so you are considering suing the architectural firm itself -- alleging vicarious liability for its lawyer agent's tortious conduct.

May you sue another law firm's client for the law firm's conduct, alleging vicarious liability?

YES

NO