

LITIGATION ETHICS: PART I (COMMUNICATIONS)

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

You are representing one of your clients in a lawsuit against a large retailer. The retailer's litigator has been very difficult, and you think that he is "short stopping" some of your settlement offers without passing them along to the retailer's vice president who is supervising the litigation for the defendant retailer. You think that you might be able to resolve the case if you can "work around" the retailer's "scorched earth" litigator.

Without the retailer's lawyer's consent, may you contact the retailer's vice president who is supervising the litigation, and try to settle the case?

YES

NO

Hypothetical 7

You have read your state's Rule 4.2, and see that it begins with the phrase "[i]n representing a client" You and your partners have a varied civil practice, and you wonder how that rule applies to some of what you and your partners do on a daily basis.

- (a)** One of your partners sometimes acts as a guardian ad litem for minor children. In playing that role, can she communicate ex parte with one of the child's parents -- without the parent's lawyer's consent?

YES

NO

- (b)** One of your partners sometimes serves as a bankruptcy trustee. In playing that role, will he be able to communicate ex parte with a represented debtor -- without the debtor's lawyer's consent?

YES

NO

Hypothetical 8

You recently lost an expensive and contentious case, and later had a dispute with your main testifying expert about his fee. The expert had essentially broken down on the stand, and you blame him for the loss. However, the expert disagreed, and has now hired his own lawyer and sued you for his fees. You think that you might be able to resolve the dispute if you can rekindle the good relationship you had before the trial began.

Without the expert's lawyer's consent, can you contact the expert to discuss his bill?

YES

NO

Hypothetical 9

All your work as an associate and a young partner paid off last year, when you and your husband finally built your "dream home." However, since then you have discovered several major structural problems with your home. You sued the general contractor, who hired a local "scorched earth" litigator. You are hoping there is a way that you can communicate directly with the general contractor himself (with whom you had a fairly cordial relationship during the building process).

- (a)** If you are representing yourself pro se in litigation, may you contact the general contractor without his lawyer's consent?

YES

NO

- (b)** If you hired a lawyer to represent you in the litigation, may you contact the general contractor without his lawyer's consent?

YES

NO

Hypothetical 10

Because you have had a few run-ins with your state bar, you have tried to be very cautious in all of your litigation-related conduct. You just received a call from a local businesswoman who says that she has become dissatisfied with her current lawyer handling a commercial case for her, and would like to talk with you. It sounds like she wants a "second opinion" from you about her current lawyer's competence, and might want to hire you -- depending on the outcome of your analysis.

May you discuss the businesswoman's case (including the conduct of her current lawyer) without that other lawyer's consent?

YES

NO

Hypothetical 11

You were just hired last week to represent a passenger seriously injured in a traffic accident. The civil litigation has not yet begun, but you have learned that one of the drivers involved in the accident has hired a criminal lawyer (who does not handle any civil cases) to represent him in dealing with a federal investigation into contraband goods found in that driver's truck after the accident. You would like to speak with that other driver, but you wonder whether you need his criminal lawyer's consent to do so.

Without the truck driver's lawyer's consent, may you communicate with the truck driver about the accident?

YES

NO

Hypothetical 12

You are representing a landowner in an ugly dispute with his neighbor about a stream that crosses both of their lots. You would like to speak with the neighbor in an effort to resolve the dispute, but you do not know if the neighbor has a lawyer. Your client has told you that the neighborhood "gossip" is that the neighbor has hired a high-priced lawyer from a large downtown law firm, but you do not know the accuracy of that gossip.

May you communicate ex parte with the neighbor?

YES

NO

Hypothetical 13

Your largest client was just served with a class action complaint. The named plaintiff is claiming to have been injured by relying on your client's public misstatements when buying the client's stock. The plaintiff seeks to represent other similarly situated purchasers of the stock. You think you might be able to gain some insight into the case if you can interview some of the class members. You also hope that you might be able to settle some of their individual claims, which would reduce the number of folks seeking damages in the case if a court certifies the class.

Without class counsel's consent, can you communicate with members of the purported class before class certification?

YES

NO

Hypothetical 14

Last year, you defended a car dealership in a lawsuit brought by a software vendor, which claimed that your client breached a software delivery contract. You won a jury trial, and the appeals period ended three months ago. You are now facing the possibility of a lawsuit from an auto parts vendor, and you think it would be worthwhile for you to interview the CEO of the software vendor about his dealings with your client.

Without the consent of the lawyer who represented the software vendor in the litigation against your client, may you communicate with the software vendor's CEO about the vendor's dealings with your client?

YES

NO

Hypothetical 15

You have been representing a client in litigation that has dragged on now for over three years. You suspect that the other side's lawyer has not been informing his client of important facts -- such as your client's position on the key issues, and the evidence supporting those positions. You and your client believe that if the other side knew of your client's positions and the evidence, the case might be resolved. You are trying to think of a way that you can arrange this, but you worry about the reaction of the other side's very aggressive trial lawyer.

Without the other side's lawyer's consent, can you send a copy of your client's interrogatory answers to the other side -- without any cover letter or other communication.

YES

NO

Hypothetical 16

You are representing a dry cleaner in connection with a customer's complaint about a ruined dress. The customer is a paralegal at a local law firm, and has advised your client that one of the law firm's young lawyers is helping her determine what to do. So far the disagreement has been fairly amicable, with your client and the customer both indicating that they want to avoid litigation.

Your client just told you that another customer has volunteered to support his version of one heated conversation he had with the complaining customer in the store. Although the other customer is willing to help support your client's story, he has asked his lawyer brother-in-law to help him determine how to help your client without being dragged into the dispute by the complaining customer. You would like to work things out informally.

(a) Because litigation has not begun or even seems likely, may you call the complaining customer without her lawyer's consent?

YES

NO

(b) Because the other customer/witness seems to be an ally rather than an adversary, may you call him without his lawyer's consent?

YES

NO

Hypothetical 17

For six months, you have represented your corporate client in a dispute with a sophisticated and very wealthy inventor. This evening, the inventor called you on your cell phone. The inventor tells you that he thinks his lawyer is actually an obstacle to resolving the dispute short of litigation. He proposes to negotiate a resolution directly with you.

(a) May you continue speaking with the inventor about the resolution?

YES

NO

(b) May you continue speaking with the inventor if he tells you that his lawyer consents to the conversation?

YES

NO

(c) May you continue speaking with the inventor if he tells you that he has fired his lawyer?

YES

NO

Hypothetical 18

You have been representing a company for about 18 months in an effort to negotiate the purchase of a patent from a wealthy individual inventor. The negotiations have been very cordial at times, but occasionally turn fairly contentious. You and your company's vice president have met several times with the inventor and his lawyer, both at the inventor's home and in a conference room in your company's headquarters. After some of the fruitful meetings, you and the other lawyer have exchanged draft purchase agreements, with both of you normally copying the vice president and the inventor. Last week things turned less friendly again, and you heard that the inventor's lawyer might be standing in the way of finalizing a purchase agreement. This morning you received a fairly cool email from the other lawyer, rejecting your latest draft purchase agreement and essentially threatening to "start all over again" in the negotiations given what he alleges to be your client's unreasonable position. As in earlier emails, the other lawyer showed a copy of the email to his client, the inventor.

May you respond to the other lawyer's email using the "Reply to All" function, and defending your client's positions in the negotiations?

YES

NO

Hypothetical 19

You represent the owner of a small apartment building in a nearby college town. Your client has had a running feud for nearly six months with one of her tenants -- a law student, who has hired a local civil rights lawyer to represent him. The tenant has already filed two ethics charges against you. You think that the charges are groundless, but you obviously are a bit "skittish." Your client just asked you to send a notice to the tenant indicating that your client is terminating the apartment lease at the end of the school year. One of the lease provisions requires that such a notice be sent directly to the tenant. Now you wonder whether the tenant will file another ethics charge if you send the notice directly to the tenant.

May you send the termination notice directly to the tenant?

YES

NO

Hypothetical 20

As the only in-house lawyer for your relatively small client, you frequently appear as counsel of record in litigating cases as well as providing daily advice to your client's executives. You are currently working on a nasty piece of litigation in which your adversary has hired an aggressive and unreasonable lawyer. You think the case might settle if the other lawyer were not involved in the discussions.

Without your adversary's lawyer's consent, may your client's CEO call the adversary's CEO to discuss the case?

YES

NO

Hypothetical 21

You are acting as counsel of record for your small company in litigation against an adversary represented by an aggressive and unreasonable lawyer. You think that direct communications between your client's CEO and the adversary's CEO might resolve the case. You are considering how to raise this issue with your client's CEO.

- (a)** If your client's CEO proposes to call the adversary's CEO directly, must you discourage your CEO from doing so?

YES

NO

- (b)** May you "suggest" that your client's CEO call the other CEO directly (without the adversary's lawyer's consent)?

YES

NO

- (c)** May you prepare your client's CEO for such a direct communication?

YES

NO

Hypothetical 22

You represent a plaintiff in a medical malpractice case against a doctor, based on the doctor's use of a relatively novel medical treatment/procedure. You just learned that another local plaintiff's lawyer is about to depose the doctor in a case that involves the same medical treatment/procedure, but a different plaintiff. You wonder to what extent you can coordinate with that other lawyer.

Without the consent of the defense lawyer in your case, may you provide suggested deposition questions to the other lawyer who will be deposing the doctor who is also a defendant in the malpractice case you are handling?

YES

NO

Hypothetical 23

Because your child has had developmental problems since birth, you have become somewhat of a crusader for the type of school programs that help such children. Last month you began to represent another parent with a child needing such programs, and filed a lawsuit against the school board -- alleging failure to meet federal guidelines. Having tussled with the school board's lawyer several times, you know that the litigation will not be easy.

- (a)** Without the school board's lawyer's consent, may you call the chairman of the school board and discuss the pertinent school programs?

YES

NO

- (b)** Without the school board's lawyer's consent, may you call a teacher and discuss the pertinent school programs?

YES

NO

Hypothetical 24

After a few unsuccessful years in private practice, you became a prosecutor. You were surprised the first time that one of your colleagues said you could conduct a non-custodial interview of a suspected criminal you know to have hired a lawyer. That seemed inconsistent with the rule with which you were familiar while in private practice.

Without a criminal suspect's lawyer's consent, may you conduct a non-custodial interview of the suspect?

YES

NO

Hypothetical 25

You represent a plaintiff who was hit by a school bus. You are carefully following your state's ethics rules, and calling only those school employees who are "fair game" for such ex parte contacts.

- (a)** May you ask a school bus driver (not involved in the accident) what guidance she received from the school board's lawyers about talking to you or other plaintiff's lawyers?

YES

NO

- (b)** May you continue interviewing a former school bus driver after she tells you that she signed a confidentiality agreement that prohibits her from talking to anyone about her job, except upon a court's order?

YES

NO

Hypothetical 26

You represent a plaintiff injured when she was hit by a truck. The trucking company lawyer has been "running you ragged" in an effort to force a favorable settlement. You are trying to think of ways that you can gather evidence without the cost of depositions.

Without the trucking company lawyer's consent, may you interview:

(a) The trucking company's chairman?

YES

NO

(b) The trucking company's vice chairman, who has had nothing to do with this case and who would not be involved in any settlement?

YES

NO

(c) The supervisor of the truck driver who hit your client (and whose statements would be admissible as "statements against interest")?

YES

NO

(d) A truck driver who has worked for the trucking company for the same number of years as the driver who hit your client (to explore the type of training she received)?

YES

NO

(e) The trucking company's mechanic, who checked out the truck the day before the accident?

YES

NO

(f) The truck driver who hit your client?

YES

NO

Hypothetical 27

You are trying to determine if you can communicate ex parte with a corporate adversary's executive. Based on your deposition of that executive, you know that the executive had a few conversations with the company's lawyer about your litigation against the company. Other than that, the executive has had nothing to do with the case.

Is this executive off-limits to ex parte communications?

YES

NO

Hypothetical 28

You represent an accounting firm in defending a malpractice case brought by a bank whose vice president embezzled several hundreds of thousands of dollars undetected. You have heard from various sources that the bank's president was having an affair with the vice president's wife, and "turned a blind eye" to obvious warning signs that something was wrong. You think that several former bank employees might be able to corroborate these rumors.

- (a)** Without the bank's lawyer's consent, may you interview the bank's former senior vice president?

YES

NO

- (b)** Without the bank's lawyer's consent, may you interview a former bank teller (who allegedly saw evidence of the president's affair)?

YES

NO

Hypothetical 29

You represent the defendant in a large patent infringement case. The plaintiff company hired a bombastic trial lawyer to handle its lawsuit against your client. The other side's Assistant General Counsel for Litigation is a law school classmate with whom you have been on friendly terms for years. You think there might be some merit in calling your friend in an effort to resolve the case.

- (a)** Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has been listed as "counsel of record" on the pleadings?

YES

NO

- (b)** Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has not been listed as "counsel of record" on the pleadings?

YES

NO

Hypothetical 30

After about 20 years in private practice, you became general counsel of your firm's largest client. After 10 years in that role, you moved just yesterday to another position -- Senior Vice President for Operations. You no longer have a legal title, and no role in the law department. The company's CEO just called you up to her office to meet with the president of the company's largest customer, in an effort to resolve a dispute about the timeliness of some deliveries. You know that the customer has a lawyer representing it in connection with this dispute, because you have spoken to that lawyer several times while in your previous General Counsel position.

Without the customer's lawyer's consent, may you participate in the meeting between your company's CEO and the customer's CEO in an effort to resolve the dispute?

YES

NO

Hypothetical 31

You have been working with in-house counsel at one of your largest clients, defending several employment discrimination cases being handled by a very aggressive plaintiff's lawyer. The lawyer has filed discovery asking for the home addresses and telephone numbers of several hundred current and former employees. From the nature of the discovery, it is obvious that the plaintiff's lawyer intends to informally (and ex parte) approach those current and former employees. Your in-house lawyer contact has asked you what you can do to prevent such communications (she worries that some of the employees might be so "disgruntled" with the company that they would assist the plaintiff).

(a) May you advise the plaintiff's lawyer that he cannot communicate ex parte with the current employees, because you represent them?

YES

NO

(b) May you advise the plaintiff's lawyer that he cannot communicate ex parte with the former employees, because you represent them?

YES

NO

(c) Should you recommend to the in-house lawyer that you (or she) formally represent the most important employees?

YES

NO

Hypothetical 32

You are the only in-house lawyer at a consulting firm with several hundred employees. A former employee just sued your company for racial discrimination, and you suspect that her lawyer will begin calling some of your company's current and former employees to gather evidence. You would like to take whatever steps you can to protect your company from these interviews.

(a) May you send a memorandum to all current employees "directing" them not to talk with the plaintiff's lawyer if she calls them?

YES

NO

(b) May you send a memorandum to all current employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

YES

NO

(c) May you send a memorandum to all former employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

YES

NO

(d) May you advise employees that they are not required to talk to the plaintiff's lawyer if the lawyer calls them?

YES

NO

Hypothetical 33

Last year you moved next door to the "neighbor from Hell." Over your repeated objections and complaints, he has directed runoff from his roof directly onto your front yard.

May you threaten to sue your neighbor if he does not redirect the water away from your front yard?

YES

NO

Hypothetical 34

You represent a worker fired by a local engraving company. Your client claims that the company fired her because she complained about other employees dumping chemicals down a nearby storm sewer. The dumping would violate various criminal laws. You filed a lawsuit against the company for back wages.

May you threaten to report the company's unlawful dumping unless it settles the civil case your client has brought against it?

YES

NO

Hypothetical 35

You represent a small machine shop, which has been sued by an employee who claims discrimination against Koreans. Your client is Korean himself, and takes the lawsuit very personally. During discovery, you learn that the plaintiff has not filed tax returns for the past three years. This also offends your client (an immigrant who has always "played by the rules"), and he wants you to take advantage of this fact. You worry about violating your state's clear prohibition on threatening criminal charges to gain an advantage in a civil matter.

(a) May you call the IRS to report the plaintiff's failure to pay taxes (without threatening to do so beforehand)?

YES

NO

(b) If your client wants to call the IRS himself, may you participate (for instance, by advising him of what number to call, what to say, etc.)?

YES

NO

Hypothetical 36

You represent a bakery in a lawsuit against a small trucking company which failed to deliver a load of wedding cakes to a local caterer -- which cost you a lucrative contract. Through discovery, you have learned that the trucking company employs illegal aliens, which amounts to a criminal violation under your state's strict laws. Your state's ethics rules prohibit lawyers from threatening or presenting criminal charges solely to gain an advantage in a civil matter. You are nevertheless considering how to use what you have learned to your advantage.

May you include the following sentence in your settlement offer letter:

- (a)** "If this case actually goes to trial, civil liability might be the least of your company's worries" (with a footnote to the criminal law prohibiting the hiring of illegal aliens)?

YES

NO

- (b)** "If this case actually goes to trial, civil liability might be the least of your company's worries" (without any footnotes or other references to any criminal laws)?

YES

NO

- (c)** "Have you considered what would happen if the INS heard everything that is going to be said at trial"?

YES

NO

- (d)** "As we get closer to the trial, my client and I think that you will see just what a disaster this could be for your client"?

YES

NO

Hypothetical 37

The lawyer on the other side of a case you are handling has a bad reputation, and now you see why. He has bullied and yelled at you and your client during mandatory settlement negotiations. At one point, he even said "I am not going to settle this case until I have earned enough fees to take a good ski vacation next winter." You have mentioned the other lawyer's outbursts several times to the judge handling the case, and she has said "I don't want that kind of behavior from either of you." Now you are considering what else you can do.

May you threaten to call the state bar if the other lawyer continues his tirades?

YES

NO

Hypothetical 38

You are representing a company trying to negotiate a withdrawing executive's severance package without resort to litigation. The executive's lawyer called your client's president without giving you advance notice, but fortunately the president knew enough not to talk with her. You sent a strong email to the other lawyer, asking that she never try such ex parte communications again. Last night you heard from your company's senior vice president, who told you that the executive's lawyer just called him at home too. Now you wonder what other steps you can take.

May you threaten to call the state bar disciplinary authorities if the other lawyer does not stop calling your senior executives?

YES

NO