

# CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS: KEY ISSUES

## Hypotheticals

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## **Hypothetical 1**

You were surprised and disappointed to hear that a former client just sued your firm for malpractice, claiming that one of your favorite colleagues had violated your state's core conflict of interest rule. After reading the complaint, a few questions come to mind.

**(a)** Can an ethics rule violation support a cause of action against the lawyer?

**(A)** YES

**(B)** NO

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

**(A)** YES

**(B)** NO

## **Hypothetical 2**

One of your law school classmates was always a hot-head, so you were not surprised to read that his girlfriend just accused him of killing her dog during a drunken argument with her. You assume that he will face animal cruelty charges, but you wonder whether he will also face professional discipline.

Can lawyers be punished professionally for conduct totally unrelated to their professional conduct?

- (A)** YES
- (B)** NO

### **Hypothetical 3**

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?

**(A)** YES

**(B)** NO

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

**(A)** YES

**(B)** NO

### **Hypothetical 4**

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 prepare a will for your childless elderly and very wealthy neighbor, who wants to name you as a minor beneficiary in her estate (the bequest is \$50,000), and prepare her will?
- (A) YES
- (B) NO
- (b) May you prepare a will for your recently-deceased aunt's husband, who wants to leave most of his \$500,000 estate to you?
- (A) YES
- (B) NO
- (c) May you solicit substantial gifts from your clients to fund a scholarship named in your parents' honor at a local law school?
- (A) YES
- (B) NO

### **Hypothetical 5**

Two years ago, you left a large downtown law firm on good terms, and started your own suburban practice. You frequently receive referrals from your former firm when it faces a conflict. You estimate that about five percent of your income comes from those referrals. A new client just asked you to represent her in medium-size breach of contract case against a client whom you know will be represented by your former firm.

Must you disclose to your prospective client the good relationship with your former firm (including your referral income)?

- (A) YES
- (B) NO

## **Hypothetical 6**

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?
  - (A) YES
  - (B) NO
  
- (b) Sign a petition supporting the "ad hoc" groups efforts?
  - (A) YES
  - (B) NO
  
- (c) Attend a rally supporting the ad hoc group?
  - (A) YES
  - (B) NO

## Representing Unpopular Clients

### Hypothetical 7

Your large law firm recently circulated a memorandum to all associates seeking volunteers to represent (on a pro bono basis) one of the 9-11 terrorists in his effort to be released from Guantanamo Bay detention. Your heart sank when you read the memo, because your aunt died on September 11, 2001 when she jumped from the 90<sup>th</sup> floor of the North Tower before the fire engulfed her. You wonder what this representation means for you and your firm.

- (a) May you assist in the pro bono representation of the terrorist?
- (A) YES
  - (B) NO
- (b) If you face a “material limitation” conflict preventing you from representing the terrorist, is your conflict imputed to all of your law firm colleagues?
- (A) YES
  - (B) NO



## **Hypothetical 8**

After several years at a large law firm, you decided to go in-house, because you have become as interested in business operations in as the law. You just interviewed with a local company which has conditioned your employment on several non-compete provisions.

- (a) May you agree to a non-compete provision prohibiting your practice as an in-house lawyer for specified competitors of your prospective employer?
  - (A) YES
  - (B) NO
  
- (b) May you agree to a non-compete provision prohibiting your accepting a business role in specified competitors of your prospective employer?
  - (A) YES
  - (B) NO

## **Hypothetical 9**

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?
  - (A) YES
  - (B) 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?
  - (A) YES
  - (B) 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)?
  - (A) YES
  - (B) NO

## Lawyers' Pre-Departure Notification to Clients

### Hypothetical 10

You recently decided to move from one law firm to another law firm that seems to better suit your personality and (especially) your clients' needs. You have checked your state's ethics authorities to determine what you may and may not do while still employed at your current law firm. But one big question remains.

May you advise the clients for whom you are chiefly responsible of your planned departure and move to another law firm – before advising your current firm of your intended departure?

- (A) YES
- (B) NO

## **Hypothetical 11**

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?

- (A)** YES
- (B)** NO

## **Hypothetical 12**

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?
  - (A) YES
  - (B) NO
  
- (b) Not to assist or cooperate with any other parties or their lawyers in pursuing cases against your client?
  - (A) YES
  - (B) NO
  
- (c) To maintain in strict confidence the amount of the settlement and all pertinent documents?
  - (A) YES
  - (B) 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?
  - (A) YES
  - (B) NO

### **Hypothetical 13**

Your client has been vexed by numerous employment claims, and has successfully settled for large amounts several suits by a skilled and tenacious plaintiff's lawyer. Your research has found numerous ethics opinions condemning various settlement provisions restricting a plaintiff's lawyer from representing other plaintiffs. One of your resourceful young associates has proposed what seems like the perfect strategy for immunizing your client from future claims brought by that plaintiff's lawyer – having your client offer to retain her. You do not envision her being a “no show” lawyer. Instead, you plan to rely on her experience, intelligence and good judgement in helping your client restructure some of its policies to minimize such employment claims after her retention, and defend against any future claims. Of course, the lawyer would thus be ethically prohibited from representing other claimants against your client.

May you avoid ethics criticism by arranging for your client's retention of the lawyer who had successfully represented claimants against your client?

- (A) YES
- (B) NO

### **Hypothetical 14**

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?

**(A)** YES

**(B)** NO

## **Hypothetical 15**

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?

- (A) YES
- (B) NO



## **Hypothetical 16**

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?

- (A) YES
- (B) NO

## **Hypothetical 17**

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?

- (A)** YES
- (B)** NO

## **Hypothetical 18**

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?

- (A)** YES
- (B)** NO

## **Hypothetical 19**

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?

- (A)** YES
- (B)** NO

## **Hypothetical 20**

You have not been particularly successful as a plaintiff's lawyer, but about two years ago you hit the jackpot. Your neighbor's uncle hired you to represent him in an enormous fraud and breach of contract case against the company that had purchased his company when he retired. The case could not have been progressing any more smoothly. You nailed the defendant's chief executive officer in a deposition. A great damages expert estimates your client's damages at \$30,000,000. The trial starts in about two months, and you expect to recover that amount and perhaps punitive damages.

Your client just called you this morning with horrible news – he has been diagnosed with Stage IV pancreatic cancer, and has been given only two months to live. He tells you that he does not want to spend the last two months of his life preparing for trial, and he insists that you drop the case.

May your client drop the case over your objection?

- (A) YES
- (B) NO

## **Hypothetical 21**

You represented a local car dealer in all of her estate planning work 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 your entire 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?
  - (A)** YES
  - (B)** NO
  
- (b)** May you bill the former client for copying the file?
  - (A)** YES
  - (B)** NO
  
- (c)** May you retain a copy of the file over your former client's objections?
  - (A)** YES
  - (B)** NO

## **Hypothetical 22**

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?

- (A) YES
- (B) NO

## **Hypothetical 23**

You know you have ethics and fiduciary duties to current clients, but three recent incidents have involved your possible duties to former clients.

- (a) Must you advise your former client (whom you represented until just six weeks ago) about a new IRS ruling that dramatically affects your former client's estate tax planning?
- (A) YES
- (B) NO
- (b) Must you advise a former client that its electronic files your firm possesses have been compromised by a cyberattack?
- (A) YES
- (B) NO
- (c) Must you respond to a document subpoena your law firm just received for a former client's documents – if your former client refuses to pay for the time you will spend objecting to the subpoena and producing any responsive documents under a court order?
- (A) YES
- (B) NO
- (d) Must you separate out the privileged documents before producing your firm's files to your former client's adversary?
- (A) YES
- (B) NO