

LITIGATION ETHICS: CLAIMS, SETTLEMENTS AND COURTS

Hypotheticals

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Hypothetical 1

One of your clients recently purchased an old house, and has had several contractors working on various renovation projects. Your client told you that the contractor working on some roof repairs cut through a water pipe -- causing about \$5,000 worth of damage. That contractor is on shaky ground financially. You know that another unrelated contractor doing plumbing work on the house has substantial assets.

May you file a claim against the plumbing contractor for cutting the pipe?

YES

NO

Hypothetical 2

You work in a public interest law firm that fights to eliminate the death penalty. You would like to claim that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes. However, the United States Supreme Court recently held that the United States Constitution does not prohibit such executions in all cases.

May you file a lawsuit contending that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes?

YES

NO

Hypothetical 3

One of your sorority sisters just lost her job, and wants to pursue a wrongful termination claim. Your firm would probably not want you to represent the plaintiff in a case like this, although you do not have any conflicts. You offer to help your sorority sister as much as you can.

Without disclosure to the court and the adversary, may you draft pleadings that your sorority sister can file pro se?

YES

NO

Hypothetical 4

One of your neighbors became quite ill on a Caribbean cruise several years ago. He never filed a claim against the cruise line, but recently has been telling you over the backyard fence that he "was never really the same" after the illness. You finally convince him to explore a possible lawsuit against the cruise line, but discover that the claim would be time-barred under a stringent federal statute. Although that statute also covers claims against the travel agent which booked the cruise, you think that there is some possibility that the lawyer likely to represent the local travel agent would not discover the federal statute.

May you file an action against the local travel agent after the cut-off date under the federal statute?

YES

NO

Hypothetical 5

One of your business clients just called to ask if you are willing to participate in what seems like an unusual arrangement. Your client is trying to resolve a contractual dispute with one of her customers. Under your client's proposed arrangement, both clients and both lawyers would agree to negotiate a possible resolution of the dispute. If the negotiations fail, both lawyers would agree to withdraw from representing their clients -- and the clients would have to retain new lawyers to litigate. This concept sounds intriguing to you, but you worry that your contractual agreement to withdraw in case of litigation would create an insoluble conflict with your duty of loyalty and diligence -- because you and the other lawyer would have an incentive to recommend settlement even if clients would be better served by litigating.

May you enter into the arrangement your client has proposed?

YES NO

Hypothetical 6

You have built a lucrative practice representing homeowners in lawsuits against pest control companies for negligent termite treatment of new homes. In some cases, you represent incorporated neighborhood associations, and in other situations you represent groups of homeowners who have jointly hired you to pursue their claims. In recent years, you have found that defendants generally like to "wrap up" litigation by paying one lump sum to settle an entire lawsuit. To ease your administrative burden, your standard retainer agreement calls for your clients to agree in advance to decide whether or not to take such a "lump sum" settlement offer by majority vote of the homeowners involved.

- (a) Is such an approach ethical in cases where you represent an incorporated neighborhood association?

YES NO

- (b) Is such an approach ethical in cases where you represent a group of individual homeowners?

YES NO

Hypothetical 7

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

YES NO

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES NO

- (c) Your client (the defendant) has instructed you to accept any settlement demand that is less than \$100,000. If the plaintiff's lawyer asks "will your client give \$90,000?," may you answer "no"?

YES NO

Hypothetical 8

You are preparing to begin serious settlement negotiations with a plaintiff's lawyer, and you have several questions about whether you can stay silent in certain circumstances that you expect might arise.

May you remain silent if the plaintiff's lawyer tells you that he realizes that the plaintiff's available damages are capped at \$250,000 by a state statute -- which you know the legislature to have raised just last week to \$500,000?

YES

NO

Hypothetical 9

You are preparing for settlement negotiations with several lawyers who have been less than diligent in pursuing their clients' cases. You expect your adversaries to make mistakes, and you wonder about your right to remain silent in certain circumstances.

- (a) May you remain silent if an adversary demands the full amount of what it understands to be your client's insurance coverage (based on statements that your client made to the adversary before hiring you, but which your client has since admitted to you were incorrect)?

YES NO

- (b) May you remain silent if an adversary demands the full amount of what it has determined to be the available insurance coverage -- when you know that there is an additional policy that the adversary could have discovered by checking available documents?

YES NO

- (c) May you remain silent when an adversary makes a \$100,000 settlement demand -- which you take as a clear indication that the other side must not know that your client also has a \$1,000,000 umbrella liability policy?

YES NO

Hypothetical 10

You recently spent two years litigating a hotly contested case in Washington, D.C. Last week, you attended a private mediation session. After you and the plaintiff's lawyer reached a tentative settlement, the plaintiff's lawyer said that she needed a ten-minute break, and left the meeting for a short time. When the plaintiff's lawyer returned to the meeting, you and she shook hands on what she said was an acceptable settlement. However, you just received a call from the plaintiff's lawyer. She tells you that her client claims not to have given her authority to settle, and therefore refuses to honor the settlement.

May you assure your client that you will be able to enforce the settlement that you reached with the plaintiff's lawyer?

YES

NO

Hypothetical 11

Having been "burned" once by a client who reneged on a settlement agreement that you thought the client had authorized, you recently insisted that a client sign a retainer agreement with the following provision:

"The undersigned client further agrees that the said attorney shall have full power and authority to settle, compromise, or take such action as he might deem proper for the best interest of the client, and the client does hereby appoint the said attorney as attorney-in-fact, with full power to execute any and all instruments and documents in behalf or in the name of said client, which are necessary to settle or make other disposition of said matter, including endorsement of checks or drafts received as proceeds of recovery."

Relying on this provision, you recently settled a personal injury case for your client. However, the client repudiated the settlement.

Will your client be bound by the settlement?

YES NO

Hypothetical 12

As your firm's ethics "guru," you receive numerous calls every day from your partners who are trying cases. This morning you received two similar calls from partners who need your immediate input.

One of your partners represents an individual plaintiff in a lease case about to be tried. Your partner called you this morning to say that the defendant appears not to have discovered her client's earlier criminal conviction for fraud and perjury. Your partner wonders about her obligations at the upcoming trial.

(a) Must your partner disclose her client's criminal conviction for fraud and perjury?

YES NO

Another partner called you from the courthouse during a break in an ex parte TRO hearing. That partner's client had earlier been found liable for engaging in fraudulent mortgage transactions -- which would be material in the matter. Your partner needs to know immediately whether to disclose that earlier judgment.

(b) Must your partner disclose the earlier judgment entered against your client?

YES NO

Hypothetical 13

You are defending a bank in a lawsuit going to trial next month. One of your newest colleagues checks on a daily basis court decisions dealing with the issues involved in your litigation. Your colleague just reported on several new decisions, and you wonder whether you must bring them to the trial court's attention in your case.

Must you advise the trial court of the following decisions:

- (a) A decision by your state's supreme court directly adverse to the statutory interpretation argument you are advancing on behalf of your bank client?

YES NO

- (b) A decision by another trial court elsewhere in your state, which does not control your trial court's decision, but which is directly adverse to your statutory interpretation argument?

YES NO

- (c) Unfavorable dicta in a decision from your state's supreme court?

- (d) A decision from a neighboring state's appellate court involving exactly the same facts as your case, and which is directly adverse to your statutory interpretation argument?

YES NO

Hypothetical 14

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

- (a)** A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

YES NO

- (b)** A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

YES NO

Hypothetical 15

Over the years, you have found that one of the most enjoyable aspects of practicing law is the wide circle of friends with whom you enjoy spending leisure time. You have just been offered a judgeship, and you wonder to what extent judges can continue to socialize with litigants.

If you become a judge, may you:

- (a)** Attend a church picnic with the defendant in a car accident case you are hearing?

YES NO

- (b)** Play golf with the plaintiff in a commercial litigation matter, whom you have known for twenty-five years?

YES NO

- (c)** Go hunting with a government official (such as the country's Vice President) who has been sued in his official (rather than personal) capacity in a case that will come before your court?

YES NO

Hypothetical 16

Having just been appointed as a local judge, you need to make some decisions about cases which have been assigned to you.

- (a)** May you hear a case in which one of the litigant's lawyers is your best friend?

YES NO

- (b)** May you hear a case in which one of the litigant's lawyers is your son-in-law?

YES NO

- (c)** May you hear a case in which one of the litigant's lawyers is your brother-in-law?

YES NO

- (d)** May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is a partner?

YES NO

- (e)** May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is an associate?

YES NO

Hypothetical 17

You practice in a state judicial district served by three judges -- two of whom are very conservative and one of whom is very liberal. Over the years, you and every other local lawyer has recognized the advantage that employment and personal injury plaintiffs have when drawing the liberal judge. Not surprisingly, you have considered various steps to increase the odds that your plaintiff's cases are assigned to the liberal judge. Your local court's docket control clerk assigns cases on a rotating basis.

May you take the following steps in an effort to increase the chances of drawing the liberal judge:

- (a) Wait until you know that both conservative judges are out of town before filing a motion (such as a motion seeking a TRO) that requires immediate judicial attention?

YES NO

- (b) Have one of your associates wait at the clerk's office until it looks as if the next case filed will be assigned to the liberal judge, at which time your associate will file your client's case?

YES NO

- (c) File three essentially identical cases for your client, and then dismiss the two cases assigned to the conservative judges?

YES NO

Hypothetical 18

One of your largest clients just hired you to defend a series of employment discrimination cases filed by several plaintiffs in Northern District of Alabama federal court. Your client also wants you to defend cases that your client expects other plaintiffs will file in the coming years. In previous employment cases, your client has been extremely unlucky before one Northern District of Alabama judge, and has asked you about possible ways to avoid that judge.

May you take the following actions -- if you are motivated by the desire to avoid having the unsympathetic Northern District of Alabama judge hear cases against your client:

- (a) Move for a change of venue to the Southern District of Alabama (if there are legal grounds for doing so)?

YES NO

- (b) Retain as additional local counsel the judge's son?

YES NO

- (c) In preparing for a case that you plan to file against an employee in six months, retain as local counsel the judge's son to appear as counsel of record when you file the complaint?

YES NO

- (d) Retain as additional local counsel a law firm in which the judge's eldest daughter works?

YES NO

- (e) Retain as additional local counsel the law firm at which the judge previously worked?

YES NO