

APPLYING ABSTRACT ETHICS RULES IN THE REAL WORLD: EX PARTE CONTACTS AND THE WITNESS- ADVOCATE RULE

Hypotheticals

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Hypothetical 1

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 2

You helped your small manufacturing client negotiate a contract with a large retailer. In some negotiation sessions you and your client were the only participants from your side. You also had one-on-one telephone calls with the retailer's lawyer about the contract. After only six months, the retailer reneged on several provisions. Your client wants you to file a breach of contract action against the retailer. You and your client agree that you will have to testify about some of the negotiations and your telephone calls with the retailer's lawyer -- but your client also wants you to try the case.

May you act as an advocate at the trial in which you are sure to be a witness for your client?

YES

NO

Hypothetical 3

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 4

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 5

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 6

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 7

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 8

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 9

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 10

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 11

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 12

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 13

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 14

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 15

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 16

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 17

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 18

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 19

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 20

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 21

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 22

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 23

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 24

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 25

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 26

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 27

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 28

You and a friend have been discussing the reason why every state's ethical rule generally prohibits the same lawyer from acting both as a witness and as an advocate in the same trial. You disagree about the effect of such a dual role on a jury. You think that a jury will give less weight to the factual testimony of a lawyer who is also acting as an advocate in that case, because the lawyer is so obviously interested in the outcome of the case for his client. Your friend thinks that the jury will give more weight to the lawyer's testimony, because she obviously is acting as an officer of the court in the proceeding itself.

Is the jury likely to provide less weight to the factual testimony of a lawyer who is acting as an advocate in the trial?

YES

NO

Hypothetical 29

You and a friend had been debating the rationale for an application of the witness-advocate rule. After deadlocking in your discussion of the jury's reaction to the same lawyer acting as both a witness and an advocate, you seem to agree on one point -- that the witness-advocate rule should not apply to judge trials or pretrial proceedings before a judge. Both of you think that judges should be capable of distinguishing between the different roles that lawyers play, and therefore will not suffer from the confusion that a jury might face.

(a) Should the witness-advocate rule apply to trials before a judge?

YES

NO

(b) Should the witness-advocate rule apply to pretrial proceedings?

YES

NO

Hypothetical 30

You and your friend disagree about the best time for a trial court to address any witness-advocate issues. Your friend thinks that the trial court should address the issue as soon as possible, so that all of the parties and their lawyers know what role they can play in the pretrial proceedings and the trial itself. You vehemently disagree, contending that it does not make sense to address the witness-advocate issue until the last minute -- both because most cases settle before trial (meaning that the judge will never have to bother with any witness-advocate issues) and because it will not be clear until the end of discovery whether the lawyer will or will not have to testify.

Should trial courts address any witness-advocate issues as soon as possible?

YES

NO

Hypothetical 31

Even though you normally represent clients in litigation, it looks as if you might soon be involved in litigation as a party. You have begun to wonder about the witness-advocate rule's applicability to several situations that might arise in the near future.

- (a)** May you represent yourself as an advocate pro se even if you have to testify as a fact witness in the trial?

YES

NO

- (b)** If you are acting as an executor, may you testify and also act as an advocate at trial?

YES

NO

- (c)** May you represent a corporation of which you are the sole shareholder, if you will have to testify as a fact witness at the trial?

YES

NO

- (d)** You, your husband, and your daughter are all plaintiffs in an action against a school board, alleging discrimination against your disabled daughter. May you represent yourself, your husband, and your daughter at the trial?

YES

NO

Hypothetical 32

You assisted your client in a transaction last year, which is now the subject of litigation. Mindful of the witness-advocate rule, you do not believe that you are a "necessary" witness on your client's behalf. You are very certain that any testimony you might provide would assist rather than prejudice your client. However, your adversary has indicated that it intends to notice your deposition and call you as a trial witness.

(a) May the adversary take your deposition during the discovery phase of the case?

YES

NO

(b) Must you be disqualified if the adversary calls you as a witness at the trial?

YES

NO

Hypothetical 33

You handled a client's business transaction last year, and now want to represent that client in litigation involving the transaction. The other side has moved to disqualify you from representing your client. It argues that it intends to call you as a witness (both in a deposition and at the trial), and that your testimony will hurt your client because you will contradict your corporate client's president's recollection about several key meetings.

If your testimony would contradict your client's president's testimony, is your adversary likely to succeed in seeking your disqualification?

YES

NO

Hypothetical 34

You handled a business transaction for a client last year, which is now the subject of litigation. Your adversary has moved to disqualify you, arguing that it intends to call you as a witness on two factual issues.

- (a) Will your adversary succeed in seeking your disqualification if you must testify about a comment your adversary's president made in your presence about a relatively minor issue?

YES

NO

- (b) Will your adversary succeed in seeking your disqualification if you must testify about a meeting at which each side in the negotiation was represented by two lawyers and two corporate representatives?

YES

NO

Hypothetical 35

You have represented a small businesswoman for nearly a decade. Among other things, you just filed a lawsuit on her behalf against a rival company, claiming various business torts. You have warned your client that the other side might move to disqualify you as an advocate, because you were either the only participant or one of only a few participants in several communications that might be important in the case. Your client has told you that she is willing to forego whatever helpful testimony you might offer on those matters -- in order to keep your services as an advocate. You are flattered by your client's loyalty, but wonder about its effectiveness.

May a client forego a lawyer's helpful testimony to retain the lawyer's services as an advocate?

YES

NO

Hypothetical 36

You have represented a local businessman in essentially all of his matters for the past twenty years. You just helped him in a transaction last year, and now want to act as his trial lawyer in the litigation even though you probably will be called as a necessary witness.

May you avoid disqualification by arguing that losing you as the trial lawyer will cause your client a "substantial hardship"?

YES

NO

Hypothetical 37

You and your client agree that you will have to testify on her behalf in an upcoming trial.

May one of your partners serve as trial counsel in the trial if you have to testify as a witness in that trial?

YES

NO

Hypothetical 38

Your paralegal had a one-on-one conversation about an important matter with a witness. That witness now appears poised to provide totally different testimony against your client at an upcoming trial.

May you continue to act as an advocate in the trial if your paralegal will testify about the conversation?

YES

NO

Hypothetical 39

You have always practiced on your own. Your largest client just asked you to represent her in an important commercial dispute headed for litigation. You played an integral role in the background incidents, and will therefore have to testify for your client at trial about meetings in which you were the only participant acting on your client's behalf. However, your client wants you to play as active a role as you possibly can before (and possibly after) the trial.

Even if you are disqualified by the witness-advocate rule from acting as your client's trial advocate, may you undertake the following activities on your client's behalf?

(a) Work "behind the scenes" in drafting briefs, cross-examination outlines, etc.?

YES NO

(b) Represent your client at settlement negotiations?

YES NO

(c) Take depositions?

YES NO

(d) Attend depositions on your client's behalf?

YES NO

(e) Argue at pretrial non-evidentiary hearings on issues (such as venue or summary judgment) that involve issues that will not come up again at the trial?

YES NO

(f) Argue at pretrial evidentiary hearings?

YES

NO

(g) Testify at a pretrial evidentiary hearing, as long as the issue will not come up again at the trial?

YES

NO

(h) Sit at counsel table during the trial?

YES

NO

(i) Argue on your client's behalf on appeal?

YES

NO

Hypothetical 40

You represented a new client in negotiating a franchise agreement. Your client and the franchisor eventually had a falling-out, and you have been representing the client in a lawsuit against the franchisor. As it turns out, your recollection of some important meetings with the franchisor and its lawyer differed dramatically from your client's recollection. Despite your efforts to avoid it, the court eventually disqualified you from acting as an advocate -- because your testimony would harm your client, based on the discrepancy between his and your testimony about the meetings. Now you wonder where that has left you and your firm.

(a) Will your individual disqualification prevent one of your partners from trying the case for the client?

YES

NO

(b) May you continue to advise the client "behind the scenes"?

YES

NO

(c) May you assist the client in reminding him of historical facts?

YES

NO