

LITIGATION ETHICS: PART II (DISCOVERY)

Hypotheticals

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Hypothetical 1

As a defense lawyer, you frequently defend automobile accident cases brought by plaintiffs claiming serious debilitating injuries. In some cases, you suspect that plaintiffs are lying about the extent of their injuries.

May you arrange for an investigator to drive by a plaintiff's house, and videotape the plaintiff engaged in such outdoor activities as mowing the lawn, climbing a ladder to clean gutters, playing touch football, etc.?

YES

NO

Hypothetical 2

As a defense lawyer, you receive numerous proposals from private investigators about how to catch plaintiffs exaggerating or even lying about the extent of their personal injuries.

May you direct a private investigator to engage in the following activities from a van parked on a public street outside a plaintiff's home:

(a) Use a telephoto lens to videotape plaintiff's activities?

YES

NO

(b) Use a camera mounted on top of the van to look over a hedge on the plaintiff's property line?

YES

NO

(c) Use a camera to look through a window into the plaintiff's home to record plaintiff's activity in her home?

YES

NO

(d) Use a special infrared camera focusing on the plaintiff's bedroom to determine the validity of his "loss of consortium" claim.

YES

NO

Hypothetical 3

You are preparing for a large commercial litigation trial against Acme Company. You have been calling various hotels in a nearby city looking for a suitable spot to conduct a mock jury trial. The hotel event planner with whom you just spoke assured you that her hotel can handle such an event -- telling you that "we have a mock jury trial just like yours lined up this Saturday afternoon for Acme Company."

May you arrange for several of your law firm's secretaries and paralegals to "hang out" in that hotel's public lobby and hallways this Saturday afternoon (hoping to overhear conversations that might prove useful)?

YES

NO

Hypothetical 4

You represent a wife in a bitter custody battle. The client has tearfully told you how verbally abusive her ex-husband has been to her and the children when they meet every other Saturday morning at a McDonald's parking lot where he picks up the children.

May you suggest that your client wear a "body wire" during one of the Saturday morning exchanges to capture her ex-husband's abusive language?

YES

NO

Hypothetical 5

You represent the wife in a bitter custody battle. Her children have reported dangerous unsanitary conditions at her ex-husband's apartment. The children have also described having trouble sleeping at night when they stay with their father, because he refuses to lock the apartment door. Your client said that last Sunday she went to her ex-husband's apartment to pick up the children, but no one was there. She peeked in the window and noticed the dangerous unsanitary conditions inside. She has asked whether she can enter her ex-husband's apartment next time she finds herself in that position, and take pictures of the unsanitary conditions.

(a) May your client enter her ex-husband's apartment and photograph dangerous unsanitary conditions?

YES

NO

(b) May your client ask one of her children to photograph the dangerous unsanitary conditions?

YES

NO

(c) If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, may you use the photographs in the custody dispute?

YES

NO

(d) If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, is the court likely to use and rely on the photographs in making custody decisions?

YES

NO

Hypothetical 6

You and your partner have debated the ethical propriety of lawyers tape-recording telephone calls, or directing their clients to do so.

May lawyers tape-record (or direct their clients to tape-record) telephone calls in the following situations:

- (a)** Without the other party's consent, in a state where both parties' consent is required?

YES

NO

- (b)** When the client (a young woman) wants to record her step-father's gloating admission that the step-father sexually abused her when she was a young girl?

YES

NO

- (c)** When a lawyer wants to record an abusive ex-boyfriend's threat to kill her?

YES

NO

- (d)** When a lawyer wants to record blatant lies by opposing counsel?

YES

NO

- (e)** When a lawyer wants to record a client's threat to withhold payment of the lawyer's bill?

YES

NO

Hypothetical 7

You are representing the defendant in litigation in which a nonparty witness will play an important role. You have determined that the nonparty witness (who seems to be hostile to your client) does not have a lawyer in the matter. You would like to arrange for someone under your direction to visit the nonparty witness's Facebook website, and seek to "friend" her -- thus obtaining access to information on her Facebook pages. The person contacting the witness would be entirely truthful in describing who she is, but of course would not describe the purpose of her interest in "friending" the witness.

May you engage in such an action?

YES

NO

Hypothetical 8

The outcome of a large commercial case might hinge on a neutral witness's credibility. You are considering ways to confidentially test his credibility.

May you:

- (a) Bring to your deposition of the neutral witness a young associate in your law firm who has a psychology PhD and an uncanny ability to determine if a witness is telling the truth or lying?

YES

NO

- (b) Install new software on your laptop computer which can analyze speech patterns and determine the likelihood that someone is lying -- and then bring your laptop to the deposition and view the results on the screen while you are deposing the neutral witness?

YES

NO

- (c) Use the new speech pattern software to analyze the neutral witness's statements on the subject matter during a press conference that was broadcast on the local news station?

YES

NO

Hypothetical 9

You have chosen as your favorite pro bono project a local private group that fights housing discrimination. Over the years, you have learned that the only effective way to find and eliminate housing discrimination is to use "testers." These "testers" are prospective homebuyers with false backgrounds that are identical in every way but one -- their race or national origin.

(a) May you participate as a "tester" in an effort to find and eliminate housing discrimination?

YES

NO

(b) May you supervise your group's use of such "testers" without engaging in the practice yourself?

YES

NO

Hypothetical 10

You recently represented a furniture manufacturer in terminating its relationship with a large retailer. Your client and the retailer entered into a consent decree in which the retailer agreed to stop selling your client's furniture at its stores. You and your client have heard rumors that the retailer is violating the consent decree by buying your client's furniture from other retailers and selling it at their stores. From what you hear, the retailer does not advertise that it sells your client's furniture, but arranges for sales to consumers who ask about the furniture when they visit the retailer's stores.

May you arrange for one of your law firm's associates, a paralegal and your son-in-law to visit one of the retailer's stores and pose as consumers interested in buying your client's furniture?

YES

NO

Hypothetical 11

You have been placed in charge of a special prosecution unit focusing on illegal drug sales.

May you participate in setting up drug "sting" operations?

YES

NO

Hypothetical 12

You are trying to compile as much information as possible about a plaintiff. One of your partners has recommended a private investigator.

- (a)** Before allowing the private investigator to start her work, must you instruct her on the ethical and legal limits on her activities?

YES

NO

- (b)** May you use the fruits of the private investigator's work without assuring yourself that the private investigator has not used illegal means to obtain it?

YES

NO

- (c)** May you use the fruits of the private investigator's work when the only conceivable way she could have obtained the information involved wrongful conduct (such as violation of health privacy laws)?

YES

NO

Hypothetical 13

You just won a jury trial for your client. You and your client are justifiably curious about whether your adversary will file an appeal. You have a cordial relationship with the adversary's lawyer, so you call her on the Thursday before the filing deadline to ask whether she intends to file an appeal. In a friendly conversation, the other lawyer laughingly "thanks" you for ruining her weekend. You instantly realize that the other lawyer must have miscalculated the appellate filing deadline -- which is Friday rather than Monday.

(a) May you refrain from telling the adversary's lawyer about her miscalculation?

YES

NO

(b) Must you advise the adversary of the calculation error?

YES

NO

(c) Without your client's consent, may you advise the adversary of the calculation error?

YES

NO

Hypothetical 14

A lawyer on the other side of one of your largest cases must just have hired a new assistant, because the other lawyer has made several mistakes in the past month.

- (a) A few weeks ago, you received a frantic call from the other lawyer saying that her assistant had Fed Ex'd a package to you that was intended for her client. She said the package would arrive tomorrow morning, and asked that you send it back at her expense.

Must you return the Fed Ex package without opening it and reading the contents?

YES

NO

- (b) Last week you opened an e-mail from the other lawyer. It seems to be some kind of status report. About halfway through reading it, you realize that it is the other lawyer's status report to her client.

Must you refrain from reading the rest of the status report?

YES

NO

- (c) You just opened an e-mail from the other lawyer. After you read several paragraphs, you realize that the e-mail was intended for a governmental agency. The e-mail seems very helpful to your case, but would not have been responsive to any discovery requests because your adversary created it after the agreed-upon cut-off date for producing documents.

Must you refrain from reading the remainder of the e-mail?

YES

NO

Hypothetical 15

Last week you received and reviewed ten boxes of documents produced by a litigation adversary. This morning you received a letter from the adversary, demanding that you return three documents it claims to have "inadvertently" included in the production.

Must you return the following documents your adversary claims to have "inadvertently" included in the production?

- (a)** A memorandum from your adversary's trial lawyer to its president, marked "privileged and confidential" and analyzing the litigation risks in this case?

YES

NO

- (b)** A memorandum to the adversary's president which does not list an author, but which discusses this litigation (your adversary's lawyer claims that she just learned that the memorandum was written by a former in-house lawyer).

YES

NO

- (c)** A chart of customer complaints that could be very useful in the litigation, but which falls outside the scope of your discovery request.

YES

NO

Hypothetical 16

From the beginning of this important case, your client warned you that your adversary and its lawyers were "sleaze balls." Two recent incidents confirmed your client's characterization, and created dilemmas for you.

- (a)** This morning you opened up a large brown envelope addressed to you in unfamiliar handwriting. The first page is a short note in the same handwriting saying simply "You need to see these. Don't tell anyone how you got them." The envelope contains three documents. From your very quick review, you can see that they are copies of e-mails from the adversary's lawyer to her CFO. In the first e-mail you quickly scan, the lawyer chastised the CFO for having destroyed several responsive documents after the litigation began, and advised her of the severe penalties for spoliation.

Must you refrain from reading the other e-mails and using them in the litigation?

YES

NO

- (b)** About an hour after you open the plain brown envelope, you received an e-mail from the adversary's lawyer. When you opened the e-mail, you saw that the lawyer intended it for her CFO. It is marked "privileged and confidential," and the first line reads: "I just learned that you destroyed more documents even though I told you never to do that again."

Must you refrain from reading the remainder of the e-mail and using it in the litigation?

YES

NO

Hypothetical 17

Last week you received and reviewed ten boxes of documents produced by a litigation adversary. This morning you received a letter from the adversary, demanding that you return three documents it claims to have "inadvertently" included in the production.

Is the court likely to find that the adversary has waived any attorney-client privilege or work product doctrine protection that might have protected the three documents?

YES

NO

Hypothetical 18

You just received an e-mail with an attached settlement proposal from an adversary. Coincidentally, last evening you read an article about the "metadata" that accompanies many electronic documents, and which might allow you to see who made changes to the settlement proposal, when they made the changes, and even what changes they made (such as including a higher settlement demand in an earlier version of the proposal).

May you try to review whatever "metadata" accompanied your adversary's settlement proposal?

YES

NO