

# IDENTIFYING THE CLIENT

## Hypotheticals

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## Hypothetical 1

You occasionally represent a law firm in your city on labor and employment matters (your work has not given you any information about the law firm's finances). The firm has five partners and ten associates. You have met all of the firm's lawyers at social functions, but deal primarily with one of the partners. One of your partners just told you that the wife of another partner at that firm wants to hire your firm to file a divorce action against her husband.

May your firm represent the wife in suing one of your law firm client's partners for divorce (without that partner's consent)?

YES

NO

## Hypothetical 2

You joined your state's attorney general's office immediately after law school, and have developed an interesting practice representing state-operated colleges. One of your college clients just asked for your help in pursuing a matter adverse to another state entity (which funds and processes state employee health care claims). You have never worked for the state health care agency.

May you represent the state-operated college in a matter adverse to the state-operated health plan?

YES

NO

### Hypothetical 3

You have been asked to represent an association of companies based in your state's capital. This is a plum assignment, and you think it might give you a real marketing opportunity -- because you will have the chance to "schmooze" many potential clients at regular meetings of the association. However, one of your partners worries that there might be a downside risk to representing the association, because it might prevent your firm from being adverse to association members.

If your law firm represents the association, may you take matters adverse to individual members of the association (without their consent)?

YES

NO

## Hypothetical 4

You had trouble finding a job after graduating from law school, but you finally landed an associate position at a law firm that primarily handles insurance defense work. During your first interview with an insured whom you have been asked to represent by the insurance company, the insured asks you a question that you cannot immediately answer: "Are you just representing me, or are you also representing the insurance company?"

When an insurance company hires a lawyer to represent one of its insureds, does that lawyer also represent the insurance company?

YES

NO

## Hypothetical 5

As part of your local bar's mentoring initiative, you answer ethics questions from recent law school graduates. You just received a call from a young lawyer who wants to start taking trust and estate matters. Although she poses her question in the abstract, the answer could affect her day-to-day actions.

If an executor hires the young lawyer to perform work, who is the lawyer's client?

The estate?

The executor (but only in his or her fiduciary capacity)?

The executor in all his or her capacities?

## Hypothetical 6

After about ten years in the business world, you decided to become a lawyer. Although you were involved in many bond deals in your previous career, you never had to answer a question that one of your law professors just posed to you.

When you act as bond counsel, is the bond issuer your client?

YES

NO

## Hypothetical 7

You have handled most of the legal work for a wealthy businessman and his equally successful long-time girlfriend. Neither one has any children or previous spouses. They show no signs of marrying, although they seem very committed to one another. Both the businessman and his girlfriend have independently mentioned retaining you to prepare estate planning documents. You have not spoken to either one of them about their intent, but you assume that they would probably leave most of their wealth to each other (and perhaps some charities).

If you prepare estate planning documents for the businessman and his girlfriend, will it be a joint representation?

YES

NO



## **Hypothetical 8**

Although you generally handle transactional work for several family-owned companies and their owners, you also help some of your clients with their estate planning. The president of one of your corporate clients just called to say that he would like you to prepare a new will for him and his fourth wife. You worry that the president's interests are or will become adverse to her interests.

May you jointly represent the president and his fourth wife in preparing their estate plan?

YES

NO

## Hypothetical 9

For the past six months, you have been representing a husband and wife in preparing their estate plan. You did not explain to either client whether you could (or must) disclose to one spouse what the other spouse told you in connection with their estate planning. Over lunch early this afternoon, the wife told you in confidence that several years before meeting her current husband she had an affair with a coworker and had an illegitimate child. Her husband does not know anything about this, but the wife is considering if she should make arrangements for her illegitimate child to receive some of her estate.

Shell-shocked, you return to the office and discuss this issue with one of your senior partners.

**(a)** Must you tell the husband about his wife's illegitimate child?

YES

NO

**(b)** May you tell the husband about his wife's illegitimate child?

YES

NO

**(c)** May you continue to jointly represent the client?

YES

NO

## Hypothetical 10

About six months ago, a well-known basketball coach asked you to represent him and his wife in preparing their estate plan. The coach had been the subject of tabloid rumors, and you did not want to be surprised by some disclosures that you might have to share with his wife. At the beginning of the representation, you therefore had your clients sign a retainer agreement indicating that you would not share with both clients information that you learn from one of the clients. Just as you feared, your basketball coach client told you this morning that he had been romantically involved (for about 15 minutes) with another woman at a bar, and worries that she will claim paternity if she has a baby.

**(a)** Must you tell the wife about this incident?

YES

NO

**(b)** May you tell the wife about this incident?

YES

NO

**(c)** May you continue to jointly represent the client?

YES

NO

## Hypothetical 11

You have been representing a husband and wife in their estate planning for about two years. At the beginning of the representation, you had both of your clients sign an explicit "no secrets" retainer agreement. Your goal was to avoid the awkward situation in which one of the clients asks you to keep secret material information from the other client, and the clients have not agreed in advance on how to handle such a conflict.

During your most recent meeting with just the husband, he tells you that he has fallen in love with his neighbor, and plans to divorce his wife. When he asks you to keep this information secret until he is ready to break the news to his wife, you remind him of the agreement that he and his wife signed two years ago that there would be "no secrets" in the estate planning process. You can tell from the horrified look on the husband's face that he has forgotten about that agreement.

**(a)** Must you tell the wife about the husband's divorce plans?

YES

NO

**(b)** May you tell the wife about the husband's divorce plans?

YES

NO

**(c)** May you continue to jointly represent the client?

YES

NO

## Hypothetical 12

Last year, you represented a husband and wife in preparing their joint estate plan. You had not addressed the "information flow" aspect of the joint representation, but fortunately that issue did not arise during the course of your work. However, you just learned that the couple is in the midst of a bitter divorce. The husband's lawyer just called to insist that you make available all of your estate planning files to him. In particular, the husband's lawyer wants all of your email communications with his wife, some of which were not copied to him at the time. Given the apparently contentious nature of the divorce, you would not be surprised if the wife's lawyer objects to this "instruction."

If the wife's lawyer objects, must you nevertheless give the husband's lawyer communications that occurred during the joint representation?

YES

NO

## **Hypothetical 13**

As the General Counsel of your publicly traded client, you naturally find yourself dealing with complicated situations. You just received a call from one of your client's directors, who serves on the Audit Committee. She has asked you to hire an outside law firm to assist the Audit Committee in conducting an internal corporate investigation into possible accounting irregularities. A prominent local lawyer comes immediately to mind, and within five minutes you have him on the phone. Before you can explain the situation in any detail, he asks you a simple question.

Who will be the outside law firm's client in this representation --

The board member who called you?

The Audit Committee?

The Board of Directors?

The corporation?

The corporation's shareholders?

## **Hypothetical 14**

You have represented a closely held corporation for several years, dealing with each of the two owners and many of the corporation's employees. The two owners have been quarreling more vigorously than usual lately, and you wonder what that means for your representation.

If the two owners become acutely adverse, can you represent the corporation and one of the owners in litigation against the other owner?

YES

NO

## Hypothetical 15

As the only in-house lawyer for a privately-held company, you are occasionally asked to represent company employees (often distant relatives of the primary owner). You want to make sure that such representations do not run afoul of any rules, or jeopardize your main job as the company's lawyer.

**(a)** May you intentionally represent a company employee in a company-related matter?

YES

NO

**(b)** May you intentionally represent a company employee in a non-company-related matter?

YES

NO



## Hypothetical 16

As your company's in-house lawyer primarily responsible for litigation matters, you recently worked with outside counsel during an investigation of possible wrongdoing by three executives. You prepared notes of your interview sessions. Your notes reflect that you and your outside colleague made the following statements to the three executives:

- "We represent the company but we could represent you as well, as long as no conflict appeared."
- "We can represent you until such time as there appears to be a conflict of interest."
- "We represent the company, and can represent you too if there is not a conflict."

As it turned out, the executives had indeed engaged in wrongdoing -- and the company fired them. The federal government began to investigate the wrongdoing, and asked for your interview notes. The former employees' new lawyers claim that you and outside counsel jointly represented the company and the employees, which gives them a "veto power" over your waiver of the privilege. The federal government is becoming increasingly insistent that you hand over the notes.

May you waive the privilege covering your interview of the then-employees, over their objection?

YES

NO

## Hypothetical 17

After about three years of practice, you decided to move in-house with your largest client. From your work with that client, you know that it has several wholly owned subsidiaries and several partially owned subsidiaries.

As an in-house lawyer, will you be jointly representing the parent corporation (which employs you) and all of its subsidiaries?

YES

NO

## Hypothetical 18

You have been asked to bring a lawsuit against a Dallas-based corporation. Although your law firm's computerized conflicts search does not reveal any problems, one of your partners just called to tell you that she is handling a small amount of labor work for one of the proposed defendant's sister corporations. Your law firm does not represent the parent. The sister corporations are in different businesses, but both rely on the parent's law department for legal advice.

May you represent your client in the lawsuit against the Dallas-based corporation (without its consent)?

YES

NO

## Hypothetical 19

As the most experienced transactional lawyer in your law department, you generally take responsibility for large corporate transactions. Your client has been trying to strategically downsize, and you have several questions about the effect of transactions on the attorney-client relationship (including the privilege).

- (a)** If you sell the stock of a subsidiary to another company, who will own the attorney-client relationship and privilege --

Your client?

The former subsidiary?

- (b)** If your client sells substantially all the assets of a subsidiary to another corporation, who will own the relationship and privilege --

Your client?

The asset's purchaser?

- (c)** Can you affect the relationship's and the privilege's ownership in the transactional documents?

YES

NO

## **Hypothetical 20**

Last year, you represented your firm's largest corporate client in spinning off one of its subsidiaries to become an independent company. The timing could not have been any worse, and the newly-independent former subsidiary declared bankruptcy. This morning you received a call from the lawyer representing the recently-appointed bankruptcy trustee. The lawyer demanded all of your law firm's files created during your work on the transaction, claiming that you had jointly represented the parent and the then-subsiidiary in the spin. Given that lawyer's threatening tone, you have been trying to remember what damaging documents might exist in the file -- while considering the trustee's lawyer's legal position.

If you had jointly represented the parent and the then-subsiidiary in the spin transaction, does the bankruptcy trustee have the right to your law firm's file?

YES

NO