

CIVIL RIGHTS AND DIVERSITY: ETHICS ISSUES

Hypotheticals

**Thomas E. Spahn
McGuireWoods LLP**

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Hypothetical 1

One of the older lawyers in your firm tells racially charged jokes in the office and during meetings with clients and others. He also has been hostile to hiring minorities, and makes his views known during hiring committee meetings.

Do the ethics rules prohibit the older lawyer's actions?

YES

NO

Hypothetical 2

You just hired two new lawyers and one new assistant. The lawyers recently graduated from law school, and the assistant had previously worked only for doctors. Having been a sole practitioner until now, you wonder about the ethical and professional implications of bringing on new folks like this.

- (a) Do you have any responsibility for assuring that lawyers and nonlawyers you supervise comply with the ethics rules?

YES

NO

- (b) Can you be held responsible for any ethics violations by lawyers and nonlawyers you supervise?

YES

NO

Hypothetical 3

You just finished your first week of work at a new law firm, and you already have some qualms. In particular, the partner who supervises your work has asked you to pose questions during a deposition that seem solely motivated by the desire to embarrass a gay adversary. You begin to wonder what responsibility you might have if your supervisor asks you to do something that makes you feel ethically uncomfortable.

May you be held responsible for conduct you undertake at your supervising partner's direction?

YES

NO

Hypothetical 4

You have been following news stories about a local lawyer who also owns and manages several large apartment buildings in town. Several local groups have accused the apartment building management of discriminating against gays and lesbians. You wonder whether housing discrimination law violations might result in professional discipline.

What types of lawyer wrongdoing should be punishable by the bar even though the wrongdoing does not involve any clients?

Hypothetical 5

After several years of spending considerable time on pro bono civil rights matters, you decided to leave your large firm and join a much smaller firm that focuses on civil rights litigation. Now you wonder how you can market yourself.

Assuming that these phrases are accurate, may you use the follow phrases in your marketing materials:

(a) "Limits her practice to civil rights matters"?

YES

NO

(b) "Specializes in civil rights issues"?

YES

NO

(c) "Certified by the Texas Supreme Court as a trial lawyer"?

YES

NO

Hypothetical 6

You just joined a small firm that focuses on civil rights litigation, and double checked the way the firm is marketing your areas of practice. Now your firm's chairman has asked you to check your colleagues' marketing.

(a) Can one of your colleagues call herself an "expert" in discrimination issues?

YES

NO

(b) Can one of your colleagues describe herself as an "authority" in anti-discrimination regulations?

YES

NO

Hypothetical 7

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

- (a) A fictionalized depiction of a client conference (using real firm lawyers and real clients)?

YES

NO

- (b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors)?

YES

NO

- (c) Pictures of people on your website who appear from the context to be your lawyers, but who are actually paid models?

YES

NO

Hypothetical 8

Despite the "lore" that clients involved in litigation become more emotional than those involved in transactional matters, one of your business clients has been quite a challenge for you. The client has become a lucrative source of business for your law firm -- because he owns extensive real estate in your city, as well as an NBA team. But he sometimes engages in racially insensitive conduct, or asks you to take the lead in legal actions that seem racially motivated. You know that you have to loyally and diligently serve your client, but you wonder if you can ask your client to forego such inappropriate actions.

May you ask your client to forego discourteous or other inappropriate actions?

YES

NO

Hypothetical 9

You have had difficulty from the start dealing with an overly aggressive client. Now he has asked you to take several actions that you consider inappropriate and unprofessional -- both in the transactional and litigation work you are handling for the client. Although you satisfy yourself that the actions would not be unethical, the gender-based theme of some of the actions bothers you. You wonder if you can withdraw from the representation without violating your duties to the client.

May you withdraw from a representation if the client insists on pursuing conduct you think is offensive?

YES

NO

Hypothetical 10

A developer has proposed to build a large apartment complex on the site of what was your state's most active slave trade auction block. City officials have been so desperate for downtown housing that they have not criticized the proposed development. However, you and some other city residents want to form an ad hoc group to oppose the development. When you learn that your law firm represents the developer, you wonder what steps you may take.

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?

YES

NO

(b) Provide "behind the scenes" advice to the ad hoc group about possible steps it could take to derail the development?

YES

NO

(c) Lobby on behalf of the ad hoc group with your Congresswoman?

YES

NO

(d) Take a leadership role in the "ad hoc" group (without acting as its legal advisor)?

YES

NO

(e) Join the "ad hoc" group and pay a \$20 membership fee?

YES

NO

(f) Sign a petition supporting the "ad hoc" group's efforts?

YES

NO

(g) Attend a rally supporting the "ad hoc" group?

YES

NO

Hypothetical 11

Although you are too young to have witnessed any cross-burnings in your home town, your parents told you how frightening it was when the KKK assembled at the edge of town, and then marched to burn a cross in the neighborhood where they lived. Many of those memories came back when a newly-formed chapter of the KKK recently announced that it would seek a permit to march through the city where you are now living. This morning you received a call from your law firm's chairman advising you that the firm had reluctantly accepted the local ACLU chapter's request that your firm represent the KKK in seeking a permit for its march. The senior partner knows that you have handled First Amendment work, and asks you to join the firm's team in representing the KKK.

(a) May you represent the KKK?

YES

NO

(b) If you do not represent the KKK, can other lawyers in your firm represent the KKK?

YES

NO

Hypothetical 12

You work with a civil rights group that takes an active role litigating discrimination cases. The media normally follows the lawsuits that your group files, and you wonder to what extent you and your colleagues can publicly comment on the lawsuits.

Should there be any limits on lawyers' public communications about matters they are handling (other than their duty of confidentiality to clients, duty to obey court orders, avoiding torts such as defamation, etc.)?

YES

NO

Hypothetical 13

Your civil rights group which actively litigates cases arranged for a young associate to research possible ethics limits on you and your colleagues' public statements about the discrimination cases your group pursues. She has determined that the ethics rules contain limits, and now you must fine-tune your analysis of what you and your colleagues may and may not say.

(a) Do limits on lawyers' public communications about their cases apply to all lawyers, (rather than just lawyers engaged in litigation)?

YES

NO

(b) Do limits on lawyers' public communications about their cases apply only to criminal cases?

YES

NO

(c) Do limits on lawyers' public communications about their cases apply only to jury cases?

YES

NO

(d) Do limits on lawyers' public communications about their cases apply only to pending cases?

YES

NO

(e) Even if it would otherwise violate the limit on lawyers' public communications, are lawyers permitted to issue public statements defending their clients from anonymous news stories containing false facts or accusations about their clients?

YES

NO

Hypothetical 14

You and your colleagues working with a civil rights group have familiarized yourself with the ethics rules limiting your public statements about pending cases. You occasionally deal with aggressive criminal prosecutors pursuing criminal charges against your clients involved in demonstrations. You wonder whether the prosecutors face the same limits you do on making public statements about pending cases.

Are prosecutors' public communications about criminal cases more severely restricted than criminal defense lawyers' statements?

YES

NO

Hypothetical 15

You and your civil rights group pursue discrimination cases and represent criminal defendants in some civil rights cases. Although some judges are more sympathetic to your efforts than others, one judge has been very hostile -- making statements in court critical of your goals, and consistently ruling against you with surprisingly harsh language. You know that the ethics rules limit what lawyers can say about their cases, and now you wonder what limits apply to lawyers' criticism of judges.

(a) Are lawyers totally prohibited from criticizing judicial opinions?

YES NO

(b) Are lawyers totally prohibited from criticizing judges?

YES NO

(c) Are any limitations on lawyers' criticism of judges applicable to nonpublic criticism?

YES NO

(d) Are any limits on lawyers' public communications about judges based on the lawyers' subjective belief in the truth of what she says (as opposed to an objective standard)?

YES NO

(e) Are any limits on lawyers' public communications about judges applicable only to the wording used (as opposed to the substance of the statement)?

YES NO

Hypothetical 16

You have always worked at a large law firm, which frequently coordinates as co-counsel with a minority-owned law firm. Your managing partner just asked you to set up another arrangement with that firm, under which your firm and the other firm will share fees.

(a) Do you need the client's consent to share your fees with another law firm?

YES

NO

(b) Must your fee sharing be in proportion to the amount of work that you handle on the matter?

YES

NO

(c) To share in another law firm's fees, must your firm assume ethical and malpractice responsibility for a matter?

YES

NO

(d) May either your firm or the minority-owned firm earn a "referral fee" without handling any of the work on the matter?

YES

NO

Hypothetical 17

After a decade of working at a large law firm, you decided to change career paths and begin serving the urban poor in your area. Several potential clients have expressed the worry that they cannot afford to pay you for handling an entire case -- but would like to hire you to handle certain parts of cases that they want to file against their landlords. In particular, one client has asked whether she could hire you to depose her landlord, but not handle any other part of her case.

May you agree to limit your representation of a client to taking one deposition?

YES

NO

Hypothetical 18

Your firm has "adopted" an inner-city public housing project, and tries to provide as much assistance as possible to its residents. Although you normally do not represent residents in filing law suits, you wonder to what extent you can assist residents in preparing pleadings that they can file pro se.

Without disclosure to the court and the adversary, may you draft pleadings that one of the public housing residents can file pro se?

YES

NO

Hypothetical 19

As an Asian-American lawyer, you have been incredibly offended by an opposing lawyer's racial slurs during your frequent telephone discussions about discovery issues. You wonder about the ethical propriety of tape recording one of the other lawyer's calls.

May you tape-record a telephone call to capture the other lawyer's racial slurs in the following situations:

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

YES

NO

- (b) Without the other lawyer's consent, in a state where one party's consent suffices?

YES

NO

Hypothetical 20

You are trying to compile as much information as possible about a restaurant owner reported to subtly harass gay and lesbian customers. 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 21

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 22

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 discrimination 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 23

Several clients have hired you to pursue employment discrimination cases in Northern District of Alabama federal court. You expect other plaintiffs will hire you in the future to pursue similar cases. In previous discrimination cases, your clients have been extremely unlucky before one Northern District of Alabama 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 your clients' cases:

- (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 counsel the judge's son?

YES NO

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

YES NO

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

YES NO

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

YES NO

Hypothetical 24

In reading about the civil rights movement, you noted that some lawyers were ordered to produce the names of those contributing financially to various civil rights organizations. You wonder about those lawyers' duty to resist such court orders.

- (a)** To comply with their ethics confidentiality duty, were civil rights lawyers required to seek an interlocutory appeal of such orders?

YES

NO

- (b)** If the only way to have assured an interlocutory review was to have ignored such a court order and then appealed the resulting contempt citation, were civil rights lawyers ethically obligated to have done so?

YES

NO

Hypothetical 25

You have researched the history of the civil rights movement during the 1960s in Democrat-controlled southern states. Among other things, you wonder if civil rights lawyers violated any ethics rules by repeatedly challenging the constitutionality of laws that clearly complied with then-acceptable constitutional doctrine articulated in Plessy v. Ferguson.

May lawyers ethically challenge the constitutionality of laws that satisfy existing constitutional doctrine?

YES

NO

Hypothetical 26

You have been litigating a case before a trial judge who seems very hostile to your client and her claims. Unfortunately, the appellate court seemed equally hostile during a recent interlocutory appeal of a trial court ruling. Among other things, the trial judge has indicated several times that he conducted his own internet research on some factual issues. You wonder about the propriety of that conduct, as well as the appellate court's reliance on factual statements in amicus briefs.

(a) Is it permissible for judges to conduct their own research using the internet?

YES

NO

(b) Is it permissible for appellate courts to rely on factual statements made in amicus briefs, but not subjected to cross-examination?

YES

NO

Hypothetical 27

Now that you have become a judge, you have tried to be extra careful in avoiding any appearance of prejudice or bias. However, several recent invitations have left you agonizing over what you can do.

May you accept an invitation to:

(a) Join an honorary society that does not admit minorities?

YES

NO

(b) Join an organization that does not allow women to hold certain positions in the organization?

YES

NO

(c) Attend a weekly lecture series at a country club which limits its membership to Protestants?

YES

NO

(d) Attend a wedding reception for your niece, to be held at a local private club which excludes minorities?

YES

NO

Hypothetical 28

You have only been a judge for about six months, but now you face a very difficult ethics issue. You just started hearing a criminal trial of a defendant charged with burning a cross in a biracial couple's front yard. This scenario triggered some strong feelings, because in a widely reported incident someone burned a cross on your biracial parents' front yard just after you were born.

(a) Must you disclose this fact to the prosecution and the defense?

YES

NO

(b) Must you recuse yourself if requested by either the prosecutor or the defense lawyer?

YES

NO

(c) From what you have already heard about this defendant from both his lawyer and the prosecutor in various pretrial hearings, the defendant seems to be a real hot head -- must you recuse yourself in the course of the trial if the defendant brags about his cross burning, says that he knows about the cross-burning incident involving your parents, and then shouts an ugly racist comment directed at you?

YES

NO