

CONFIDENTIALITY: PART II (EXCEPTIONS TO THE DUTY)

Hypotheticals

**Thomas E. Spahn
McGuireWoods LLP**

Copyright 2015

Hypothetical 1

One of your firm's largest clients just hired you to represent it in a lawsuit filed against your client and several other companies, alleging personal injuries from exposure to chemicals that your client and the other companies used in their manufacturing process. You know from experience that co-defendants in cases like this never sue each other or even "point the finger" at each other, so you tell your client that you will be able to represent it in the lawsuit. Soon after speaking with this client, you received a call from one of your partners, who tells you that she has just accepted a representation of another defendant in the case.

Is your firm's representation of these defendants a joint representation?

- (A) Yes
- (B) No

Hypothetical 2

For the past six months or so, you have represented a wealthy doctor and his second wife in preparing their elaborate estate plan. A few minutes ago, the doctor called you to say that he needed to provide some inheritance for an illegitimate child he fathered decades ago. This news came as a shock, because you had not heard anything about this illegitimate child until just now. The doctor asked you to keep the information secret from his second wife.

What do you do?

- (A)** You must tell your other client (the second wife) about the husband's illegitimate child.
- (B)** You may tell your other client about the illegitimate child, but you don't have to.
- (C)** You may not tell your other client about the illegitimate child.

Hypothetical 3

You jointly represent two tenants in tense dealings with their landlord. One of your clients just called to ask whether she could provide certain documents or other information to the landlord during an upcoming meeting that she has scheduled with the landlord.

- (a) Without the other client's consent, may this client give the landlord a legal memorandum that you prepared for and sent to both of your clients?
- (A) Yes
- (B) No
- (b) Without the other client's consent, may this client disclose to the landlord the substance of communications that she had with you (outside the other client's presence).
- (A) Yes
- (B) No

Hypothetical 4

You formerly represented two co-defendants in litigating and ultimately settling a products liability case. One of your former clients has now sued the other for contribution and indemnity, and filed a third-party subpoena seeking all of your files. The other former client objected to the subpoena, claiming privilege protection for its unilateral communications with you and your colleagues during the joint representation.

Is the objecting former client likely to successfully assert privilege protection for the unilateral communications with you during the joint representation?

- (A)** Yes
- (B)** No

Hypothetical 5

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?

- (A)** Yes
- (B)** No

Hypothetical 6

In your role as general counsel of a Silicon Valley company, you take the lead in exploring possible acquisitions of other companies. You often encounter resistance from potential sellers, who balk at providing you access to their privileged documents. This sometimes prevents you from conducting the type of due diligence you think necessary, and you are considering what you can do.

May you avoid a privilege waiver by arranging for a common interest agreement between your company and the potential acquisition target?

- (A)** Yes
- (B)** No

Hypothetical 7

You represent a large lettuce grower, which has been sued by plaintiffs claiming that they became sick after eating at a well-known restaurant chain. The plaintiffs have also sued the lettuce distributor. Your company and the lettuce distributor have filed cross claims against each other, essentially blaming each other for any possible contamination. However, you also want to cooperate with the lettuce distributor in trying to establish that the plaintiffs were sickened by some other food they ate -- not the lettuce.

May your company enter into an effective common interest agreement with the lettuce distributor, despite direct litigation adversity between the two companies?

- (A) Yes
- (B) No

Hypothetical 8

You represent one of several defendants in high-stakes commercial litigation, all of whom entered into a "common interest" agreement when the case began.

Unfortunately, there has been a serious falling-out among the defendants, and you and your colleagues are trying to sort out its effect.

- (a) If one of the other defendants files a cross claim against your client, will it be able to use at trial any of the communications and documents that you shared with the other common interest participants under the agreement?
- (A) Yes
- (B) No
- (b) In that situation, will the other defendants be able to access and use any private communications you had with your client, which were not shared with the other common interest participants?
- (A) Yes
- (B) No
- (c) If one of the other defendants files a cross claim against your client, will you be able to represent your client in defending against that cross claim?
- (A) Yes
- (B) No

Hypothetical 9

You work at a local legal services office, and have been discussing with your colleagues increasingly onerous federal laws governing your activities. Among other things, a new law requires you to disclose to the government a list of your clients and their yearly income. You and your colleagues wonder about this law's effect on your confidentiality duty. Courts have rejected other legal services offices' constitutional and statutory challenges to the law, so you and your colleagues agree that a court might consider a further challenge to be frivolous.

May you disclose this information to the government without violating your confidentiality duty?

- (A)** Yes
- (B)** No

Hypothetical 10

You represent a client in contentious commercial litigation being overseen by an impatient judge. You have argued discovery motions nearly every Friday for two months, which has increasingly frustrated the judge. At this morning's hearing, the judge cut off your argument and hurriedly overruled several of your important privilege objections in ordering your client to produce clearly privileged documents. Your justifiably irritated client wants you to resist the order as vigorously as you can.

- (a)** To comply with your ethics confidentiality duty, must you seek an interlocutory appeal of the judge's order?
- (A)** Yes
- (B)** No
- (b)** If the only way to assure an interlocutory review is to ignore the court's order and then appeal the resulting contempt citation, must you take that step?
- (A)** Yes
- (B)** No

Hypothetical 11

You just asked a paralegal to take a CD containing client documents and several boxes of client documents for copying at a local copy service near your office. The paralegal asked you a question, and seemed taken aback when you did not immediately know the answer.

May you disclose client documents on the CD and in the box to the copy service without the client's explicit consent?

- (A)** Yes
- (B)** No

Hypothetical 12

You have been intrigued by the possibility of saving your clients some money by arranging for lawyers other than partners and full-time associates to prepare fairly basic transactional documents. As you analyze the possibilities, you want to make sure that you comply with all of the ethics rules.

- (a) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a part-time associate who occasionally works from home?
- (A) Yes
- (B) No
- (b) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a part-time paralegal who works out of his home (both for your firm's clients and for other local firms' clients)?
- (A) Yes
- (B) No
- (c) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a document preparation service based in Indianapolis?
- (A) Yes
- (B) No
- (d) Without the client's consent, may you arrange for the client's routine transactional documents to be prepared by a document preparation service based in India?
- (A) Yes
- (B) No

Hypothetical 13

Although you began your legal practice before the popularity of electronic communications, you pride yourself on having become fairly tech-savvy. Among other things, you have begun to use listservs to monitor developments in your area of practice, seek specific advice about some abstract legal issues, and heighten your professional profile by offering what you think are helpful insights to others. You were taken aback when one of your less tech-savvy colleagues questioned your participation in such listservs.

Does your participation in listservs violate your ethics confidentiality duty?

- (A) Yes
- (B) No

Hypothetical 14

One of your partners just received a call from a potentially lucrative new client, which wants to hire your firm to pursue a trademark action against Acme (one of your firm's smaller clients). You are rarely involved in the "conflicts clearance" process, and you wonder what to do next.

- (a)** Without Acme's consent, may you tell the potential new client that your firm represents Acme?

 - (A)** Yes
 - (B)** No

- (b)** Without Acme's consent, may you tell the potential new client what matters your firm is handling for Acme?

 - (A)** Yes
 - (B)** No

- (c)** Without the potential new client's consent, may you ask Acme for a consent to represent the potential new client adverse to Acme in the trademark matter?

 - (A)** Yes
 - (B)** No

Hypothetical 15

Your firm's chairman asked you to meet with a potential lateral hire to discuss the possibility of her joining your firm. You have conducted some independent research about the lateral hire, but a few questions cross your mind as you prepare for your lunch together.

- (a)** Without your clients' consent, may you identify some of your law firm's clients during your lunch conversations?

 - (A)** Yes
 - (B)** No

- (b)** Without your clients' consent, may you describe your work for some of your law firm's clients during your lunch conversations?

 - (A)** Yes
 - (B)** No

- (c)** Without her clients' consent, may the potential lateral hire identify some of her clients during your lunch conversation?

 - (A)** Yes
 - (B)** No

- (d)** Without her clients' consent, may the potential lateral hire describe her work for some of her clients during your lunch conversation?

 - (A)** Yes
 - (B)** No

Hypothetical 16

As a mid-level associate working on a large litigation matter, you must frequently deal with the law firm representing your client's adversary. You have really grown to admire that other firm, and its associates seem much more satisfied with their salaries and responsibility than associates at your firm. You have actually considered seeking a job at that other firm, and you wonder about the confidentiality and conflicts ramifications of taking such a step.

- (a) Without advising your law firm and its client whom you are representing in the current litigation, may you mention to one of that other law firm's partners that you might be interested in applying for a job there at some point?
- (A) Yes
- (B) No
- (b) Without advising your law firm and its client whom you are representing in the current litigation, may you meet with one of the other firm's partners to discuss possible salary and job assignments?
- (A) Yes
- (B) No
- (c) If one of the other firm's partners senses your interest without your having said anything about it, must you advise your firm and its client if the partner offers you a job?
- (A) Yes
- (B) No

Hypothetical 17

After nearly five years of intense discovery and pre-trial motions, the largest case you have ever handled is moving toward trial. You received the other side's expert designations this morning. The adversary's main expert is your former client. While representing him years ago in an unrelated matter, you learned confidences that you could use now to destroy his credibility.

What do you do?

- (A)** File a motion to preclude the other side's reliance on that expert?
- (B)** Arrange for "conflicts counsel" to cross-examine that expert at his deposition and at trial?
- (C)** Tell your current client that you have to withdraw as its counsel on the eve of trial?

Hypothetical 18

You represent two national drugstore chains. This morning you met with the regional manager of one of your clients, who told you that she just arranged for the purchase of real estate in a fast-growing area of Houston. She said that her company planned to rush its development there, and open a new drugstore within six months.

You are now in the middle of a luncheon meeting with your other client's regional manager and some other company executives. You overhear the regional manager saying that his company is looking at investing \$50,000 in a study to determine whether that same area of Houston could support a drugstore. The regional manager says that the study would be a waste of money if another chain built a drugstore in that area in the near future -- but that he is not aware of any other company's plans to do that.

What do you do?

- (A) Remain silent
- (B) Speak up, and tell the regional manager that it would be a waste of money for his company to undertake the study
- (C) Something else

Hypothetical 19

You represent a company that is planning and will build a commuter rail line. During this representation, you have learned incriminating information about a subcontractor that your client recently terminated. You also have seen the still-secret map of the likeliest routes.

- (a) May you represent another contractor in an unrelated lawsuit against the subcontractor about whom you learned the incriminating information?
- (A) Yes
 - (B) No
- (b) May you represent a developer interested in acquiring parcels of land along the possible rail line routes?
- (A) Yes
 - (B) No

Hypothetical 20

Having just attended a remarkably instructive and entertaining ethics program on exceptions to lawyers' confidentiality duty, you returned to your office with a question that had never before crossed your mind.

Without a client's consent, may you disclose information about that client to law firm colleagues not working on the client's matters?

- (A)** Yes
- (B)** No

Hypothetical 21

You just signed up for your local bar's mentor program, and you are anxious to work with new lawyers in your town. On your first mentoring "assignment," you meet with a new lawyer who says that she has several very thorny issues arising in her immigration practice. Before turning to any of the issues, she asks a few introductory questions.

- (a)** Without her clients' consent, may the new lawyer disclose protected client information to you as part of your local bar's "mentoring" program?
 - (A)** Yes
 - (B)** No

- (b)** Without her clients' consent, may the new lawyer present hypothetical situations to you as part of your local bar's "mentoring" program?
 - (A)** Yes
 - (B)** No

Hypothetical 22

You have practiced law by yourself for decades, and have seen many changes in the profession. One of the most welcome changes involves your state's adoption of an ethics rule allowing lawyers to sell their practice -- which traditionally was unethical. However, some old habits remain, and you wonder how you can sell your law practice without violating one of the profession's core duties.

Without each client's consent, may you disclose protected client information to prospective purchasers of your law practice?

- (A)** Yes
- (B)** No

Hypothetical 23

You were rattled this morning when one of your clients suggested that you had acted unethically in disclosing its confidences (without its consent) to a document preparation service headquartered in Germany. You want to make sure that you did not violate any applicable ethics rules. Unfortunately, you realize that you need to go outside your firm for the kind of specific ethics advice you think you need, but the last thing you want to do is compound any possible confidentiality breach.

Without your client's consent, may you seek the advice of an outside lawyer on the ethical propriety of your actions?

- (A)** Yes
- (B)** No

Hypothetical 24

One of your former clients unexpectedly sued your firm for malpractice, claiming that it mishandled a real estate transaction. Your firm's outside defense lawyer needs your input into the firm's response, because you led your firm's team on the real estate transaction. When you see the proposed response, you worry about some of the protected client information your firm's outside defense lawyer has included.

Without your former client's consent, may you disclose protected client information in your law firm's answer to the former client's malpractice claim?

- (A)** Yes
- (B)** No

Hypothetical 25

Under the "no good deed goes unpunished" rule, you should have seen this one coming. After diligently but unsuccessfully seeking to defend your court-appointed client from serious criminal charges, he has now claimed "ineffective assistance of counsel" in a habeas petition. Within just a few hours of your ungrateful former client's filing, the prosecutor calls you to ask for a meeting to discuss the case.

May you meet with the prosecutor, and disclose protected client information to defend yourself from your former client's allegation of "ineffective assistance."

- (A)** Yes
- (B)** No

Hypothetical 26

One of your partners just sent you an email linked to a front-page article in this morning's newspaper containing an ugly statement about you by a former client. One of your former clients called you "a sleazy lawyer who billed too much for doing too little." Right after you read the article, you receive a call from the reporter who wrote the story. She wants your "on the record" response to your former client's criticism.

Without your former client's consent, may you disclose protected client information in talking with the reporter?

- (A) Yes
- (B) No

Hypothetical 27

You were just served with a lawsuit claiming that your firm and one of its clients defrauded the plaintiff in a transaction. You and the client had a falling out after that transaction, and you doubt that the former client will be very cooperative in allowing you to defend your firm.

Without your former client's consent, may you disclose protected client information in defending yourself?

- (A)** Yes
- (B)** No

Hypothetical 28

Last month, you settled a product liability case in which the plaintiff claimed he was injured while using one of your defendant client's skateboards. The plaintiff's case had fallen apart when you caught him lying about his injuries, so your client paid only a nominal settlement. However, your client was still dissatisfied with your bill, and fired you right after the settlement. On this morning's local television news, you saw the plaintiff claiming that you had acted unethically during the litigation, hiding evidence and lying about your client's product. The plaintiff told a reporter that the client must have agreed, because it just fired you.

As you pick up the phone to call the reporter, you wonder whether you need your former client's consent to explain what really happened during the litigation, and why the client fired you.

(a) Without your former client's consent, may you give the reporter copies of publicly available pleadings demonstrating that the plaintiff lied during the litigation?

(A) Yes

(B) No

(b) Without your former client's consent, may you tell the reporter that the client fired you because it was dissatisfied with your bill?

(A) Yes

(B) No

Hypothetical 29

After several months of trying to collect your fee from a troublesome ex-client, you have taken the matter to your firm's management with the suggestion that you file a lawsuit against your former client. One of your partners who serves on your firm's executive committee just attended a seminar on the importance of confidentiality, and wonders whether your firm can disclose protected client information in such a lawsuit.

Without your former client's consent, may you disclose protected client information in a lawsuit to collect your fees?

- (A)** Yes
- (B)** No

Hypothetical 30

What was once a good relationship with a corporate client has deteriorated so much that things have turned ugly. When your former client refused to pay your fee, you carefully disclosed only enough protected client information to obtain a judgment, but your former client still seeks to avoid paying.

- (a)** May you turn the unpaid bill over to a collection agency?
 - (A)** Yes
 - (B)** No

- (b)** May you report the unpaid bill to a credit bureau?
 - (A)** Yes
 - (B)** No

- (c)** If your former client declares bankruptcy to avoid paying your unpaid bill, may you use protected client information in an effort to block discharge of the client's unpaid bill?
 - (A)** Yes
 - (B)** No

- (d)** May you try to pierce the corporate veil and seek payment of the unpaid bill from your former corporate client's owners?
 - (A)** Yes
 - (B)** No

Hypothetical 31

You need to withdraw as counsel of record for a client who has become increasingly hostile and uncooperative. Among other things, the client stopped paying you three month ago, and this morning refused to send you non-privileged responsive documents you must produce in an upcoming document production.

- (a) In your motion to withdraw as counsel of record, or during the resulting hearing, may you disclose that you are withdrawing because the client has not paid your bill?
- (A) Yes
- (B) No
- (b) In your motion to withdraw as counsel of record, or during the resulting hearing, may you disclose that you are withdrawing because the client has refused to provide non-privileged responsive documents that must be produced?
- (A) Yes
- (B) No

Hypothetical 32

You have spent a miserable five years working as an in-house lawyer for a Bay Area government contractor. In addition to the rowdy atmosphere at the company, you suspect that one or more of the company executives have engaged in some serious misconduct unrelated to the work you have handled for the company. The final straw came today, when the company fired you for not being a "team player" -- because you refused to participate at the annual company "wet T-shirt" contest. Now you wonder what to do.

(a) May you sue your former client/employer for wrongful discharge?

(A) Yes

(B) No

(b) If you find improper conduct in connect with government contracts, may you file a qui tam case?

(A) Yes

(B) No

Hypothetical 33

You have spent the last year representing a very high-profile client in a fairly ugly divorce. The client can no longer pay you, and you are trying to determine how you can proceed without suffering a huge financial loss yourself. One of your partners suggested that perhaps the client could agree to let you write a book about the case after the divorce becomes final. You think such an arrangement would make sense financially, but you wonder whether the ethics rules permit it. Your partner says that you could always arrange for the client to receive independent advice about whether to enter into such a contract.

If your client receives independent advice, may you enter into a contract with the client giving you the literary rights to publish a book about the case you are handling?

- (A) Yes
- (B) No

Hypothetical 34

You represented a wealthy heiress in preparing her estate plan. She recently died, and you expect several attacks on her estate.

- (a)** Will the attorney-client privilege protect your communications with your client from discovery by her son, who was named as a beneficiary under the will but who disputes the executor's interpretation of the provision under which he takes?

 - (A)** Yes
 - (B)** No

- (b)** Will the attorney-client privilege protect your communications with your client from discovery by her estranged daughter, who claims that she should have been included as a beneficiary in the mother's will?

 - (A)** Yes
 - (B)** No

- (c)** Will the attorney-client privilege protect your communications with your client from discovery by a creditor, who claims that the estate owes it \$500,000?

 - (A)** Yes
 - (B)** No

Hypothetical 35

For the past few years, you have represented one of your neighbors, a lively but somewhat eccentric artist. Among other things, you have prepared her estate plan and handled some contracts with various local galleries. Your client has been acting more strangely than ever lately, and you frankly wonder whether she is slipping into a mental illness such as borderline personality disorder or even schizophrenia. Some of the things that she has said to you during private meetings have you worried that she might be losing touch with reality. You have gently suggested that she see a therapist, but she always denies having any problems. Now you wonder what you can or should do to help your client.

- (a) Without your client's consent, may you disclose to a psychiatrist (whom you have selected) some of your private conversations with her to a psychiatrist?
- (A) Yes
- (B) No
- (b) Without your client's consent, may you disclose to her parents some of your private conversations with your client?
- (A) Yes
- (B) No

Hypothetical 36

You have been representing a young man with some psychological problems, although so far he has not become impaired enough to trigger the ethics rules governing such extreme circumstances. Still, your client is quite fragile, and you have to be very careful when you report any "bad news" to him. You just learned this morning that your client's parents have disinherited him. This will come as quite a shock to your client, and will clearly have a material effect on both his lifestyle and on some of the work that you are handling for him.

Must you immediately tell your client that his parents have disinherited him?

- (A) Yes
- (B) No