

Litigation Ethics: Key Issues

Hypotheticals

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Hypothetical 1

You occasionally have lunch with your favorite law school professor, and enjoy a vigorous "give and take" on abstract legal issues that you never face in your everyday practice. Yesterday you spent the entire lunch discussing whether lawyers lose their First Amendment rights when they join the profession.

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 2

Your state's chief justice just appointed you to a commission reviewing your state's ethics rules provision dealing with lawyers' public communications. You wrestle with some basic issues as you prepare for the commission's first meeting.

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

YES NO

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

YES NO

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

YES NO

- (d) Should 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, should lawyers be permitted to issue public statements defending their clients from anonymous news stories containing false facts or accusations about their clients?

YES NO

Hypothetical 3

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 4

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 5

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 6

You represent a worker fired by a local engraving company. Your client claims that the company fired her because she complained about other employees dumping chemicals down a nearby storm sewer. The dumping would violate various criminal laws. You filed a lawsuit against the company for back wages.

May you threaten to report the company's unlawful dumping unless it settles the civil case your client has brought against it?

YES

NO

Hypothetical 7

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 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 8

You have read about the useful data a lawyer can obtain about an adverse party or witness by searching social media sites. One of your partners just suggested that you have one of your firm's paralegals send a "friend request" to an adverse (and unrepresented) witness. The paralegal would use his personal email. He would not make any affirmative misstatements about why he is sending the "friend request," but he likewise would not explain the reason for wanting access to the witness's social media.

May you have a paralegal send a "friend request" to an adverse witness, as long as the paralegal does not make any affirmative misrepresentations?

YES

NO

Hypothetical 9

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 10

A lawyer on the other side of one of your largest cases has always relied on his assistant to send out his emails. He must just have hired a new assistant, because several "incidents" in the past few months have raised some ethics issues.

- (a)** A few weeks ago, you received a frantic call from the other lawyer saying that his assistant had accidentally just sent you an email with an attachment that was intended for his client and not for you. He tells you that the attachment contains his litigation strategy, and warned you not to open and read it. You quickly find the email in your "in box," and wonder about your obligations.

May you open and read the attachment?

YES NO

- (b)** Last week you opened an email 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 email from the other lawyer. After you read several paragraphs, you realize that the email was intended for a governmental agency. The email 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 email?

YES NO

- (d) Must you advise your client of these inadvertently transmitted communications from the other lawyer, and allow the client to decide how you should act?

YES NO

- (e) Must the other lawyer advise his client of the mistakes he has made?

YES NO

Hypothetical 11

You just received an email 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

Hypothetical 12

Your largest client recently downsized its upper management. Unfortunately, now you find that you need the testimony of several retired senior executives. Perhaps a bit bitter about being laid off, several of them have demanded that you reimburse them for their travel expenses, and that you pay for their time.

- (a) May you reimburse the executives for their travel expenses?

YES NO

- (b) One of the retired executives has started a consulting firm. May you agree to his demand that you pay for the time he spends preparing for his testimony at the hourly rate he charges his consulting clients?

YES NO

- (c) May you pay the same rate for the time that the retired executive spends actually testifying in a deposition or at the trial?

YES NO

- (d) Another retired executive moved to Florida and plays golf, fishes, or relaxes every day. Can you pay him an hourly rate for the time he spends preparing for his testimony?

YES NO

- (e) Another retired executive has found a job with a competitor. In addition to being reimbursed for his travel expenses, this fact witness has demanded \$5,000 "to tell the truth" when he testifies. Can you pay him \$5,000 to "tell the truth"?

YES NO

Hypothetical 13

You represent a wealthy individual in a child custody case. At your first meeting with the client, you begin to ask him background facts about how he treated his children. The client stops you and asks the following question: "Before I tell you how I treated my children, why don't you tell me the law governing child custody."

May you answer your client's question before examining him about the factual background?

YES

NO

Hypothetical 14

One of your sorority sisters just lost her job, and wants to pursue a wrongful termination claim. Your firm would probably not want you to represent the plaintiff in a case like this, although you do not have any conflicts. You offer to help your sorority sister as much as you can.

Without disclosure to the court and the adversary, may you draft pleadings that your sorority sister can file pro se?

YES

NO

Hypothetical 15

One of your neighbors became quite ill on a Caribbean cruise several years ago. He never filed a claim against the cruise line, but recently has been telling you over the backyard fence that he "was never really the same" after the illness. You finally convince him to explore a possible lawsuit against the cruise line, but discover that the claim would be time-barred under a stringent federal statute. Although that statute also covers claims against the travel agent which booked the cruise, you think that there is some possibility that the lawyer likely to represent the local travel agent would not discover the federal statute.

May you file an action against the local travel agent after the cut-off date under the federal statute?

YES NO

Hypothetical 16

You have built a lucrative practice representing homeowners in lawsuits against pest control companies for negligent termite treatment of new homes. In some cases, you represent incorporated neighborhood associations, and in other situations you represent groups of homeowners who have jointly hired you to pursue their claims. In recent years, you have found that defendants generally like to "wrap up" litigation by paying one lump sum to settle an entire lawsuit. To ease your administrative burden, your standard retainer agreement calls for your clients to agree in advance to decide whether or not to take such a "lump sum" settlement offer by majority vote of the homeowners involved.

- (a) Is such an approach ethical in cases where you represent an incorporated neighborhood association?

YES NO

- (b) Is such an approach ethical in cases where you represent a group of individual homeowners?

YES NO

Hypothetical 17

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

YES NO

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES NO

- (c) Your client (the defendant) has instructed you to accept any settlement demand that is less than \$100,000. If the plaintiff's lawyer asks "will your client give \$90,000?," may you answer "no"?

YES NO

Hypothetical 18

You are preparing for settlement negotiations with several lawyers who have been less than diligent in pursuing their clients' cases. You expect your adversaries to make mistakes, and you wonder about your right to remain silent in certain circumstances.

- (a) May you remain silent if an adversary demands the full amount of what it understands to be your client's insurance coverage (based on statements that your client made to the adversary before hiring you, but which your client has since admitted to you were incorrect)?

YES NO

- (b) May you remain silent if an adversary demands the full amount of what it has determined to be the available insurance coverage -- when you know that there is an additional policy that the adversary could have discovered by checking available documents?

YES NO

- (c) May you remain silent when an adversary makes a \$100,000 settlement demand -- which you take as a clear indication that the other side must not know that your client also has a \$1,000,000 umbrella liability policy?

YES NO

Hypothetical 19

You recently spent two years litigating a hotly contested case in Washington, D.C. Last week, you attended a private mediation session. After you and the plaintiff's lawyer reached a tentative settlement, the plaintiff's lawyer said that she needed a ten-minute break, and left the meeting for a short time. When the plaintiff's lawyer returned to the meeting, you and she shook hands on what she said was an acceptable settlement. However, you just received a call from the plaintiff's lawyer. She tells you that her client claims not to have given her authority to settle, and therefore refuses to honor the settlement.

May you assure your client that you will be able to enforce the settlement that you reached with the plaintiff's lawyer?

YES

NO

Hypothetical 20

As your firm's ethics "guru," you receive numerous calls every day from your partners who are trying cases. This morning you received two similar calls from partners who need your immediate input.

One of your partners represents an individual plaintiff in a lease case about to be tried. Your partner called you this morning to say that the defendant appears not to have discovered her client's earlier criminal conviction for fraud and perjury. Your partner wonders about her obligations at the upcoming trial.

(a) Must your partner disclose her client's criminal conviction for fraud and perjury?

YES NO

Another partner called you from the courthouse during a break in an ex parte TRO hearing. That partner's client had earlier been found liable for engaging in fraudulent mortgage transactions -- which would be material in the matter. Your partner needs to know immediately whether to disclose that earlier judgment.

(b) Must your partner disclose the earlier judgment entered against your client?

YES NO

Hypothetical 21

You are defending a bank in a lawsuit going to trial next month. One of your newest colleagues checks on a daily basis court decisions dealing with the issues involved in your litigation. Your colleague just reported on several new decisions, and you wonder whether you must bring them to the trial court's attention in your case.

Must you advise the trial court of the following decisions:

- (a) A decision by your state's supreme court directly adverse to the statutory interpretation argument you are advancing on behalf of your bank client?

YES NO

- (b) A decision by another trial court elsewhere in your state, which does not control your trial court's decision, but which is directly adverse to your statutory interpretation argument?

YES NO

- (c) Unfavorable dicta in a decision from your state's supreme court?

YES NO

- (d) A decision from a neighboring state's appellate court involving exactly the same facts as your case, and which is directly adverse to your statutory interpretation argument?

YES NO

Hypothetical 22

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

- (a) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

YES NO

- (b) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

YES NO