

# LITIGATION ETHICS: PART IV (CLAIMS AND SETTLEMENTS)

## Hypotheticals

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## **Hypothetical 1**

One of your clients recently purchased an old house, and has had several contractors working on various renovation projects. Your client told you that the contractor working on some roof repairs cut through a water pipe -- causing about \$5,000 worth of damage. That contractor is on shaky ground financially. You know that another unrelated contractor doing plumbing work on the house has substantial assets.

May you file a claim against the plumbing contractor for cutting the pipe?

YES

NO

## **Hypothetical 2**

You represent the defendant in state court litigation. Although you think that a witness living in another state might have documents that would help your position, your client cannot afford to undertake the elaborate process involved in obtaining discovery across state lines. Your state allows lawyers to prepare and serve their own third-party document subpoenas within the state (although such subpoenas have no force in other states).

May you send such a subpoena to the out-of-state witness in the hope that he will produce documents?

YES

NO

### **Hypothetical 3**

You work in a public interest law firm that fights to eliminate the death penalty.

You would like to claim that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes. However, the United States Supreme Court recently held that the United States Constitution does not prohibit such executions in all cases.

May you file a lawsuit contending that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes?

YES

NO

### **Hypothetical 4**

Your local federal court appointed you to represent a criminal defendant. Your client wants to appeal his recent conviction, and insists that you pursue every possible argument -- including some arguments that you believe have no merit.

May you include in an appeal of a criminal conviction arguments that lack any factual support?

YES

NO

### **Hypothetical 5**

You devote several hundred hours each year to your state's capital murder pro bono project.

At one recent meeting with a client, he expressed tremendous regret for the murder that he admits committing. He wants you to forego putting on a defense, saying that he "deserves to die." This client seems to be increasingly confused, and you wonder about his competence to make decisions.

May you honor your client's request not to present any defense at his murder trial?

YES

NO

### **Hypothetical 6**

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 7**

Your neighbor occasionally asks for your advice about everything from shrubbery to legal matters. You know that he has struggled with his ex-wife over child custody matters. Your neighbor just told you that he has filed a pro se pleading in court, seeking additional visitation rights. He has a few questions about what happens next.

May you give advice to your neighbor about the visitation rights matter he is now litigating against his ex-wife?

YES

NO



## **Hypothetical 8**

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 9**

You are considering every affirmative defense that you might file in response to a complaint. Among other things, you worry that filing certain affirmative defenses might waive the attorney-client privilege and the work product protection.

- (a)** Will your client waive any privilege/work product protections by filing an affirmative defense alleging reliance on advice of counsel?

YES

NO

- (b)** Will your client waive any privilege/work product protections by answering the plaintiff's lawyer's deposition question, "Did you rely on your lawyer's advice before signing this contract?" with the following answer: "I always rely on my lawyer's advice before taking an important step like that."?

YES

NO

## **Hypothetical 10**

You represent a surgeon sued for malpractice by one of his former patients. The plaintiff missed the statute of limitations, but claims that the statute should not have begun running until several months after her surgery -- because she did not realize until then that she had been injured in the surgery. Your investigators just discovered that the plaintiff spoke with a personal injury lawyer just a few days after her surgery. You obviously want to find out what the plaintiff talked about with the personal injury lawyer, but you expect the plaintiff to claim privilege protection.

Are you likely to overcome the plaintiff's privilege assertion for communication she had with the lawyer shortly after her surgery?

YES

NO

## **Hypothetical 11**

One of your business clients just called to ask if you are willing to participate in what seems like an unusual arrangement. Your client is trying to resolve a contractual dispute with one of her customers. Under your client's proposed arrangement, both clients and both lawyers would agree to negotiate a possible resolution of the dispute. If the negotiations fail, both lawyers would agree to withdraw from representing their clients -- and the clients would have to retain new lawyers to litigate. This concept sounds intriguing to you, but you worry that your contractual agreement to withdraw in case of litigation would create an insoluble conflict with your duty of loyalty and diligence -- because you and the other lawyer would have an incentive to recommend settlement even if clients would be better served by litigating.

May you enter into the arrangement your client has proposed?

YES

NO

## **Hypothetical 12**

You represent your neighbor in pursuing litigation against a local tree surgeon who accidentally damaged your neighbor's house while attempting to cut down a tree. The tree surgeon has chosen to represent himself. Your neighbor and the tree surgeon have worked out a settlement which must be endorsed by the parties and entered by the court.

May you prepare the settlement order and present it to the unrepresented tree surgeon for his signature?

YES

NO

### **Hypothetical 13**

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 14**

You are engaged in furious settlement negotiations, trying to resolve a case over the weekend so you can avoid a Monday morning trial. You think that disclosing some protected documents might help resolve the case.

- (a)** Will disclosing privileged communications during the settlement negotiations waive that protection?

YES

NO

- (b)** Will disclosing protected work product documents during the settlement negotiations waive that protection?

YES

NO

## **Hypothetical 15**

You represent a Fortune 50 company facing a government investigation and possible indictment. You think that you might be able to settle the government's claim against your client, but you wonder about the effect of disclosures that you and your client are considering making to the government during upcoming settlement negotiations.

- (a)** Are you likely to waive the attorney-client privilege by sharing privileged communications with the government during settlement negotiations?

YES

NO

- (b)** Are you likely to waive the work product doctrine protection by sharing protected communications with the government during settlement negotiations?

YES

NO

- (c)** Are you likely to waive either the attorney-client privilege or the work product doctrine protection by sharing the fruits of your internal corporate investigation with the government during settlement negotiations?

YES

NO



## **Hypothetical 16**

You are preparing for settlement negotiations in an important case, and you have several questions about the type of statements that you may ethically make.

- (a)** If your client's medical bills total \$35,000, may you tell the other side that the medical bills actually total \$50,000?

YES

NO

- (b)** May you tell the other side that another defendant has agreed to a stipulated judgment of \$50,000 (which is literally true, although you also agreed with the other defendant that it can satisfy that judgment by paying only \$100)?

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 to begin serious settlement negotiations with a plaintiff's lawyer, and you have several questions about whether you can stay silent in certain circumstances that you expect might arise.

May you remain silent if the plaintiff's lawyer tells you that he realizes that the plaintiff's available damages are capped at \$250,000 by a state statute -- which you know the legislature to have raised just last week to \$500,000?

YES

NO

## **Hypothetical 19**

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 20**

You and your client have been furiously negotiating settlement documents with the other side in a big case -- frequently working well into the early morning. Late last night you and the other side agreed to add a certain indemnity provision into the documents, but you realize this morning that the other side had not included the agreed-upon provision in the draft they sent you at 3 a.m.

**(a)** Must you tell the adversary of its oversight?

YES

NO

**(b)** Must you advise your client of the adversary's oversight?

YES

NO

## **Hypothetical 21**

You represent the plaintiff in a personal injury case. After several months of intense negotiations, it appears that you are nearing a settlement agreement with the defendant. You just learned that your client and his brother (whom the defendant recently deposed, and whom you envisioned as a trial witness) were killed in a car accident.

**(a)** Must you inform the defendant's lawyer that your client has died?

YES

NO

**(b)** Must you inform the defendant's lawyer that a witness has died?

YES

NO

## **Hypothetical 22**

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 23**

Having been "burned" once by a client who reneged on a settlement agreement that you thought the client had authorized, you recently insisted that a client sign a retainer agreement with the following provision:

"The undersigned client further agrees that the said attorney shall have full power and authority to settle, compromise, or take such action as he might deem proper for the best interest of the client, and the client does hereby appoint the said attorney as attorney-in-fact, with full power to execute any and all instruments and documents in behalf or in the name of said client, which are necessary to settle or make other disposition of said matter, including endorsement of checks or drafts received as proceeds of recovery."

Relying on this provision, you recently settled a personal injury case for your client.

However, the client repudiated the settlement.

Will your client be bound by the settlement?

YES

NO



## **Hypothetical 24**

Your client was pleased when you were able to settle a plaintiff's claim for less than the client expected to pay. However, you just received a call from a new lawyer claiming to represent the plaintiff, and advising you that the plaintiff now claims not to have authorized his first lawyer to settle the case. The plaintiff's new lawyer says that she will file an affidavit from her client claiming that the client never even spoke with the first lawyer about a possible settlement. Not surprisingly, you and your client want to do all you can to enforce the settlement.

Can you successfully argue that the plaintiff has waived any attorney-client privilege covering communications with his first lawyer by claiming that he never discussed settlement with that lawyer?

YES

NO