

CONFIDENTIALITY: PART IV (NON-CLIENTS' MISCONDUCT)

Hypotheticals

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Hypothetical 1

Your practice primarily involves representing local governments, which keeps you close to home nearly every day. The lawyer with an office next to you seems to travel constantly, because her practice involves union campaigns, employment discrimination cases, and sexual harassment training for your firm's clients across the country. During one recent ethics program, you jokingly told your colleague that you can only be punished by one state's bar, while she is at risk for punishment by many states' bars. She wonders what you mean.

Can your colleague be punished by a state bar other than her home state's bar?

YES

NO

Hypothetical 2

You work in your firm's Chicago office, and are licensed only in Illinois. You have been admitted pro hac vice in a Missouri court to assist a client in contentious litigation there. You are considering several tactics in discovery and at trial that the Illinois ethics rules prohibit, but that the Missouri ethics rules allow.

May you undertake the tactics without risking ethics punishment?

YES

NO

Hypothetical 3

You work in your firm's Chicago office, and you are preparing for litigation that your client will soon be filing in Colorado. You and your Colorado local counsel have been interviewing witnesses and conducting some surveillance of witnesses in several western states. Your local counsel has become somewhat nervous about the ethical propriety of some of the activity that you are undertaking in those other states. Colorado allows such surveillance activities, but some of the states where the surveillance is taking place do not permit it. You just spoke with one of your partners who is handling a case in Missouri, and you wonder if the same principle will apply to your pre-trial work preparing for the Colorado litigation.

Will the Colorado ethics rules apply to your pre-trial activities in connection with the case your client will soon be filing in Colorado?

YES

NO

Hypothetical 4

You primarily handle real estate transactional work, which frequently takes you to states where you are not licensed. You recently have been accompanying your client to another state (where you are not licensed) to negotiate a transaction with a large landowner. You have discovered that the landowner has for several years not properly paid real estate taxes. Your home state prohibits threatening criminal charges to gain an advantage in a civil matter, but the state in which you will be negotiating permits such a tactic.

May you mention the possibility of criminal tax charges in an effort to "close the deal" with the landowner?

YES

NO

Hypothetical 5

You primarily handle real estate transactional work. Although you are licensed only in North Carolina, you are currently working on one deal for a client based in Philadelphia -- which involves negotiations in, and the possible purchase of land in, New Hampshire. While meeting with your client representatives in their Philadelphia office preparing for the New Hampshire negotiations, you receive a proposed contract from the landowner. One of your colleagues suggests that you check for any "metadata" that the landowner might have failed to scrub from the document. Pennsylvania ethics rules permit such "mining" of metadata, while your home state's ethics rules and New Hampshire's ethics rules prohibit such conduct.

May you check the landowner's proposed contract for metadata?

YES

NO

Hypothetical 6

Today you are facing one of the toughest ethics choices any lawyer can confront. During a meeting at your client's headquarters (in a state where you are not licensed), your client's president told you that she intends to arrange for her employees to hack into a competitor's computer system to steal the competitor's business plan. You warn your client that the conduct would violate federal and state criminal laws, but she insists that her company's survival depends on acquiring the information.

Your home state's ethics rules require you to report your client's criminal intent to the authorities, but the ethics rules of the state where you learned of the plan (and where your client is headquartered) prohibits disclosure of such a confidence.

Must you disclose your client's criminal intent if she refuses to abandon it?

YES

NO

Hypothetical 7

For years, you have been among your small town's most-respected lawyers. You have always tried to act with the utmost integrity and honesty, but an incident that occurred this evening has triggered an agonizing moral dilemma for you.

A despicable man was killed in a knife fight near your house. You initially thought that your young son had killed the man, defending himself and your daughter from his attack. When the sheriff arrived on the scene, he immediately told you that the attacker fell on his own knife, but you know that didn't happen. When the sheriff kept repeating what you know is a lie, you push back -- telling the sheriff that perpetuating such a falsehood would contradict the way you've raised your children.

The increasingly frustrated sheriff finally admitted that one of your neighbors killed the man to save your children's lives. However, the sheriff bluntly told you that he intends to protect the heroic neighbor from the inevitable publicity, and that he will report that the attacker fell on his own knife. You therefore know that the sheriff will knowingly lie on any official reports that he must file, and deliberately mislead the public.

Your young daughter overheard your tense confrontation with the sheriff. She knew that your heroic neighbor killed the attacker -- thus saving her and her brother. You lamely turned to your daughter and asked if she "can possibly understand" that the despicable man who attacked her and her brother died when he fell on his own knife. She assured you that she understands -- but you know that she realized that story is false.

Does your failure to report the sheriff's inevitable official and public falsehoods violate the ethics rules?

YES

NO

Hypothetical 8

Your state's governor just appointed you to a Commission charged with reviewing their state laws, and possibly suggesting new ones. The Commission's very first meeting generated a vigorous debate.

Should lawyers be required by law to report child abuse by a non-client?

YES

NO

Hypothetical 9

While handling a business transaction for a corporate client, you discovered that an assistant vice president with whom you are working (and with whom you have become quite friendly) has been stealing lunch every day from the company cafeteria.

What do you do?

- (A)** You must disclose the vice president's theft "up the ladder" within the corporation.
- (B)** You may disclose the vice president's theft "up the ladder" within the corporation, but you don't have to.
- (C)** You may not disclose the vice president's theft "up the ladder" within the corporation, unless the vice president consents.

Hypothetical 10

You have represented a medium-sized local company for over a decade, and have come to know most of its executives. As a litigator, you rarely become involved in any transactional matters (unless they result in litigation). You recently stumbled onto evidence that the company's CEO has been embezzling substantial amounts of money from the company and signing off on materially false financial statements. The CEO's misconduct is unrelated to anything you are handling for the company.

What do you do?

- (A)** You must disclose the CEO's embezzlement and other misconduct "up the ladder" within the corporation.
- (B)** You may disclose the CEO's embezzlement and other misconduct "up the ladder" within the corporation, but you don't have to.
- (C)** You may not disclose the CEO's embezzlement and other misconduct within the corporation, unless the CEO consents.

Hypothetical 11

Your firm's largest client's executive vice president is both your closest friend and the source of nearly all your firm's work for the client. When your friend recently invited you to lunch to discuss an antitrust issue, you assumed it involved one of the cases you are handling. However, your friend instead tearfully confessed that he has been fixing prices with several competitors. He begs you not to tell anyone else about it.

What do you do?

- (A)** You must disclose the vice president's wrongdoing "up the ladder" within the corporation.
- (B)** You may disclose the vice president's wrongdoing "up the ladder" within the corporation, but you don't have to.
- (C)** You may not disclose the vice president's wrongdoing "up the ladder" within the corporation, unless the vice president consents.

Lawyers' Correction of Their False Statements of Fact to Tribunals

Hypothetical 12

You just obtained a tremendous result for your client after a lengthy pretrial argument. However, you are stunned by your client's sheepish admission that some of the material facts you recited in your briefing (which you obtained from the client) were incorrect. The client reacted angrily when you told her that you must now correct those facts -- and she specifically refused to let you disclose the falsity of what you had told the court.

What do you do?

- (A) You must correct your misstatement.
- (B) You may correct your misstatement, but you don't have to.
- (C) You may not correct your misstatement, unless your client consents.

Hypothetical 13

You have been working with lawyers from several other law firms in defending your firm's client and their clients under a common interest agreement. You prepared a friendly third-party witness for direct testimony (to be conducted by one of the other defendant's lawyers), and expected things to go well. In a way, your colleague's direct examination went too well -- the third-party witness provided very helpful testimony that you know to be false.

What do you do?

- (A)** You must correct the non-client witness's false testimony.
- (B)** You may correct the non-client witness's false testimony, but you don't have to.
- (C)** You may not correct the non-client witness's false testimony, unless your client consents.

Hypothetical 14

Early on in the case you are handling, you learned that one of your client's neighbors had a real "grudge" against your client. However, you were surprised at how strong the "grudge" must be -- because the hostile neighbor just provided harmful material testimony against your client that you know to a certainty to be false. Given the witness's demeanor, you think he might believe to be true what he just said on the stand.

What do you do?

- (A)** You must correct the non-client witness's false testimony.
- (B)** You may correct the non-client witness's false testimony, but you don't have to.
- (C)** You may not correct the non-client witness's false testimony, unless your client consents.

Hypothetical 15

Although you have tried many cases, you have never confronted the situation you faced this morning. A hostile witness being examined by your adversary's lawyer must not have fully understood the case -- because she provided testimony that you knew to be false, but which helps rather than hurts your client. The client wants you to remain silent and not correct the false testimony, but you worry about your role as an "officer of the court."

What do you do?

- (A)** You must correct the non-client witness's false testimony.
- (B)** You may correct the non-client witness's false testimony, but you don't have to.
- (C)** You may not correct the non-client witness's false testimony, unless your client consents.

Hypothetical 16

You are representing the defendant in a newsworthy case, and arranged for a public relations agency to continually monitor press coverage of the trial. Although you did not ask the agency to monitor the electronic social media of jurors serving in the case, one of the agency's folks told you that a juror just posted a message on her public Facebook page indicating that she had conducted some research into the plaintiff's earlier litigation history. You know that the juror's research will reveal some unsavory facts about the plaintiff, but now you wonder whether you have to advise the court of the juror's research -- because it violates the court's strong preliminary warning to jurors not to engage in such research.

What do you do?

- (A) You must disclose the juror's misconduct.
- (B) You may disclose the juror's misconduct, but you don't have to.
- (C) You may not disclose the juror's misconduct, unless your client consents.

Hypothetical 17

After practicing in the fairly cloistered setting of a large law firm, you joined your state bar's "ethics hotline" team. Among other things, this has forced you to deal with ethics issues confronting lawyers in many varied roles that you never considered while at a big law firm. Several questions have come into the ethics hotline about lawyers' possible duty to report another lawyer's serious ethics violation.

Must a lawyer acting in the following roles report another lawyer's serious ethics violation?

- (a)** Defense lawyer representing another lawyer already charged by the bar with an ethics breach?

YES NO

- (b)** Lawyer participating in a local lawyers assistance program?

YES NO

- (c)** Judge?

YES NO

- (d)** Lawyer acting as a mediator?

YES NO

Hypothetical 18

You have always tried to get along with other local lawyers, although you know that you might have a duty to report lawyers who are guilty of certain egregious ethics violations. You are wondering how far that duty extends.

(a) Must you report serious ethics violations by lawyers acting in a non-legal capacity?

YES

NO

(b) Must you report serious misconduct by judges?

YES

NO

(c) Must you report serious ethics violations by one of your own partners?

YES

NO

(d) Must you report your own serious ethics violation?

YES

NO

Hypothetical 19

You just moved from a small town to a big city, and have found that the lawyers' conduct is much "sharper" than you were used to. You never even thought of reporting any lawyers where you formerly practiced, but now you wonder about what standard applies.

- (a) Do you have a duty to report another lawyer for what you suspect to be coaching one of her witnesses to lie?

YES

NO

- (b) Do you have a duty to investigate what seems to be another lawyer's egregious ethics violation?

YES

NO

- (c) If you know that another lawyer has engaged in sufficiently egregious misconduct, do the ethics rules require you to report that lawyer (rather than give you discretion to do so)?

YES

NO

Hypothetical 20

You have reluctantly concluded that you have a duty to report another lawyer's ethics violations, if they are sufficiently serious. You wonder where the rules draw that line.

- (a) Must you report another lawyer's unethical use of a trade name in marketing her law firm?

YES

NO

- (b) Must you report another lawyer's conflicts of interest violation, which you discovered in connection with your job as an adjunct law professor?

YES

NO

- (c) Must you report another lawyer's uncivil comment to your law firm's receptionist about what a jerk she has been for not bringing in coffee immediately upon his arrival at your law firm for a deposition?

YES

NO

- (d) Must you report another lawyer's social use of cocaine, which you saw at a cocktail party?

YES

NO

- (e) Must you report another lawyer's theft of valuable artwork from your city's art museum, which you saw during your bar's annual Christmas party - but which the lawyer perpetrated while clearly impaired by alcohol?

YES

NO

- (f) Must you report another lawyer's recitation of a very racist joke during a social gathering of your local bar association?

YES

NO

Hypothetical 21

You think it is likely that you will soon have a duty to report another lawyer's serious litigation-related ethics misconduct. Now you wonder about the logistics.

- (a) If you determine that the ethics rules require you to report the other lawyer's misconduct, to whom do you report?
- (A) Court?
 - (B) Bar?
 - (C) Lawyers assistance program (for misconduct caused by alcohol or other impairment)?

YES

NO

- (b) If the judge handling the litigation announces in open court that she intends to report the other lawyer's violations, must you also report the other lawyers violations?

YES

NO

- (c) If a newspaper reporter hears the judge describe the other lawyer's ethics violations (and his intent to report them), and the newspaper publishes a front page story about the judge's intent, must you nevertheless report the other lawyer's violations?

YES

NO

Hypothetical 22

You have actual knowledge of a local lawyer's very serious litigation-related ethics violation, and you are wondering about the timing of your duty to report him, and what risks you face.

- (a)** May you wait until the end of a nasty piece of litigation before reporting the adversary's lawyer's fraud on the tribunal?

YES

NO

- (b)** Would you risk an ethics violation yourself if you report the other lawyer's serious ethics violation too early?

YES

NO

- (c)** Would you risk an ethics violation yourself if you report the other lawyer's serious ethics violation too late?

YES

NO

Hypothetical 23

You represent the ex-wife of a prominent local lawyer, who has been receiving substantial alimony payments since the divorce. Your client just told you that her ex-husband has been stealing from his clients' trust accounts to pay her alimony. For obvious reasons, she does not want you to report her ex-husband to the bar.

What do you do?

- (A)** You must disclose the trust account theft.
- (B)** You may disclose the trust account theft, but you don't have to.
- (C)** You may not disclose the trust account theft, unless your client consents.