

# LITIGATION CONFLICTS WITH NON-PARTY CLIENTS

## Hypotheticals

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### **Hypothetical 1**

You have developed a statewide reputation for representing retailers. Your largest client is a retailer, which sells clothing. You just received a call from your client's largest competitor. You are flattered that the competitor has called you, but you also worry that representing both retailers might create an inappropriate conflict of interest.

May you represent both retailers?

YES

NO

## Hypothetical 2

One of your largest clients has asked you to file an infringement action against a manufacturer which appears to be infringing your client's patent. If you succeed, you will stop that manufacturer from using your client's patent in its manufacturing process. You know that the manufacturer to be targeted by your planned infringement lawsuit sells most of its output to another of your law firm's large clients. That other client will suffer severe financial loss if it cannot purchase components from the defendant manufacturer because your lawsuit has shut down the manufacturer's production.

May you file the patent infringement action without your other client's consent?

YES

NO

### Hypothetical 3

You are defending a nursing home in a lawsuit brought by a software company. You determine that your best defense might be to blame the software company's recently deceased president for incompetence. You don't intend to counterclaim against the company. However, you just received a call from the president's widow, whom one of your partners is representing in selling her house. The widow claims that your litigation strategy creates a conflict, because it would embarrass her.

Is your litigation strategy "adverse" to the widow for conflicts purposes (thus requiring her consent)?

YES

NO

### **Hypothetical 4**

You have represented a bank for several years. It is not your largest client, but has been a steady source of business. On behalf of that client, you normally argue that a particular state statute does not allow a certain type of claim against banks. One of your partners just received a call from a potentially lucrative new corporate client, which is in the midst of litigation with another bank that you have never represented. In that litigation, the company wants to take the position that the state statute does allow such a claim against banks.

May you represent the corporate client in asserting its position on the meaning of the statute (without your bank client's consent)?

YES

NO

### Hypothetical 5

A new associate is preparing a number of third party subpoenas that you will have to issue in a commercial case. He just called to ask a few questions.

- (a) Absent consent, may you issue a subpoena to another firm client (which your firm represents on unrelated matters) when you expect a dispute over the discovery you seek?

YES

NO

- (b) Absent consent, may you issue a subpoena to a bank (which your firm represents on unrelated matters), when there is no reason to think that the bank would resist or dispute the subpoena?

YES

NO

## **Hypothetical 6**

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 7

You represent two national drugstore chains – handling their litigation work and arranging for your partners to handle their real estate work.

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. The regional manager told you the good news that the land the client just purchased is properly zoned and would allow quick development of the drug store.

You are now in the middle of an afternoon meeting with your other client's regional manager and general counsel. They just told you that they are considering purchasing some land to build a drug store in the same area of Houston that you and your other client talked about this morning. This client's general counsel told you that she will need your regulatory and litigation skills to seek the land's rezoning so they can build a drug store there – which will take at least a year. The regional manager says that the land purchase and rezoning effort would be a waste of money if some other drug store chain built a drug store in that area in the near future – but that she 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 and general counsel that it would be a waste of money for their company to purchase the land and start the rezoning effort.
- (C) Something else.



### **Hypothetical 8**

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?

YES

NO

- (b)** May you represent a developer interested in acquiring parcels of land along the possible rail line routes?

YES

NO

### **Hypothetical 9**

You practice in a 20-lawyer firm in a medium-sized city. An out-of-state company just hired you to defend it in a commercial litigation lawsuit. The plaintiff is represented by a lawyer with whom you are working in a co-counsel relationship on a large case that takes up approximately 30 percent of your time each day.

Does this working relationship with the plaintiff's lawyer create a conflict of interest that requires disclosure and consent?

YES

NO

### **Hypothetical 10**

You just received a call from your firm's largest client -- which has been sued by a plaintiff represented by another firm in town that is approximately the same size as your firm. Coincidentally, last week your managing partner retained that other law firm to represent your firm in a malpractice case that arose from your alleged mistakes.

Must you disclose to your largest client that the plaintiff's law firm in that case is also representing your law firm in an unrelated matter?

YES

NO