

# Lawyers' Communications about Cases: Basic Principles

## 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.)?

# Lawyers' Communications about Cases: Defining the Limits

## 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)?
- (b) Should limits on lawyers' public communications about their cases apply only to criminal cases?
- (c) Should limits on lawyers' public communications about their cases apply only to jury cases?
- (d) Should limits on lawyers' public communications about their cases apply only to pending cases?
- (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?

# Ex Parte Communications with a Corporate Adversary's Employees

## 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?
- (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?
- (c) The supervisor of the truck driver who hit your client (and whose statements would be admissible as "statements against interest")?
- (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)?
- (e) The trucking company's mechanic, who checked out the truck the day before the accident?
- (f) The truck driver who hit your client?

# Ex Parte Communications with a Corporate Adversary's In-House Lawyer

## 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?
  
- (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?

# Request to Avoid Ex Parte Communications

## 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?
- (b) May you send a memorandum to all current employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?
- (c) May you send a memorandum to all former employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?
- (d) May you advise employees that they are not required to talk to the plaintiff's lawyer if the lawyer calls them?

# Threatening Criminal Charges

## 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?

# Ghostwriting Pleadings

## Hypothetical 7

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?

## **Filing Claims Subject to an Affirmative Defense**

### **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?



## **Enforcing Settlement Agreements: General Rule**

### **Hypothetical 9**

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?

# Disclosing Unpublished Case Law

## Hypothetical 10

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"?
  
- (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"?