HYPOTHETICAL PROBLEMS

ETHICS, PRO BONO AND PROFESSIONALISM CLE

Hypothetical Problems

Written for the Chief Justice's Commission on Professionalism by

Professor Patrick Longan
William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law
Mercer University School of Law
Macon, Georgia

Ethics, Pro Bono, and Professionalism Scenarios
May 26, 2021

Scenario #1: "A routine extension of time in discovery"

You represent a plaintiff in a civil case. The defendant's lawyer contacts you and asks for a 30-day extension to answer interrogatories and respond to a request for the production of documents. The extension would not cause any significant harm or delay in the case.

- Based on those facts alone, would you grant the extension? Would you consult with your client first? If you did consult, what would you say?

Now let's add some "special circumstances" and talk about the extent, if any, to which your answers might change. One by one, let's add these:

- Suppose your client has told you that in this case the client expects you not to give any accommodations to "the enemy." Now do you talk to your client before deciding on the extension? If so, what do you say? How could or would you have handled the client's instruction at the outset of the representation?
- Suppose opposing counsel has a reputation for being generally disagreeable and uncivil. Does that change how you deal with the request?
- Suppose opposing counsel in previous cases with you has declined to give you routine extensions of time. How, if at all, does that change your response to the request?
- Suppose opposing counsel in this same case has declined to give you a routine extension of time and other conducted herself with a lack of civility.
- Suppose this is the third extension request. Now how do you respond?
- What if an extension would cause substantial harm to your client? Now you must refuse the extension, correct?
- Finally, what other circumstances (perhaps in addition to one or more of these) would lead you perhaps to refuse the extension of time?

Scenario #2: "The Covid-19 civil jury demand"

You have just been retained to represent a defendant in a civil case. Liability is pretty clear, and the potential damages are huge, but your investigation reveals that the plaintiff is in dire financial straits. The plaintiff does not demand a jury trial. You assume that plaintiff's counsel made this decision because of the likelihood of a years-long backlog of civil jury trials because of the Covid-19 judicial emergency. You assume that, by making a jury demand, you could ensure that the case is not tried for several years. You also know that the delay would give you enormous leverage in negotiations with the plaintiff to reach a settlement. The plaintiff needs money now. Faced with a long delay, the plaintiff might accept pennies on the dollar. The circumstances are such that strategically you would never want to actually try this case to a jury.

- Is it unethical or unprofessional to request the jury trial for the purposes of ensuring a delay that you give you leverage in a negotiation?
- Before making or not making the jury demand, would you consult with your client? If so, what would you say?
- What would you do if you and your client disagree about what to do?

Scenario #3: "Mild cognitive impairment – two views"

(a) Version A

Suppose you are an attorney over the age of sixty and you start to experience some lapses of memory – "senior moments" you call them. You become more concerned when you forget about a phone call that you promised to make and when you briefly become disoriented driving home from work. You decide to make an appointment with your doctor, who refers you to a neurologist. Next thing you know, you are in the neurologist's office drawing the face of a clock and naming as many animals as you can in one minute. At the end of the appointment, the doctor gives you a diagnosis of "mild cognitive impairment."

The doctor hands you a pamphlet from the Mayo Clinic that lists several things you may or may not experience with mild cognitive impairment:

- You may forget things more often.
- You may forget important events such as appointments or social engagements.
- You may lose your train of thought or the thread of conversations, books or movies.
- You may feel increasingly overwhelmed by making decisions, planning steps to accomplish a task or understanding instructions.
- You may start to have trouble finding your way around familiar environments.
- You may become more impulsive or show increasingly poor judgment.[1]

You feel fine, and you confidently tell yourself, "even at 80% of capacity I would still be better than other lawyers are at their best." You learn that mild cognitive impairment is sometimes a precursor to dementia. Sometimes the symptoms never worsen. Sometimes they get better.

What are your ethical and professional obligations?

(b) Version B

Now suppose that you oppose an aging lawyer in several cases. You begin to suspect that the aging lawyer is suffering from some sort of mental impairment. It is apparent that the lawyer is unaware of the impairment (a condition known as Anosognosia, which you know is sometimes present in patients with impairments such as Alzheimer's). The signs are definite enough for you to notice but might not be apparent to people who do not regularly interact with opposing counsel. You know that there are ways in which you can turn these circumstances to your advantage. Frankly, an impaired opposing counsel is easier to beat than one at the top of his or her game.

What are your ethical and professional obligations?

[1] https://www.mayoclinic.org/diseases-conditions/mild-cognitive-impairment/symptoms-causes/syc-20354578

Scenario #4: "My opponent is a rookie"

Your best friend from law school calls you up. He tells you that he is representing a defendant in a civil case. The plaintiff's lawyer is young and inexperienced and apparently does not have anyone guiding and mentoring him. "This kid reminds me of myself at that stage," says your friend. "I didn't know what I was doing back then, and it took getting knocked around by some older lawyers before I learned how not to get upset and distracted while I was taking a deposition. Those old guys were jerks, and I swore I would never become one of them."

You commiserate with your friend about the tactics that older lawyers used against you in the early days. "Yeah, I went to a CLE last week, and they even have a name for that stuff now," you tell your friend. "They call it 'strategic incivility.' It's still going on, although now that I have some gray hair no one tries it on me anymore."

Your friend laughs, but then explains why he called. "Look, I'm almost embarrassed to admit this, but it occurs to me that I could mess with this young lawyer during the depositions, and he'd never know what hit him. I'm not talking about anything outside the rules. There's a lot of money at stake in this case – I have no idea how the other side ended up with a rookie lawyer. Don't I owe it to me client to jerk this kid's chain? I don't really want to, but I'm an advocate. As long as I don't cross some ethical line, I kinda feel obliged to walk right up to the edge of it."

How would you respond to your friend?

Scenario #5: Interviewing the former employee

You represent a plaintiff in a case against Acme, Incorporated. Your client allegedly was severely injured when Driver, an employee of Acme at the time, negligently drove an Acme Truck on Acme business and collided with your client's automobile. You learn that Driver was fired from Acme after the accident. You did not name Driver as a defendant in the case. You learn where Driver lives, and you want to interview him about the accident. Acme has retained counsel in the matter. Driver does not have counsel about the accident, as far as you know.

Consistent with your ethical and professional responsibilities:

- May you interview Driver without getting the permission of Acme's counsel?
- If you interview Driver, do you have to reveal who you are and who you represent?

Scenario #6: Purchasing a competitor's firm name as a "key word"

You specialize in plaintiff's personal injury work. You know that the key to a successful plaintiffs' practice is to get the good cases and that most of your clients find you (and your competitors, for that matter) by using the internet. You do not have the budget to advertise heavily, but you learn that it is possible to buy the name of one of your competitor law firms as a search keyword. If you make that purchase, anyone who does a search on Google for your competitor will see your law firm's web site at the top of the page of search results, before the site of your competitor. Your "hit" will be labeled as an "ad," but at least you will be at the top.

Consistent with your ethical and professional responsibilities, may you purchase your competitor's firm name as a search keyword?