

MATERIALS
PROFESSIONAL AND ETHICAL PROBLEMS
IN EVERYDAY PRACTICE
October 12, 2018

Hypothetical Questions

Please note that your instructors will select some of these questions for discussion. It is unlikely that your group will have an opportunity to discuss each of these problems.

In determining your answers to these questions, you may wish to consult the Law Society of Ontario's *Rules of Professional Conduct*, found at <https://www.lsuc.on.ca/lawyer-conduct-rules/>

1. Balancing professional responsibility with following advice from senior lawyers

You are a second year associate and handling a small file on your own. During the course of handling the file, you ask a partner for some advice. The partner has been called to the bar for over 20 years. You consider the advice and also talk to your client. Your client does not want to do what the partner has suggested and you in fact have done your own research and now believe the partner is wrong. You try and tell the partner why you disagree with her conclusion. She tells you she is right and you must take this step.

You refuse. The senior partner says that she is going to speak to the Managing Partner and tell him what has transpired and how you have refused to take her advice. What do you do?

2. How to deal with your own inadvertent error

You act for a municipality at a public inquiry. Commission Counsel obtains and produces thousands of pages of cellular telephone records. Your office OCR (scan) the documents and import the data into Microsoft Excel. Your office analyzes the data and produces charts that analyze individual calls to certain specific individuals. You work day and night for two weeks. You advise counsel for the other parties that you will be providing charts that analyze the data. You finally complete the charts late the day before you intend to cross-examine the person who made the calls. You email the charts to your service list of all counsel about 6:00 pm and continue to work on the cross-examination until after midnight.

The next day counsel for the witness (a senior and well-respected lawyer) tells your senior partner and you that he never received the charts. You check the email you sent the night before. He was not on the recipient list. He had recently been retained and your distribution list had not been updated to include him. This is a big problem. What to do?

3. The difficult client

You act for an individual plaintiff in a property dispute with some family law overtones. The opposing party is also represented by counsel. Your client directs you to serve the defendant personally. You decline. Your client becomes increasingly angry and tells you that you are her lawyer and you have to do what she says. The client insists that if she wants you to serve the defendant personally, you have to do that because you have to follow her instructions. What to do?

Later, you proceed to set up a mandatory mediation. You propose the name of an excellent mediator that your firm has used before and for whom you have a great deal of respect. Your client refuses to accept your recommendation because the proposed mediator is Jewish and the defendant is Jewish. Your client is concerned that the mediator will be too sympathetic to the defendant. What to do?

4. Your client behaves irrationally

You are representing a client in a sexual harassment case. As the trial approaches, you believe you notice a decline in your client’s mental health. The client has become angry with you at times when you have pointed out weaknesses in his case. He has directly asked you, “whose side are you on?” more than once.

The opposing party has made a reasonable *Offer to Settle* and you have recommended that your client accept it. He declines. He tells you that he desperately wants to settle because he feels that the stress of trial will cause him to suffer a complete breakdown. However, he also instructs you not to settle for less than an amount that you know is far in excess of what a court will ever order or that the other side will pay. You think his instructions are irrational.

5. Inappropriate conduct by judge

You act for an Indigenous client. You appear in court to seek a brief adjournment of a motion due to your inability to get instructions from your client. You explain that your client is visiting family and you have been unable to reach her for the past several days. The presiding Justice refuses to grant the adjournment and in so doing states: “give me a break counsel; we don’t communicate by smoke signals anymore”.

6. Inappropriate conduct by opposing counsel

You attend at court to argue a motion. When you say good morning to opposing counsel he makes a rude remark under his breath. During this exchange, you notice the strong smell of alcohol on his breath. During the course of the argument of the motion, opposing counsel is impolite, condescending and at times disparaging of your client. You think that he is slurring his words. This is not the first time that you have noticed alcohol on opposing counsel’s breath. You suspect that he will be driving back to his office when he is finished in court.

7. Difficult instructions from your client

You are a lawyer who acts for Unions in labour relations matters. You are representing the Union in a grievance alleging sexual harassment. You have met with the grievor several times before the hearing in order to prepare. She has expressed a tremendous amount of faith and confidence in your abilities. She says she trusts you. She has stated from the outset that all she wants is the opportunity to tell her story at a hearing so that justice may be done. In the course of preparing for the hearing, it becomes apparent that one of the accused harassers is someone who had been responsible for organizing the Union several years prior and who maintains very close ties to the current Union executive. Once the Union comes to know these facts, you are instructed to settle the case on the first day of hearing.

8. Client indicates that he or she intends to commit perjury

You are an employment law lawyer representing an employee in a wrongful dismissal case. You explain to your client that mitigation is a key issue in any breach of contract case and ask whether the client has succeeded in mitigating his damages by finding alternate employment. The client tells you that he is working under the table for his uncle's restaurant. He explains that no records are kept and he is paid entirely in cash. He says that he will say he is not working at examinations for discovery and instructs you to tell the employer's lawyer that he is not working.

9. Unequal resources for litigation

Your client is a successful businessman. He and his ex-common law partner share physical custody of their 11 year old son. The child spends half of his week with his mother and half with his father, and has been doing so since he was 4 years old. Your client works long hours, and until now the joint custody arrangement has worked well for him given his demanding work schedule.

Your client makes all decisions regarding the child's schedule, and alters it at his convenience, depending on whether he wants to spend more or less time with the child. The child's mother works as a cashier in a grocery store. She has a quiet personality, and few financial resources.

Your client has retained you because he would like to have full custody of his son. He tells you that his reason for wanting to change the *status quo* is that his son's mother does not provide a structured home environment. For example, according to your client the child does not brush his teeth or do his homework when he is in his mother's care. He stays up late playing computer games and chatting with his friends via the internet. Your client recently remarried, and should he be awarded full custody his new partner will stay home to look after the child after school and in the evenings.

Your client is prepared to spend whatever it takes on a custody battle.

You advise your client that, from a legal perspective, seeking an order for custody will be an uphill battle in the circumstances. Your client has only a small chance of success at trial. Your client is nevertheless convinced that he would prevail because his ex-spouse would simply not be up for the battle emotionally or financially and he could wear her down. From what your client has told you, you agree that the child's mother would be no match for your client in a custody battle.

Your client instructs you to draft an application for custody. He wants you to act very aggressively and bring as much pressure as possible to bear on the situation.

You don't like your client. You find him hostile, aggressive and manipulative. You don't believe that a long and drawn out custody battle would be in the child's best interest emotionally. Nor do you believe that a change in the *status quo* would benefit the child.

What do you tell your client? Do you act on his instructions? What legal and ethical rules would guide you? What obligations do you have to your client? What obligations do you have to the child? Do you have any obligations to the child's mother? Assume that you have advised your client not to pursue full custody, but he client insists on going in that direction. In those circumstances, what are your options?

10. Client Interview

You are contacted by a man who tells you his daughter is in need of legal representation as a result of her recent separation from her husband. The man arranges a meeting between you and his daughter, and advises you that he will be paying for all legal services rendered on his daughter's behalf.

On the day of her appointment, the daughter arrives with her father. He suggests that it would be helpful if he could sit in on the meeting, since his daughter is quite distraught and he is concerned about her capacity to take in information and make informed and healthy decisions.

During that initial meeting, and despite your attempts to elicit information from his daughter, the father does most of the talking. He tells you that his daughter would like full custody of the children, spousal support and child support, and the matrimonial home.

You become concerned that you are not getting her side of the story, and worried about the dynamic between her and her father. You ask the father to leave for a few minutes so you can speak to his daughter alone.

Once you are alone with the daughter, she bursts into tears. She advises you that her family dislikes her husband but that she still loves him. She isn't convinced she wants the relationship to end but they fight all the time. She has a young daughter and is concerned about the impact of a separation and divorce on her. She advises you that she is confused, and asks you what you think she should do in the circumstances.

What advice do you give this woman? Do you give her your personal opinion? Do you invite the father back into the room? How do you satisfy yourself that she is mentally capable of giving you instructions?

11. Privilege

Your client arrives for a meeting in your office brandishing a letter of opinion from her spouse's lawyer, addressed to her spouse, which she has intercepted in the mail. Do you read the opinion letter?

Would your answer change if the letter was not from opposing counsel, but was a financial statement from the bank addressed to your client's spouse that sheds light on his financial situation?

Would your answer change if it was not a letter, but a photocopied financial statement in the husband's own handwriting that your client found while cleaning up the house?

12. Tactical litigation, I

Your client instructs you to make a claim for custody of the children. He has no intention of pursuing the claim for custody; he simply wants to use it for leverage against his wife in her action for spousal and child support. Do you make the claim?

Later, the client instructs you to reveal a deeply embarrassing personal fact about his wife in his affidavit. The evidence is irrelevant to the issue at stake. However, your client knows that his wife would be mortified if the issue ever came to light, and he wants to use it as leverage. Do you include the evidence?

13. Harassment

You are a first-year associate at Adorable, Grimm. Cara and David are both on track to partnership in this medium sized law firm. Cara joined the firm directly after completing her articles there, and is now a fourth year associate. David worked as a judicial clerk for two years before joining, and is now in his second year. Their constant spicy banter has more than a few of their colleagues wondering what's going on between them. At times, what's being said between Cara and David is definitely not conversation articling student Laura would have with her colleagues—not even with her close friends over drinks on a Friday night.

You know Laura is uncomfortable, and you approach the managing partner. She tells you there's nothing she can do because the relationship is mutually reciprocated. Besides a few inappropriate statements, she explains, nothing else has happened. In order to decide how to respond, do you need to know the exact content of what's been said in front of Laura?
