Talking to the Enemy

Analyze the ethical issues in each of the following situations.

Read: Rules 4.2, 4.3, 3.8, 1.13
Morgan and Rotunda: Problem #19, pages 314-330
Brill: pages, 184-187, 211-216

A) Attorney represents plaintiff in a negligence matter.

1) Attorney knows defendant has an attorney for the negligence matter, but attorney calls defendant personally to discuss the accident and the possibility of settlement.

2) Attorney does not know if defendant has an attorney, and calls defendant.

3) Attorney asks “Are you represented by an attorney.” Defendant says, “Well, I talked to a lawyer.”

4) Attorney knows defendant has an attorney for an unrelated domestic relations matter, and attorney calls defendant.

5) Attorney has made a settlement offer to the lawyer for the defendant, but has received no response. Attorney suspects the offer has not been communicated to the defendant. Attorney is at a social event and meets the defendant. Can the attorney ask the defendant about the settlement offer in general terms? Formal Opinion 92-362, page 318 of Morgan.

6) Defendant has an attorney, but defendant calls attorney for plaintiff to discuss the matter, saying “my lawyer doesn't return my calls and I don't know what is going on.” Formal Opinion 95-396, page 315 of Morgan.

B) Attorney represents husband in a divorce. Wife is represented by another attorney. Attorney tells husband, "call your wife personally and see if she will accept our offer and let me know the results." See page 318 of Morgan.

C) Attorney is proceeding pro se in divorce. Can he contact his wife ex parte when she is represented by counsel? See page 319 of Morgan.

D) Elizabeth Engineer will be an expert witness on design defects for the plaintiff in a products liability case. Defense attorney represented Elizabeth last year in the purchase of her home. Can the defense attorney informally talk to Elizabeth about the products liability case without notifying the plaintiff's attorney? Formal Opinion 93-378, pages 185, 211 of Brill.

E) 1) Wilma Witness will be an occurrence witness for the plaintiff in a negligence case. The defense attorney knows Wilma socially. Can the defense attorney informally talk to her about the negligence case without notifying the plaintiff's attorney?

2) Same as above, but Wilma Witness has her own attorney for personal matters. Can the defense attorney speak to her without notice to her attorney?

3) Wilma Witness is a doctor who will be testifying as a treating physician for the plaintiff and the defense attorney represented her last year in a medical malpractice case. Can the attorney for the defense speak to Dr. Witness without notice to the plaintiff's attorney? See Ark. R. Civil Pro. 35(c)(2). See page 185 of Brill.

F) 1) Plaintiff sues Wal-Mart for a slip and fall accident. Can the plaintiff's attorney informally talk (without notice to the attorney for Wal-Mart) to the manager of the store? The person in charge of maintenance? A cashier on duty that day? One of the janitors who was not on duty at the time of the accident?

2) Same as above, but the individuals are no longer employed by Wal-Mart. Formal Opinion 91-359, page 211 of Brill.

3) Same as above, but the lawyer receives a phone call: “I work for Wal-Mart, and I am willing to tell you the truth about the accident.”

4) Same as above, but the lawyer receives an unmarked envelope with confidential and damaging Wal-Mart documents. Formal Opinion 94-382, page 410 of Morgan, and page 216 of Brill.

G) In a criminal matter,

1) Can the prosecutor speak informally with the “target” or potential defendant without notifying the attorney for the defendant? Can the police? An undercover agent?

2) Can the prosecutor speak informally with a witness without notifying his attorney?

3) Can the attorney for one defendant speak to a co-defendant without notifying the attorney of the second defendant?

4) Can the attorney for the defendant talk to the victim without notice to the prosecutor?

H) 1) Attorney represents a land fill company in a bitterly disputed regulatory matter. Can the attorney contact high level governmental officials in the agency without notice to the agency's counsel? Formal Opinion 97-408, page 322 of Morgan and page 211 of Brill.

2) In a termination of parental rights matter, may the attorney for the parents talk to the social worker for DHS without notice to the attorney for DHS?

I) Attorney represents a corporation which is accused of illegal activities.

1) Can the attorney talk to the Vice-President who is most implicated in the illegal activities? Suppose the Vice-President has his own attorney. See Rule 1.13 (d, e)

2) Can the attorney talk to the other employees in general? Must he give them any initial warnings?

f:brill/prof.resp/worksheets/2009-6 talking enemy