

## **Question 4 Professional Responsibility**

1. What, if any, ethical violations has Austin committed as an attorney?

### Conflict of Interest

A lawyer owes a duty of loyalty to the client, and must exercise professional judgment solely for the benefit of the client, free of compromising influences and loyalties. If the lawyer becomes conflicted and that conflict materially limits the representation, the lawyer may continue to represent the client if the lawyer (1) informs the client in writing of the conflict, (2) receives client consent, and (3) reasonably believes the lawyer can continue the representation without the representation being limited. In California, client consent must be in writing.

Here, Austin had been a physician. He served on a medical association committee that furthered physicians' rights to be compensated fairly by health insurance providers. At the same time, Austin represented BHC Company ("BHC"), a health insurance provider, who was sued in a class action by physicians, including some of Austin's close friends. It appeared Austin's own interests would adversely compromise his representation of BHC. However, as discussed below, Austin acted competently, and did not let his personal interests or friendships affect his independent advice or loyalty to BHC. Though Austin initially advised BHC he was not confident BHC had a defense in the lawsuit, he conducted further research, and discovered a public policy argument that could modify existing law to benefit BHC with a plausible defense.

Thus, no conflict of interest existed.

### Duty to Avoid Frivolous Claims

ABA Model Rule 3.1 prohibits lawyers from defending or bringing a proceeding, or opposing or asserting an issue in a proceeding unless there is a basis in fact and law for doing so that is not frivolous. A good faith argument for a modification, extension, or reversal of existing law is not frivolous. California Rules of Professional Conduct Rule 3-200(B) does not allow a lawyer to accept, seek, or continue employment if the lawyer knows or should know the objective of employment is to present a defense or claim in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for a modification, extension, or reversal of existing law. California Business and Professions Code Section 6068(c) forbids a lawyer from maintaining or counseling an action, proceeding, or defense that does not appear legal or just, except for the defense of a person charged with a public offense.

Here, Austin discovered a stated policy of the health care law was the containment of health care costs. He advised BHC he could plausibly argue reimbursements to physicians might legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He explained he would argue for a modification of existing decisional law to allow such a result based on public policy. Austin's good faith argument for a modification of existing law based on public

policy met the ABA Model Rules, California Rules of Professional Conduct, and California Business and Professions Code.

Thus, Austin's defense was not frivolous.

### Duty of Candor to the Tribunal

Under ABA Model Rule 3.3, a lawyer representing a client in any proceedings of a tribunal has the duty of candor. A lawyer must not make a false statement of law to the court, but is free to make non-frivolous arguments of law that favor a client. A lawyer must disclose controlling legal authority known to the lawyer to be directly adverse to the client's position, not disclosed by opposing counsel. The lawyer may argue against the authority and seek to have it overturned, or attempt to distinguish it from the case at hand.

Here, Austin initially advised BHC that he was not confident it had a defense. Austin was required to disclose to the court any legal authority directly adverse to BHC's position, not disclosed by Bertha, counsel for the class of physicians. After discovery, Austin could disclose to the court his public policy argument to change existing decisional law.

Thus, if Austin disclosed to the court legal authority directly adverse to BHC's position not disclosed by Bertha, Austin did not violate the duty of candor to the tribunal.

### Duty of Competence

Under ABA Model Rules, a lawyer is obligated to provide competent representation to a client and possess the legal knowledge, skill, preparation, and thoroughness reasonably necessary for representation. California Rules of Professional Conduct requires a lawyer to not intentionally, repeatedly, or recklessly fail to perform legal services with competence, and defines "competence" as the application of "the (1) diligence, (2) learning and skill, (3) mental, emotional, and physical ability reasonably necessary for the performance" of any legal service.

Here, Austin conducted research and discovered a stated policy of the health care law to come up with a plausible defense for BHC.

Thus, Austin acted competently.

In conclusion, Austin did not commit any ethical violations as an attorney.

## 2. What, if any, ethical violations has Bertha committed?

### Threatening Charges

California Rules of Professional Conduct Rule 5-100 prohibits lawyers from, and subjects them to discipline for, threatening to bring "criminal, administrative, or disciplinary charges", in an effort to obtain an advantage in a civil dispute.

Here, Bertha wrote Austin a letter stating that if he presented the public policy defense, she would report him to the state bar for engaging in a conflict of interest. Bertha appeared to threaten to bring disciplinary charges against Austin to gain an advantage in the class action.

Thus, Bertha could be subject to discipline.

### Reporting Misconduct

ABA Model Rule 8.3 requires a lawyer to report misconduct by another lawyer to the appropriate professional authority when the lawyer has actual knowledge of misconduct. The duty to report is limited to “material matters of clear and weighty importance,” which raise a substantial question as to the lawyer’s honesty or professional fitness. California has no ethics rule requiring a lawyer to report misconduct by another lawyer.

Here, Bertha heard the defense Austin planned to assert, and wrote him a letter stating if he presented that defense, she would report him to the state bar for engaging in a conflict of interest. As discussed above, it was debatable whether Austin engaged in any conflict of interest that raised a substantial question as to Austin’s honesty or professional fitness. Though he and his close friends served on a committee that furthered the rights of physicians, he never represented any of the physicians, and the committee did not engage in public advocacy.

Thus, since there was unlikely a substantial question as to Austin’s honesty or professional fitness, Bertha might not be required to report Austin to a professional authority.

In conclusion, it was debatable whether Bertha committed any ethical violations by threatening to bring disciplinary charges against Austin in violation of California Rules of Professional Conduct.

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