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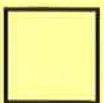
July 2010

California

Bar

Examination

Essay Question 2



2)

Ethical Violations of Anne

Duty of Loyalty

A lawyer owes a duty of loyalty to avoid conflicts of interest. A conflict of interest requires: 1. potential conflict; 2. actual conflict.

Duty of Loyalty-Current Client/Hap

A lawyer owes a duty of loyalty to her current client, and that she not take on a matter that is materially adverse to the position of her current client.

Here, H is A's current client because she is his tax lawyer. Now H is bringing two other parties to the meeting where they are all facing the same lawsuit; cleaning up the County hazardous waste site. They are facing joint and several liability. Hap(H) and Fred(F) are new clients to A. An ethical attorney would need to evaluate whether there is an actual or potential conflict of interest between the three parties potentially being represented jointly.

Potential Conflict of Interest

An attorney must advise all parties of a potential conflict of interest and in CA, this consent must be obtained in a signed writing. Again, there is a potential conflict of interest when there are new vs. current clients whose positions may be adverse to one another.

Here, all three parties are responsible for the waste clean-up. The county

has identified this as a priority, so the situation is imminent. As such, they have similar interests. However, A did not explain the potential conflicts to them at the meeting called by O, her current client. Instead, she witnessed the fact that H and F agreed to O's offer to pay her fees, and distributed the identical retainer agreements. As such she did not obtain their informed consent other than to advise them of the costs involved, which were being paid by O. Even though they signed the agreements, this does not answer the question as to whether they were properly advised of the potential conflict by A. The potential conflict would ripen into an actual conflict when and if one of the parties did not pay for their share of the clean up costs. At that point, County would impose joint and several liability. Again, A did not explain this properly to the two potential/new clients and to her current client.

Thus, there was a potential conflict of interest.

Actual Conflict of Interest

When an actual conflict of interest exists, a lawyer must withdraw or decline representation of one or all of the parties involved.

Here, and as discussed above, A owes a duty of loyalty, not to mention a duty to keep confidences of O inviolate. On the facts, O could well have competing interests separate from F, the former owner. Certainly he would have competing interests with that of H, who produced the subject matter of this case; the hazardous substances. County has advised them of their degree of culpability, and now O is trying to manipulate his lawyer, A, represent his interests to his possible advantage. A should have explained to H and F, who could have competing interests from O, that she declined to represent them because she owes the duty of loyalty to O, first and

foremost, as a current client.

Thus, A should have declined representation of H and F.

Unconsentable Conflicts-dual representation

A lawyer must undertake to decide when there is an unconsentable conflict, where no reasonable lawyer can accept or continue with the representation. Again, this compromises the duty of confidentiality as the lawyer must, first and foremost, protect client confidences.

Here, a reasonable lawyer might have evaluated each responsible (or culpable) party's position in the matter before accepting representation of all three parties. Instead, Anne simply handed out the identical retainer agreements, knowing that she would be paid for all three parties by her current, and wealthiest client, O. Moreover, O obtained the consent of H and F, not Anne, because he offered to pay her fees "in exchange" for A being the sole attorney on the case. In light of the impending judgment against them by County, this can also be seen as a coercive measure on the part of O. He may have been trying to gain an unfair advantage over them in the event that one of them would default on the site cleanup costs. A should have taken care to explain this fact to all three clients, because it may have been an unconsentable conflict.

As such, A likely did not act ethically in this situation, and should have seen the conflict amongst the three as unconsentable.

Withdrawal from representation

A lawyer may withdraw from representation as above, when there is an actual conflict. They may not, in CA, withdraw in the case of financial

hardship or make any sort of "noisy" withdrawal that would materially prejudice her client.

Here, this fact is not at issue because A did not attempt to withdraw from representation. In fact, she has been assured of payment by her current client, O. However, because there may be an actual conflict in this case, she likely should have withdrawn or declined representation of H and F.

Owen Paying Anne's Fee's

When a lawyer agrees to have a third party pay for current client fees, she must take care that it not affect her independent judgment and reasoning. In CA, that consent for payment by third parties must be obtained in a signed writing.

Here, O actually arranged for the meeting and offered to pay the attorney fees of H and F if they agreed to be represented by A. It is questionable whether A would be materially prejudiced by O's influence here. He is wealthy and wants to make sure that his interests come first. Further, will A give the requisite care and judgment allocated to F and H in the matter? O is the current owner and possibly stands to have the largest degree of culpability. A should have taken care to explain to H and F the ramifications of the bill being paid by O, and obtained their informed consent. She did not do so because she handed out the identical retainer agreements without explanation.

Thus, she is likely committing an ethical violation here, as well.

Anne-Tax Attorney

A lawyer owes the client a duty of competence to use the diligent skill, knowledge and care of an ethical attorney. The attorney may educate

themselves to become competent, or they may associate with another attorney (with informed consent of the client) to perform competently.

Here, A is the tax lawyer of O. A tax lawyer may not be very knowledgeable about environmental matters. In the case of H, O and F, this is directly related to matters involving environmental law. A must have the knowledge requisite to competently represent all three parties before she should have undertaken representation. On the facts, she is not knowledgeable enough to handle a matter of this scope until she takes the time to become competent, or associate with another attorney. Even though she obtained signed retainer agreements, it does not appear that she explained to them that she did not regularly practice in this field.

Thus, this is another possible violation of her ethical duties.