

ID: (CALBAR_7-16_Q4-6) July 2016 California Bar Examination

6)

QUESTION 6



DUTY OF LOYALTY

CONCURRING CONFLICT OF INTEREST



The issue here is whether Len has breached his duty of loyalty to ABC. An attorney has a duty of loyalty to each client that requires the attorney to provide judgement that is independent of of influence from external influences that may compromise an attorney's judgment in providing adequate representation. Further, an attorney has a duty to avoid actual conflicts that may arise and affect his representation of his client, or take reasonable steps to address a potential conflict of interest. Generally, a client may represent both sides of an issue, as long as no conflict arises.



Here, A potential conflict of interest exists in Len's representation of ABC. During Len's representation of ABC, Len is a member of Equal, a non-profit organization that seeks to enact a statute that would require all new residential developments to contain certain percentage of low-income housing. However, Len's current client ABC, is a corporation that seeks to challenge this statute through Len's help. The problem with Len's representation is that he secretly hopes ABC is not successful in its lawsuit. This would arguably consitutes Len's judgment in the matter to be compromised by his own bias and his membership with Equal. Therefore, a potential conflict arises because Len has chosen to follow through with the lawsuit challenging the statute on ABC's behalf and conflicts may arise later in Len providing independent judgment for his client.


Thus, since there is a potential conflict here, if not actual, Len must take necessary steps to address the conflict.

ADDRESSING THE CONFLICT

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 Under the ABA, in the event a potential conflict arises under an attorney's representation of a client, an attorney may still undertake representation if he reasonably believes that he can adequately represent his client, provides informed consent, and obtained consent in writing from his client. California does not use the reasonable lawyer standard and requires informed written consent from the client for actual or potential conflicts of interest. Also under California, if the conflict only concerns the attorney's personal interests or past relationship, then only informed written disclosure is required. 


 Here, Len may proceed with representation of ABC if he reasonably believes he can provide adequate representation independent of compromising influences, under the ABA. However, even if Len reasonably believes he can, Len has not informed ABC of his membership on EQUAL nor obtained written consent from ABC. Therefore Len has committed an ethical violation under the ABA. Under California, Len may not need to obtain informed written consent from ABC because the conflict interest concerns his own personal interest in having the statute supported by Equal passed. Therefore, only written disclosure would only be needed. Here, Len has not provided written disclosure to his client of his personal bias on the lawsuit against passing the statute.

Thus, Len would be liable for violating ethical obligations under ABA and CA.



DUTY TO REPORT



The issue here is whether Len was required to report ABC's conduct in filing false reports with the State Environmental Protection Agency (SEPA). Under the ABA, an attorney who represents a corporation and learns of illegal conduct by the corporation must take necessary steps to mitigate his client's conduct. An attorney in this situation must report to the highest authority of the corporation. If the corporation fails to take action against its illegal conduct, then the attorney must report out to the authorities. Under California, an attorney is similarly  required to report to the highest authority, however the attorney is not required to

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report outside to the appropriate authorities.

Here, Pat, the president of ABC, informed Len that he had filed false reports with the SEPA regarding the disposal of non-hazardous waste and was planning on continuing. Upon learning of Pat's disclosure, Len was required under both the ABA and California to advise Pat against filing further false reports and to disclose his conduct to the appropriate authorities. In alternative, Len should have reported to the highest authority of the ABC. Instead, Len took no action.

Thus, Len committed ethical violations in his failure to report Pat's conduct to the highest authority of ABC. Even if ABC decided to take no action, Len's failure to report to outside authorities was a violation under the ABA.

DUTY OF CONFIDENTIALITY

The issue here is whether Len was permitted or required to disclose Pat's conduct to avoid financial harm to ABC. An attorney is required to keep all communications between him and his client confidential. In representation of a corporation, this duty extends to the agents of the corporation who have the authority to communicate with the attorney. If an attorney learns during his representation of his client that the client plans to take actions that would result in financial injury either to the client or a third party, the attorney is permitted to disclose such information to avoid financial harm under the ABA. California has no comparable exception to disclosing information obtained through representation of a client. If the attorney finds that his own services are being used to further such injury, then an Attorney must withdraw.

Here, Len has learned from Pat that he plans to make further false reports to the SEPA and that such reports could make ABC liable for a substantial civil fine. Under the ABA, Len would therefore be permitted in disclosing such information to an appropriate source in order of avoiding financial harm to ABC through the civil fines. However under the California, Len would not be permitted to do so.

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Thus, Len would be permitted to disclose Pat's intention to file false reports in order to avoid financial injury to ABC.

DUTY TO WITHDRAW



The issue here is whether Len had a duty to withdraw from his representation of ABC. An attorney will be required to withdraw if an actual conflict of interest exists. Upon withdrawal, the attorney must notify his client of the withdrawal, advise the client to seek other counsel, return all unspent fees, and return the client's files and attorney's work product. An attorney may permissibly withdraw if he shows good cause.

Here, if Len's bias towards the passing of the low-income housing statute rose to a level of an actual conflict, Len would be required to withdraw and provide adequate notice to ABC. It may be argued that it did since Len did not want the lawsuit to succeed.

Thus, if actual conflicts exists, Len must have withdrawn under ABA and CA law.



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