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1. Attorney-Client Relationship

Attorney-Client Relationship

An attorney client relationship forms when the attorney agrees to represent the client in a legal matter. Such a relationship exists even with prospective clients.

Corporation as Client

When an attorney agrees to represent a corporation, she is first and foremost, representing the corporation as the client, and not the individual officers or directors. When an attorney represents a corporation, she must indicate to the officers, directors or any employees that the corporation is the client.

Here, Linda may argue that she was representing her personally because she had contacted Linda and asked her to develop a formal employment agreement for her. However, it may be argued that when she agreed to accept the matter, she was hired as Nonprofit's attorney, because she was told by Ellen that Nonprofit would like to retain her to help develop a formal employment agreement with Ellen. It may be argued that her representation was based on making Ellen an official director of Nonprofit, so Linda was representing Nonprofit, not Ellen on an individual basis.

Thus, it is likely that Linda formed an attorney-client relationship with Nonprofit, not Ellen. In addition, Linda may have violated the following ethical duties at the time the attorney-client relationship was formed.

Duty of Loyalty

Under ABA and CA Rules of Professional Conduct ("CA Rules"), an attorney owes a duty of loyalty to her client. Under this duty, the attorney must act in the best interests of the client, as well as avoid any conflicts of interest.

Conflict of interest arises when the representation of a client is directly adverse to the interest of the attorney's other clients or former clients. There are two types of conflicts of interests: actual conflicts and prospective conflicts. An actual conflict arises when the representation of the client is materially limited by the interest of the attorney, another client or a third party. A prospective conflict arises when the representation is directly adverse, but it not yet materially limited by the interests of the attorney, another client or a third party.

Here, it is likely that a prospective conflict arose, when Linda agreed to accept the matter. Here, Linda is supposed to represent Nonprofit, as the client, but only spoke to Ellen about the matter, not the highest ranking officer who was authorized to speak on behalf of Nonprofit. However, it may be argued that it was impossible to have another officer to speak to Linda about this matter because, at the time, Ellen was the only employee, and she had no official title. But we are told that Nonprofit was governed by a board of directors, which one of them holds position of board chair. It may be argued that the board chair is the highest ranking officer of Nonprofit, and that if Linda was representing Nonprofit as her client, then all communications regarding the representation must be through the board chair, not Ellen, who held no title prior to her contacting Linda. If Linda was representing Nonprofit, then its interests are directly adverse to Ellen's interest.

However, under ABA, an attorney may cure the conflict of interest if he reasonably believes that he can competently represent the client, it is not prohibited by ABA rules or law, and the client gives informed written consent. Under CA rules, there is no reasonable belief requirement, and the attorney must give written disclose to the client re. any conflicts.

Here, it is unlikely that the conflict is cureable, given that Linda is representing Nonprofit, but her actions would likely benefit Ellen on an individual basis.

Thus, Linda likely breached the duty of loyalty

2(a). Linda's Ethical Obligations re. Ellen's Employment Agreement.

Fee Agreement

Under ABA, the fee agreement is permitted to be in writing, stipulate the attorney fees (whether it is based on hourly rate or percentage), whether the expenses will be subtracted before or after the attorney fees, and the fees must be reasonable, based on the attorney's skill, experience, as well as the amount of time spent on the case. Under CA Rules, all fee agreements must be in writing unless the fee is less than \$1,000, it is regular course of work for a regular client, or the client is a corporation. Under CA rules, the fees must not be unconscionable.

Here, Linda may have violated the fee agreement rules. Here, we are told that Linda agreed to accept the matter but did not memorialize the retainer in writing. Under ABA rules, it is likely she did not violate the rule because having a written retainer agreement is only permissive, so long as the attorney fees are stipulated and the fees are reasonable based on Linda's skill and experience, as well as time spent on the case. Assuming that the fees are stipulated and reasonable, Linda likely did not violate the ABA rules. However, it may be argued that Linda may

have violated the CA rules on fee agreements. Here, CA rules require fee agreements to be in writing. Here, it is likely that Ellen is not a regular client of Linda's, since this involves employment agreement for a newly formed corporation. However, Linda may argue that there is no violation. Based on the facts, we can assume that the total fees may not exceed \$1,000 (given that it is drafting an employment agreement). Also, if Nonprofit was the client, instead of Ellen, then the fee agreement did not need to be in writing. It is likely that Linda may not have violated the fee agreement rules under ABA or CA rules. However, if Linda had memorialized the retainer agreement in writing, she would not be in violation of the CA rules (if it was deemed that Ellen, not Nonprofit, was her client.)

Thus, Linda likely met her ethical obligations regarding Ellen's employment agreement.

2(b). Linda's Ethical Obligations re. Ellen's Request for Confidentiality re. Source of Survey Data.

Duty of Loyalty/Conflict of Interest

See rules on duty of loyalty and conflict of interest above.

Duty of Confidentiality

Under ABA, an attorney is required to keep all client information confidential. Under CA rules, the Attorney Oath stipulates that the attorney must keep all the secrets of the client. Under both ABA and CA rules, only the client must break confidentiality.

Here, it is likely that Linda may have breached her duty of confidentiality

Duty of Diligence

Under ABA and CA an attorney has the duty to represent her client zealously, and keep her client informed on all matters relating to the representation. Here, it is likely that Linda breached her duty of diligence to Nonprofit, if she does not inform the board about Ellen's source of survey data.

Thus, Linda likely breached her duty of diligence to Nonprofit.

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