

QUESTION 6

Len, an attorney, is a member of Equal Ownership Inc. (Equal), a nonprofit organization that seeks to help low-income families purchase homes throughout the state. Len does not represent Equal as an attorney. Equal helped to get a statute enacted that requires that all new residential developments contain a certain percentage of low-income housing.

ABC Development Corp. (ABC) is a corporation that wants to challenge the statute. Pat, the President of ABC, asked Len to represent ABC and Len agreed. Len does not personally agree with ABC's objective, but moves forward with the representation nonetheless by filing a complaint challenging the statute. Len personally thinks the statute is a good law and secretly hopes that ABC is not successful in its lawsuit.

During the course of Len's representation of ABC, Pat informs Len that he (Pat) has filed false reports with the State Environmental Protection Agency regarding the disposal of non-hazardous waste, and is planning to file another false report next month. Filing a false report makes a person and his or her employer liable for a substantial civil fine. Len does not take any action with respect to the impending filing of the false report.

What ethical violations, if any, has Len committed? Discuss.

Answer according to ABA and California authorities.

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Disagreement with Client Objective

The ABA model rules restrict attorneys from representing clients whose objectives they find unacceptable. Len is a member of nonprofit that helped enact the very statute his present client seeks to challenge. While this is not result in a per se violation of the ABA rules, Len does not appear to have rescinded his membership with Equal. He also personally thinks the statute is a good law. He is not forbidden from all personal disagreements with ABC's objective of challenging the low-income housing statute, but must withdraw if he cannot accept the possibility of ABC prevailing over the statute with his counsel.

Len secretly hopes that his client is not successful. This is a much stronger indication that Len is indeed violating this ABA model rule by continuing with the representation.

The CA professional ethics rules do not expressly forbid attorneys from representing clients whose objectives they find unacceptable, but still requires attorneys not to represent clients in cases where they are unable to do so competently. Len's secret hope of his client's defeat can foreseeably impair his ability to provide ABC with adequate representation. If the CA state bar learns that Len secretly hopes his client will lose, he may be subject to disciplinary action for proceeding with the representation.

Duty of Loyalty

Len has a duty of loyalty to his clients -- past, present, and future. Len can argue that he is and never was legal counsel for Equal, and thereby did not breach any duty of loyalty to ABC. While this may demonstrate that he is not in clear violation of the rules, ABC can complain that Len failed to notify it of his prior and concurrent membership with the very sponsor organization of the statute

ABC seeks to defeat.

Conflict of Interest

Under the ABA rules, proceeding with representation of a client may result in a conflict of interest, an attorney has a duty to notify the conflict to all the conflicting parties. In CA, the attorney must also obtain informed, written consent from the parties. Again, Len does not appear to have legally represented Equal, but his continued membership in the contested statute's sponsor organization may give rise to a conflict with ABC. He does not seem to have disclosed this potential conflict to either party, which may subject him to discipline under the CA rules.

Duty of Candor

Under both the ABA and CA rules, a lawyer has a duty of candor and may be disciplined for offering false information to any party and the courts. It's unclear whether any of Pat's previous false reports were filed during Len's representation, but in any case he has clearly done nothing with respect to the impending false report. If the CA bar determines that the state EPA falls within the scope of the tribunals requiring candor by lawyers, Len may be subject to discipline. He might also have a duty to counsel the organization (which could be through its board members rather than Pat) to cease any false report filing.

Client's Use of Legal Services to Violate Law

The ABA rules require a lawyer to withdraw from representation where a client has repeatedly and continuously used the lawyer's services in furtherance of violating the law. The CA rules permit a lawyer to withdraw when a client is failing to comply with the law. Here the president of the client organization informs Len that he has filed false reports to the state EPA in the past, and plans to do so

again next month. Len does nothing.

Under the ABA rules, Len has a duty to counsel ABC not file or allow Pat to file false reports with the state EPA, or to withdraw from representation if the client continues to do so. In the case at hand, Len does nothing. He might not be required to withdraw from representation in CA, but his failure to counsel ABC its president to comply with the law may cut against other rules.

Notification Exception to Attorney-Client Privilege

Under the ABA rules, a lawyer must withdraw or provide notice to prevent a client from conducting imminent, serious bodily harm or death. Under the CA rules, a lawyer may or may not disclose a client's imminent threat of harm to another party. In the case at hand, Pat's false report regards the disposal of non-hazardous waste. There does not seem to be any credible risk -- imminent or otherwise -- to a specific party. This rule is better exemplified by scenarios where a client informs their lawyer about a plan to seriously injure or kill an identifiable target, and the lawyer's dilemma between his duty to the client and moral obligation to the impending victim.

Note that in this situation, Len is representing ABC, and its president Pat is the one filing false reports with the state EPA. Len's duty is to ABC as an organization, not to Pat individually. Accordingly, he may not necessarily be in violation of the rules if he determines that correcting the information with the EPA will have a positive outcome for ABC, but certainly cannot further the agency's reliance on false information. ABC's corporate structure is not apparent, but Len may disclose Pat's filing of false reports to the board without violating a privilege.

Question #3 Final Word Count = 883

(Question 6 continued)

ID: 02484 (CALBAR_7-16_Q4-6) July 2016 California Bar Examination

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