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Linda's (L) Potential Ethical Violations

Under both the ABA model rules (ABA) and California Rules of Professional Responsibility (CA) lawyers are bound to the highest duties to act ethically at all times, in compliance with the rules that govern their professional responsibility. Failure to comply with these rules subjects the lawyer to criminal and civil liability, as well as discipline by the local state bar and possibly disbarment, fines or suspension.

Scope of Representation

An attorney decides the methods of how to accomplish the clients goals (means). Here, Clint (C) hired L to represent him in a personal injury (PI) suit against Dan (D). C want to recover for his injuries and L will decide the best legal methods to do so. There are no facts to indicate that L is not experienced in PI cases so her representation of C is presumably within the proper scope and not a violation.

Duty of Financial Integrity

Fee Agreement - Contingent

Under both ABA and CA rules, attorneys may enter into contingency fee agreements, but may not do so for any family law or criminal cases. This is a civil PI case and a contingency fee agreement is allowed. However under this type of fee agreement, the attorney has a duty to inform the client of the costs associated with the case. The attorney fee percentage must not be unconscionable or outside the normal range of attorneys in that area with that type of skill.

ABA allows attorneys to front those costs but the client is ultimately liable for them. CA requires that any fee agreement over \$1000 must be in writing and the details fully disclosed, such as expected costs, amounts, hourly rates, and who will pay for the costs if they are incurred. The writing must also be signed by the client. Failure to write the agreement is a violation.

Over \$1K

Here the settlement offer is \$100,000 so the fee agreement should be in writing, but there are no facts that there is a writing because C "orally agreed" to this fee arrangement. Even if the initial agreement was oral CA requires that it be in writing and signed. This is a violation because there is no signed writing. The agreement must define the parties rights and responsibilities and specify costs, reimbursement and other particular rights at any stage of the case. The agreement should also define the scope of representation. Failure to write and sign

this agreement is a violation because it is over \$1K.

Contingency upon Recovery

If a fee agreement is contingent the fee agreement should define what "recovery" is. Is it just winning at trial or winning a settlement? Client must know what is "recovery" and what the potential for recovery is. Failure to define this is another violation of CA rules on fee agreements that require particularity and specificity. There is not writing and no specificity or particularity which is a violation.

Unconscionability

A fee agreement is unconscionable if it is taking unfair advantage of a less sophisticated party or is outside the normal range of those types of agreements on those types of cases. While it is not unheard for attorneys to take 30% or even 40% of a settlement, it seems far outside the range to take 50% especially when C has no money and can't afford to pay L upfront. C is injured and possibly will have his earnings capacity reduced. L taking 50% or \$50K seems unconscionable as C is likely not sophisticated enough to know that this is abnormal for PI cases. Unless there are facts that this percentage is the norm, a 50% contingency fee is unconscionable is a likely violation of CA fee agreement rules.

Costs Disclosed with Specificity

The oral agreement is that L gets 50% "less any costs L incurred". However, CA requires that costs be estimated with as much particularity up front in the written agreement so C may decide if the costs are too great to pursue the case. There are no facts that L disclosed the costs or the prices.. If L is in the business of PI cases, she knows the typical costs associated with this type of case. She had a duty to disclose those up front so that C was fully informed before entering the fee agreement. This agreement also violates because it gives L full discretion to spend as many costs as she chooses. She could conceivably use of the remaining \$50K in costs leaving C with nothing or very little. This is another violation of CA rules on fee agreements.

Duty of Competence

Attorneys are to act with competence, and all the skill, knowledge and professionalism required to provide the legal services. ABA requires that the attorney positively and affirmatively possess all the skills for competent representation while CA rules are negative in that it bars attorneys from being incompetent or acting dishonorably and dishonestly in the representation of clients. CA requires attorneys to be mentally and emotionally and physically able to zealously advocate for clients.

Here L "before she did substantive work" on the case, received an email to settle from the insurance company. L was "thrilled" and accepted. L did literally no work, which is a complete violation of the duty of competence.

Duty of Communication

Both ABA and CA require attorneys to communicate with their clients about any relevant issues that are material to the case. Settlement offers are always relevant and material to the case. Attorneys are required to present all settlement offers to clients and may not accept on behalf of their clients without first presenting the offer and discussing options. Clients may give attorneys express permission to accept offers within certain parameters but attorneys must still disclose the offer and discuss with clients.

Here L did not tell C about the offer of \$100,000. C had no opportunity to find out if this is a good offer or a sign that his case is actually worth much more because insurance companies are known for offering low offers out the gate. The whole reason one hires an attorney for a PI case is to avoid being taken advantage of by the insurance company. P accepted the offer without talking to C so this is a clear violation of both ABA and CA rules.

L later told C about the settlement and he was "relieved" it settled so quickly. However facts do not indicate that L told C she did no substantive work. L lets C believe she did work and incurred costs. This is a clear misrepresentation and lie by omission. L should have told C she had no work to do or did very little (1 email) and L should have greatly reduced the percentage she took to reflect the little work she did. By not telling C the truth she also violated the duty of honest communication.

Duty of Loyalty

An attorney's job is to advocate zealously for her clients best interest. Here, in addition to avoiding conflicts of interest, L must do what is best for C. There is no evidence in the facts that taking the first and likely low offer is what is best for C. L did no work, so L did not zealously advocate. In fact, L did not even make a demand because insurance company offered first. L is not loyal to C and this is a violation of both ABA and CA rules.

Duty of Fairness

Attorneys must be fair in their representation of clients and fair to opposing counsel also. Here, as discussed above it is likely very unfair to C for L to take 50% of the settlement and only give C the other 50% minus costs. This is a violation of CA and ABA requirements of fairness.

Attorney Trust and Business Accounts

Attorneys must keep client funds completely separate from their business accounts. There must never be commingling of the attorney business funds with client funds, with the small exception that attorneys may deposit the exact amount needed to cover bank fees on the client trust account.

Here the insurance company gave L a check payable to L for \$100K for the settlement and L deposited it into her firm's business account instead of a separate client trust account. This is a clear violation of both CA and ABA rules.

Cost Accounting Duty

Attorneys must account for all costs to clients.

Here, L mailed C his half (\$50K) less costs. The facts do not indicate what those costs are or that C received an accounting of them. There are also no facts that tell us how much costs were what the net amount is that L sent to C. In fact, it is hard to imagine how one single penny of costs could have been incurred by L because she did no substantive work on this case. It appears that her only "work" was an email accepting the first settlement offer, which she did not even solicit with a demand letter. There should be no costs at all. Without more details, it appears that any costs were in violation because L did no substantive work. At most there may be cost of postage to send L his check.

Because there was no accounting of reasonable actual costs incurred, L has violated both ABA and CA rules.

Accord and Satisfaction

Attorney fee agreements are governed under contract (K) law. When a party threatens to sue the other or breach, as C has done here with L, the parties may come to an agreement (accord and satisfaction A & S) to avoid suit if both parties give consideration. A&S agreements must be in writing under CA law.

Here the consideration is that L is giving up \$10,000 of her fee, and C is giving up the right to sue L for taking too many fees or costs from his settlement. The A & S is in writing because C accepted and "executed" indicating C's signature on the A & S. There are no facts to indicate that L signed the agreement however.

Even if the A & S is a valid agreement, this does not absolve L or remove L's liability for her many ethical violations. It simply removes her liability for suit from C and is a total violation.

State Bar Discipline of Attorney for Ethical Violations

Because L has violated many ethical rules and duties as outlined above, L is still subject to discipline by the CA State Bar. This could include fines, suspension, and a requirement of restitution to C. Or it could simply be a reprimand. If this is one of other past violations of the ethical rules, L may even be subject to disbarment, though the facts do not indicate any previous history or professional rule violations. As stated above, the A&S with C will not protect L from discipline for her ethical duty violations.

However, if C does not report L, because he agreed not to in the A&S, L may escape punishment. Merely escaping discipline does not cure her violations and does not absolve her if C does choose to report her later.

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