

2)

Unless specifically noted otherwise, the ABA and CA rules are the same.

1. With Whom did Linda establish an Attorney Client Relationship and what ethical violations commit?

Attorney Client

Attorney client relationship arises when the attorney is contacted by the client and signs the agreement that the lawyer will represent the client. All communication that had taken place prior to the formation of A-C relationship will still be protected under duty of confidentiality.

When the attorney represents an organization, then his client will be the organization itself, not the directors or officers or employees who contact the lawyer requesting for representation.

Here, despite that L was approached by E, L had formed an A-C relationship with the Nonprofit ("N") because E specifically stated that N would like to retain L to help develop a formal employment agreement.

Thus, the attorney client relationship had formed between L and N.

Note that A-C relationship is subject to restrictions under ethical rules (see below).

Duty of Loyalty

The lawyer owes a duty of utmost loyalty to the client. The lawyer must not engage in self dealing and put his client's interest at the foremost importance.

The lawyer also has a duty to avoid conflict of interest. The lawyer must not represent a client whose interest is directly adverse to his current matter or client (present Conflict of interest ["COI"]). The lawyer must avoid representation if there is significant likelihood of material limitation that his representation will be limited by current interest to the third party, former client, or witness (future COI).

Under ABA rules, the lawyer may still represent despite the COI with written informed consent given by the client if: 1. the lawyer reasonably believes that his representation will not be materially limited; 2. the lawyer's representation is not directly adverse to the matter that he is

representing right now; and 3. the representation is not illegal.

Here, L had a duty of loyalty to the client, N. There was no COI interest at the time of the formation of A-C relationship because he was simply retained for the purpose of creating a formal employment agreement with an already existing employee. While some may argue that employers and employees will be negotiating for salary and benefits, they may be in an adversarial relationship, this is unlikely to be the case because N was governed by a volunteer board and had already hired employed E unofficially. Simply developing a formal agreement to give someone an official title is unlikely to be directly adverse to the client's interest.

Furthermore, there was no significant likelihood of material limitation **at the time of formation** because as stated above, L was retained only for developing a simple employer agreement.

Thus, under ABA rules, L will not be in violation of duty of loyalty.

Under CA rules, the lawyer must fully disclose in writing any personal, business, legal relationship with the involved parties or witnesses to the client. If there is a significant risk of material limitation of representation, then the client has to give informed written consent.

Here, there were no preexisting relationship between L except for the possibly that L had represented nonprofits in the past. However, mere experience alone does not state that there was an existing relationship with this client.

Thus, under CA rules, L will not be in violation of duty of loyalty.

Duty to the Organization

The lawyer owes a duty of loyalty to the organization, and not the directors of the officials. When there are any conflicts between the interests between the employee and the organization, the lawyer must tell the employee that his allegiance is to the organization, and that he can only advise the employee to seek outside counsel.

Here, **at the formation of the A-C relationship**, there was no conflicting interest between E and L. However, L may have ethical issues later on in the negotiation phase (see below.)

Thus, no violation of duty to the organization at the time when relationship was created.

Fees/Retainer Agreement

Lawyer's representation has to be supported by a written agreement in the form of a retainer, which includes the types of services that will be provided and the fees that will be paid.

Under ABA, the fees shall not be unreasonable. Unreasonable is measured by the amount of work that is required to perform the job, the difficulty of the work, preparation needed, and the lawyer's experience.

Under CA, the fees shall not be unconscionable. Unconscionable is measured by whether there was fraud or illegality, such as misrepresentation in the agreement.

Here, the facts state that L did not memorialize her retainer agreement in writing. This would cause potentially grave issues as to lawyer compensation and what is expected from the lawyer's service once the representation begins.

Thus, L violated his duty to have a signed written retainer agreement that contains the types of services and fees.

2.a. Linda's ethical obligations with regards to Ellen's Employment Agreement

Duty of Competence

The lawyer owes a duty of competence to the client.

Under ABA, competence is measured by the thoroughness and preparation by the lawyer, the skill and knowledge of the lawyer.

Here, it seems like L had the competency to carry on the development of employer agreement because L was a lawyer with experience in representing small businesses, including nonprofits.

Thus, L did not violate duty of competence under ABA rules.

Under CA, competence is measured by the lawyer intentionally, recklessly, with gross negligence failing to act competently in a repeated manner.

Here, there's no clear indication that L had repeatedly failed to act competently. However, L's inability to refuse to E's idea of using the salary that E had researched, and also, E's drafting of the employment agreement may possibly indicate that L had failed to act competently because it was gross negligence to let a layperson develop a legal document.

Furthermore, it seems like L had simply accepted E's request to keep the negotiation terms that

were more favorable to E a secret.

Thus, considering these facts combined, L has likely violated CA duty of competence by acting with gross negligence in a repeated manner.

Scope of Representation

The lawyer decides the legal strategy of representation, whereas the client makes the ultimate decision regarding legal issues. For instance, in civil matters, the client decides whether to take the settlement, or in criminal matters, the client decides whether to take the plea.

Here, E drafted employment agreement initially and gave it to L. E also researched the proposed salary on her own and created provisions that were more favorable to E than other typical employment agreement. L should have been strict about the forming the legal strategy during representation. L should have been clear that it was her responsibility to draft the agreement, and to compute the salary. However, L failed to do so.

More importantly, L was retained by N, not E. L's allegiance was to L and she had to consult N regarding the negotiation.

Thus, L has violated the duties regarding her scope of representation.

Duty of Diligence

Under ABA, the lawyer has a duty to act with diligence and promptness.

Here, no facts state that L failed to act with diligence or promptness.

Under CA diligence rules, the lawyer may not negligently create undue delay regarding a legal matter.

Here, likewise, there are nothing that specifically states that L caused undue delay. However, if L had delayed coming up with an initial draft of the employment salary, and if that is why E had provided the initial draft, then it could be a cause for a violation of duty of diligence under CA rules.

Thus, only under CA (not under ABA), L may be in violation of duty of diligence.

2.b. Linda's ethical obligations with regards to Ellen's request for confidentiality

Duty of Confidentiality

The lawyer may not disclose anything regarding the representation of the client, subject to exceptions. This includes any information that was conveyed to the lawyer prior to accepting the representation that had taken place during the interviewing phase.

The lawyer is allowed to disclose confidential information when: 1. there is client's consent; 2. to avoid substantial bodily harm or injury; 3. when the lawyer is being sued and is using it for his own defense; and 4. when the law requires.

Here, it is important to note that the duty of confidentiality lies to the client, which is the Nonprofit. L does not owe a duty of confidentiality to E because E was not the client (see above under duty to organization). When E asked L not to tell N's board about the source of the survey data, she had no duty to protect the confidentiality of E. Furthermore, it was not communication that took place prior to accepting representation.

Instead, L had a duty to communicate to her client, N (see below).

Thus, no duty of confidentiality issue took place when E requested for confidentiality because E was not L's client.

Duty of Communication

The lawyer has a duty to the client to keep the client up to date and completely informed.

Here, L should have informed the board of N that there were suspicious and dubious terms included in the contract that may have benefitted E over N.

Thus, L had a duty to communicate this information to the client, N.

Duty to Organization (Reporting up/out)

See above for general rule.

When there are issues within an organization, under ABA, the lawyer has a duty to report up to the higher chain of command such as the President or the Directors. If not, then the lawyer may also report out.

Here, the lawyer had a duty to report up in terms of the odd negotiation for employment that was taking place with regards to E. Because E was the only employee, and N did not have any real checks or balances within the organization (e.g. governed by a volunteer board), L had a duty to report up to whoever that could respond to this matter. Since E was likely to be the president, L should have reported to the board chair.

Nonetheless, it also seems like the board chair may have been unduly influenced already by E, considering that he asked L to invite E to the board meeting to join their discussions. Considering that this was a nonprofit corporation, it may be important for the public to know what exactly is going on within the organization. Under ABA, it may be advised that L report out to proper authorities.

Thus, under ABA, L should have reported out.

Under CA, the lawyer may report UP, but NOT OUT.

Here, L could report up to the board of directors, but could not report out to appropriate authorities.

Thus, no violation under CA rules as long as L had reported to the top of the command--the board.

Withdrawal

Mandatory

The lawyer has to withdraw mandatorily under these circumstances: 1. continued representation will lead to ethical violation; 2. under CA, the representation is only for frivolous lawsuits or for the client to maliciously injure someone else through the case; 3. when the lawyer gets fired; 4. when the lawyer knows that continued representation will lead to substantial bodily injury or harm; 5. and when the lawyer is physically or mentally not competent.

Here, there seems to be high likelihood that his continued representation will lead to ethical violation because the board chair specifically asked L to invite E to attend the board meeting and join their discussions. She would be violating duty to the organization, loyalty, competence just to name a few. Further, if the Board was indeed on the same side as E in abusing the nonprofit money, then her representation would be a violation to the duty of the decorum to the public as well (which holds that lawyers have to act professionally).

Thus, the lawyer had a valid reason for mandatory withdrawal.

Permissive

Lawyer is permitted to withdraw for good cause, and would not cause undue delay.

Here, the lawyer had good cause.

Thus, L was permitted to withdraw as well.

Procedures

L has to return all papers and payments. Under CA, it's not legal to hold papers.

Question #2 Final Word Count = 2040

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