

#### Question 4

Austin had been a practicing physician before he became a lawyer. Although he no longer practices medicine, he serves on a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. The committee develops recommendations, but its members do not personally engage in public advocacy. Austin is a close friend of several of the other physicians on the committee, though as a lawyer he has never represented any of them.

In his law practice, Austin represents BHC Company, a health insurance provider. BHC has been sued in a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay, and denial and reduction of reimbursements for medical services. Austin initially advised BHC that he was not confident it had a defense to the lawsuit. After further research, however, Austin discovered that a stated policy of the health care law is the containment of health care costs. He advised BHC that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He explained that he would argue for a modification of existing decisional law to allow such a result based on public policy.

When Bertha, counsel for the class of physicians, heard the defense Austin planned to assert in the lawsuit, she wrote him a letter stating that if he presented that defense she would report him to the state bar for engaging in a conflict of interest.

1. What, if any, ethical violations has Austin committed as an attorney? Discuss.
2. What, if any, ethical violations has Bertha committed? Discuss.

Answer according to California law and ABA authorities.

## Answer A to Question 4

### **1. AUSTIN'S ETHICAL VIOLATIONS AS AN ATTORNEY**

#### Duty of Competence

An attorney owes to a client the duty of competence. Under the ABA Rules, an attorney must possess the legal knowledge, skill, thoroughness, and preparation of an average member of the profession. Under the California Rules, an attorney must have the requisite diligence; learning and skill; and mental, emotional, and physical ability of an average member of the profession.

Here, the facts do not state Austin's particular area of legal practice. However, there is nothing in the facts to suggest that Austin is not competent in the present matter. Thus, Austin has not violated his duty of competence.

#### Duty of Confidentiality

An attorney owes to his client a duty of confidentiality, whereby the attorney may not disclose the client's confidential communications made during the representation either during or after the termination of the representation.

Here, the facts indicate that Austin has not represented any of the physicians in the medical association committee, nor has he represented any of his physician friends (to the extent that they are not part of the association committee). Thus, it does not appear as though Austin has obtained any confidential information from any prior representation of any of the parties involved in this action.

As such, it does not appear that Austin, as of yet, has violated any duty of confidentiality.

#### Duty of Loyalty

A lawyer owes to his client an ethical duty of loyalty. Pursuant to this duty, the lawyer owes to his client a duty of utmost trust and confidence. A lawyer may violate his duty of loyalty to his client if he has a concurrent or former conflict of interest with the client.

## **Concurrent Conflict**

Under ABA Model Rule 1.7, an attorney must not represent a client where the attorney represents another client whose interests are directly adverse to the prospective client, or where there is a significant risk that the attorney's services will be materially limited due to the attorney's present or former personal relationships or interests or due to the attorney's representation of a former client. An exception to this rule exists where the attorney (1) reasonably believes that he can competently and diligently represent the client in the face of any such conflict; (2) the conflict does not require the attorney to advance a claim for the client in issue against another client in the same proceeding; (3) the representation is not prohibited by law; and (4) the clients give informed, written consent. The California Rules of Professional Conduct (CRPC) differ in three ways: (1) they apply to both present and potential conflicts; (2) they do not have a "reasonable belief" standard as under the ABA Rules; and (3) the attorney needs only give written disclosure to the client---as opposed to informed, written consent---where the conflict relates to the attorney's personal interests (actual conflicts between clients require informed, written consent). Finally, an attorney must obtain the client's informed written consent and comply with the above exceptions each time a potential conflict arises.

### *Austin's Service on a Local Medical Association*

As a general rule, an attorney's mere service on a corporate board of directors or a local association does not in and of itself violate any ethical rules. However, such membership is highly discouraged due to the high risk such membership poses in terms of creating conflicts of interest in future client representation.

Thus, while Austin's membership in the association is not a per se ethical violation, it may cause a concurrent conflict to arise with respect to his representation of BHC, as described below.

### *Austin's Representation of BHC Company (BHC)*

Here, Austin is presently representing BHC in defending a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay and denial and reduction of reimbursements for medical services. This poses a potential conflict of

interest between his representation of BHC and Austin's membership on the local medical association committee, as well as Austin's prior occupation as an attorney and close friendship with many physicians on the committee. The issue then becomes whether Austin's personal relationships and interests here create such a conflict as to pose a significant risk of material limitation on his services.

That Austin serves on a committee that specifically works to further the rights of physicians with respect to fair compensation by health care providers is in direct conflict with his defense of BHC in a matter involving delay and denial of reimbursements for medical services. Thus, Austin's personal interests do appear to pose a significant risk of materially limiting his representation of BHC, as it could be very difficult for Austin to put aside his personal beliefs and convictions in order to aid BHC's defense. This is further supported by the fact that the association may publicly ostracize Austin's representation of a perceived "enemy." Thus, Austin must meet the exceptions enumerated above.

#### Reasonable Belief (ABA)

There are no facts directly revealing Austin's reasonable belief that his personal interests will not impede his diligent and competent representation of BHC. In fact, Austin's initial advice to BHC prior to any research was that he was not confident that BHC had a defense. The facts are unclear as to Austin's motivation behind this statement, but to the extent that the statement was based on his personal beliefs rather than a disinterested professional legal opinion, this statement likely makes Austin liable for discipline.

After further research, however, Austin appears to have formed a reasonable belief that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He further expressed his belief that he could make an argument for a modification of existing decisional law to allow such a result based on public policy. This may reflect Austin's reasonable belief that he could in fact represent BHC competently and diligently. Thus, the "reasonable belief" requirement under the ABA rules could likely be met.

### Assertion of Claim Against Another Client/Not Prohibited by Law

Because the facts indicate (as discussed in more depth below) that Austin has not represented any of the physicians in the committee previously, nor does he presently represent any of them now, Austin's representation of BHC will not require him to assert a claim on BHC's behalf against any of his present clients. Further, there is no indication that Austin's representation of BHC is contrary to any law.

### Informed Consent

As stated above, under the ABA Rules, an attorney must obtain the client's informed, written consent from his client to proceed in the face of a personal conflict that poses a significant risk of materially limiting his services to another client. Under the CRPCs, the attorney needs only make written disclosure of the conflict.

Here, Austin likely fails to meet his ethical duty under both the ABA and California Rules. There are no facts indicating that Austin either obtained BHC's informed, written consent nor gave BHC written disclosure of his personal relationship with his physician friends, his prior occupation as a physician, or his membership in the medical association committee. Indeed, there are no facts that Austin made such disclosures at all, even orally.

Thus, because Austin neither obtained BHC's informed, written consent to proceed with the representation nor gave BHC written disclosure of his personal conflicts, Austin is subject to discipline under both the ABA and the California Rules.

### **Former Conflict**

Under the ABA Rules, an attorney who has represented a former client may not thereafter represent another client in the same or a substantially related matter where the representation of the current client would be materially adverse to the former client, unless the attorney obtains the former client's informed, written consent. The California Rule is substantially the same.

Here, although Austin serves on the local medical association committee that works to further the rights of physicians to be compensated by health insurance providers, the facts indicate that Austin has never represented any of the other physicians in the committee.

Thus, for the purposes of the former conflict rule, because none of the physicians are former clients of Austin's, Austin has not violated his ethical duty of loyalty to BHC for purposes of the former conflict rule.

### Duty of Candor to the Court

Under the ABA Rules, Federal Rule of Civil Procedure 11, and the California Rules, an attorney may not bring a claim that is not warranted under existing law or that is meant to harass or delay.

Here, Austin's initial belief that BHC did not have a valid defense may reflect Austin's belief that BHC did not have a valid claim that Austin could assert in good faith. However, the facts later indicate that after further research, he believed he could make an argument for a modification of existing decisional law to allow such a result based on public policy. Under the ABA Rules and the California Rules, an attorney is permitted to bring an action for a good faith proposal to modify existing law. Here, the facts do not indicate that Austin's belief that he could make an argument for a modification of existing decisional law was in bad faith or was intended to harass or delay.

Thus, Austin should not be subject to discipline for bringing an action to argue for a modification of present law.

## **2. BERTHA'S ETHICAL VIOLATIONS**

### Reporting Ethical Violations

Under the ABA Rules, an attorney must report another attorney's ethical violation to the state bar. Under the California rules, reporting ethical violations is only permissive (not mandatory), unless an attorney knows of the other attorney's misconduct and the attorney fails to report the conduct to prevent such conduct from occurring or continuing.

Here, Bertha has become aware of Austin's engaging in a conflict of interest. As such, under the ABA Rules, Bertha is required to report Austin's ethical violation to the state bar. In California, Bertha ordinarily would not be required to report Austin's violation, but she could if she were so inclined. Here, however, it appears that Austin intends to proceed with his representation of BHC in the face of a conflict. Thus, Bertha will likely be required to report Austin's continued violation of an ethical rule.

#### Threats to Obtain an Advantage in a Civil Case

Under the ABA Rules, an attorney may threaten criminal or disciplinary action against an attorney, so long as the charges are sufficiently related to the civil action. Under the California Rules, an attorney may not threaten criminal, administrative, or disciplinary action to gain an advantage in a criminal case.

Here, as discussed above, Bertha is likely under a duty under both the ABA and California Rules to report Austin's violation. Further, Bertha's letter to Austin is manifestly a threat, as she stated that she would report him if he presented a specific defense in the case. Under the ABA Rules, Bertha's threat to Austin likely does not violate an ethical duty, as the threat is reasonably related to the litigation, i.e., Austin's conflict of interest in this particular case. Under the California Rules, however, while Bertha may---and likely must---report Austin's conduct to the California State Bar, Bertha is nevertheless absolutely prohibited from using that fact as a threat to gain an advantage in this case.

Thus, while Bertha is likely not subject to discipline under the ABA Rules, she is subject to discipline under the California Rules.

## **Answer B to Question 4**

### 1. Austin's Potential Ethical Violations

#### Duty of Loyalty

A lawyer has a duty of loyalty to his client. The lawyer must ensure that no personal interest or duty to a third party materially impairs his ability to loyally represent the client. Here, Austin's client is BHC Company, a health insurance provider. By the nature of its business, BHC is interested in minimizing the amount it pays to physicians, because the more that BHC compensates physicians, the less able it will be to successfully compete in the market for health insurance providers. Furthermore, BHC has an obvious interest in winning its law suit for both financial and reputational reasons.

#### Conflict of Interest Posed by Austin's Committee Membership

Austin has a personal interest outside of his legal practice in that he is a member of a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. As a former doctor, Austin seems to be passionate about this cause.

The fact that BHC has a diametrically opposite interest, which is to pay as little as possible to physicians, creates a conflict of interest. How can Austin be loyal to BHC when he is absolutely opposed to BHC's cause? Thus, in the face of this conflict Austin must decide whether it is reasonably objectively possible to represent BHC without materially impairing its interests, and if it is possible Austin must disclose and get BHC's written consent.

#### Is the Conflict Consentable?

The conflict is only consentable if Austin objectively and reasonably believes he can adequately represent BHC. Austin may believe this, saying he can compartmentalize his life outside the firm from his life as a lawyer. He may also argue that as a committee member he is working to change the health care laws, while as a lawyer he is working to ensure that his client complies with the law but is not forced to



pay beyond what the law requires. If Austin is successful in changing the law in his role as a committee member it may not hurt BHC because costs for all health insurance providers will rise equally so BHC will not be put at a competitive disadvantage.

On the basis of these arguments, the conflict posed by Austin's committee role is probably consentable provided that Austin discloses to BHC and gets its written consent. Austin may also have a duty to inform the committee that BHC is a client because that may appear deceptive to the fellow committee members if Austin does not disclose. However, in so disclosing Austin must make sure he has BHC's prior consent in order not to violate the duty of confidentiality (discussed further below).

### Conflict of Interest Posed by Austin's Friendships

Austin is a close friend of several of the plaintiff's in the class action suit that he is defending on behalf of BHC. Friendship is a personal interest of the lawyer that could potentially be materially adverse to the lawyer's duty of loyalty to the client. Thus, Austin must decide whether he can objectively reasonably believe he can adequately represent BHC in the face of this conflict.

Once again, Austin will state that he can compartmentalize between his work life and his outside interests. However, Austin may be faced by the reality that his close friends will not accept this compartmentalization and will begin to distrust him. If Austin is faced with losing some of his closest friends, will he really be able to continue zealously representing BHC as his duty of diligence requires him to? Lawyers are often required to speak impassionately against the other side and BHC may want to employ a take-no-prisoners strategy in the litigation; perhaps by impugning the work done by the plaintiffs including Austin's friends. For example, Austin may be called on to cross examine a friend in front of the jury to make the point that the friend overcharges for low quality medical services.

Based on these considerations, Austin can not objectively reasonably believe his representation of BHC will be adequate, and disclosure and consent will not be enough. Therefore, Austin should withdraw from the representation.

### Duty of Confidentiality

A lawyer has a duty of confidentiality to the client, and may not discuss any information relating to the representation. Here, it is difficult to believe that Austin could meaningfully participate on his committee without discussing information relating to the representation of BHC. Therefore, Austin has very likely violated his duty of confidentiality.

### Duty of Candor and Truthfulness to the Court

As part of his duty to the court, Austin must disclose adverse legal authority and may not make frivolous arguments. Here, Austin wants to make an argument to modify existing court decisions based on public policy grounds. This is a good faith argument to overturn precedent based on a legal argument not previously made, and therefore Austin may ethically go forward with the argument even if he is not confident the court will accept it. Indeed, as part of his duties of competence and diligence Austin must make such arguments if he thinks they have a reasonable prospect of success, as long as he is careful to fully inform the court of previous decisions that control within the jurisdiction and go against his argument.

## 2. Bertha's Possible Ethical Violations

### Duty to Report

Under the ABA model code, but not California rules, an attorney has an ongoing duty to report any ethical violation of another lawyer. Thus, by not reporting Austin's ethical violations immediately, Bertha has violated the ABA code.

It is important for Bertha to report because it is unfair to the court and to the clients on each side of the case if one client's lawyer has a conflict of interest, because it creates the possibility of a mistrial or other delays.

### Duty of Fairness

A lawyer has a duty of fairness to both the court and to her adversary. Here, Bertha is flagrantly violating this duty by using the threat of reporting an ethical violation to stop a lawyer from presenting a valid defense. This is essentially blackmail; Bertha is telling Austin to throw his case or risk being reported for an ethical violation. This is

grossly unfair to the court, to Austin, and to BHC. Therefore under both the ABA code and the California rules, such behavior is prohibited. While it is permissible, and indeed required under the ABA, to report ethical violations, using the threat of reporting ethical violations as a bargaining chip is prohibited and constitutes a serious ethical violation.