

Session: The Adversary System and Lawyers as Advocates

Topic: Civility

Recommended time: 90 Minutes

Score: 50 Marks

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Facts

You are an articling student in the office of the Conduct Counsel, Law Society of Alberta who is investigating complaints of ethical misconduct against Josh, a sole practitioner in Edmonton. Your principal had called you during lunch to sound your opinion on the allegations against the lawyer and tossed you the file to go through.

Here are the facts of the matter as contained in the file:

Last year, Josh was retained as a defence counsel in an application pursuant to the Convention on the Civil Aspects of International Child Abduction (the “Convention”) that was brought by a mother for the return of her child, contending that the child was being wrongfully retained in Ontario by the father and should be returned to his habitual residence in Germany.

It was a contentious and acrimonious matter in which both parties called several witnesses in support of their respective positions. In the course of the trial, the Deputy Judge had twice warned Josh against personal attacks on the plaintiff and her counsel and to be mindful of his choice of words. Josh replied that he was merely doing his job since *Rule 5.1-1* of Alberta’s Code of Conduct and of the Model Code imposes a duty on him, on his client’s behalf, to raise “fearlessly” every issue, advance every argument and ask every question, “however distasteful”, so long as such will help his client’s cause. At some point during the hearing, Josh made remarks insinuating that the opposing counsel may have “instigated” the “unwilling plaintiff” to “invent” facts in support of this “ridiculous” application, wondering what “special interest” the plaintiff’s counsel harboured in this matter. “Ahhh... I think I know the reason”, he added. “The plaintiff’s counsel is desperately throwing everything at this case to secure the fortuitous fame it might bring him”. The judge then said, “I’m shocked. Are you aware that these are weighty allegations and do you have evidence to support them”? Josh replied, “The evidence is written all over the countenance of the plaintiff’s counsel. Anyway, I’ll let it pass”.

While cross-examining Leone, one of plaintiff's witnesses, Josh had remarked, jokingly, that the witness was only trying to play on the judge's "weakness for children" and had sought to "mesmerize" the judge with "tantalizing ... imaginary tales of the unfounded psychological effects the mother's absence was having on the child". When the judge asked how Josh knew she had a "weakness for children", he answered that it was "common knowledge", as evidenced by the judge's three previous "failed marriages just like Leone's". The judge wondered if it was right to bring other peoples' personal issues into this matter, to which Josh replied that Commentary [4] to Rule 5.1-2 of the Model Code explains that when examining a witness, the lawyer is allowed to pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The judge didn't say anything further.

Your principal now requests you to prepare a memo proffering an opinion as to whether or not any allegation of misconduct has been made out, and if you say yes, to recommend the appropriate charges that may be brought against Josh.

Prepare your memo. (*You do not need to consider the application of Charter right of freedom of expression in your answer*).

Notes:

This sample question seeks to test your knowledge of what may constitute unethical conduct in an adversarial proceeding. The question will task your reasoning because the facts themselves contain enough justifying reasons to say yes or to say no. In this case, the examiner wants you:

(1) to explain whether or not the conduct of Josh in the courtroom was unethical, and, if you say yes,

(2) to recommend the appropriate charges that may be brought against him.

(Here's a tip: when an examiner asks you to answer whether a fact exists or not and then adds a follow-up question that requires you to provide an explanation only if you say yes, then that should be an indication that the examiner expects your answer to be yes, and for you to provide the reasons to support it. The same principle will apply if the examiner says you must provide an explanation only if you say no. But if she says you must provide an explanation whether you say yes or no, then your answer could be either way, and you must provide the reasons to support the answer you adopt).

In the sample question, if you answer that allegations of misconduct have been established against Josh, which is the correct answer, then you must provide specifics about the charge(s). Do take note too that the question comes in two parts. Our sample answer below will provide you a guideline.