

Session: The Adversary System and Lawyers as Advocates

Topic: Duty of Candour – Zealous Representation

Recommended time: 70 Minutes

Score: 40 Marks

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Facts

You are the Chair of an Investigation Committee set up to investigate allegations of professional misconduct against Ms. Deborah Atkinson, a senior partner at Double-Edged Law LLP, in Kelowna, British Columbia. The facts of the complaint are as follows:

Ms. Deborah was retained by Huber in a family law dispute in April of 2023. Huber had informed her that his wife, following a domestic altercation, left home with their two children and had not been seen since then. That two weeks later, a cousin of his wife discreetly alerted him that the wife had concluded plans to travel out of Canada with the two children, all in the bid to permanently deprive Huber of their access and/or custody. Huber had immediately instructed Ms. Deborah to file an urgent application to prevent the wrongful removal or retention of the children, as well as to commence a divorce proceeding.

After Ms. Deborah filed the process but before hearing, Huber notified the lawyer that he now had information from the same cousin about the wife's new location and also that she was willing to return the children to Huber for a month. The cousin told Huber that it appeared the wife had changed her mind about travelling out of Canada with the kids. To confirm this information, Huber sent someone to check the address who reported seeing the children there but not the wife. Huber told Ms. Deborah he wanted her nonetheless to go on with the application on the ground that her wife's location was unknown because he wasn't too sure if the wife actually lived at the new address. Besides, it was common knowledge in the family that his wife's cousin who gave the information is untruthful, dishonest and totally unreliable. Huber preferred that the application would remain uncontested so he could obtain the order of interim custody of the children faster. Ms. Deborah expressed her reservations about this but Huber urged her that since the wife would eventually be served with the divorce proceedings, serving her with the present application would unnecessarily prolong the matter as he knows his wife to be unduly litigious.

The wife felt aggrieved that the application for interim custody of the children was granted without her knowledge and without notice to her. She complained to the Law Society about the lawyer's complicity in

the whole matter, seeking to know if that was the proper procedure, particularly when her cousin confessed to have told Huber of her new location and he had promised to pass on the information to his lawyer. To her chagrin, all she got was a court order without any notice.

Upon the conclusion of investigations, Ms. Deborah was charged with:

- (1) Professional misconduct pursuant to section 38(4) of the Legal Profession Act through a failure to act honorably and with integrity or contrary to Ms. Deborah's obligations to the court in that:
 - a. she misled the court that the address of Huber's wife was untraceable and unknown when the client had notified her about information regarding the new address of the wife;
 - b. she misstated the facts that the new address of Huber's wife was unknown when she had information that Huber had sent someone to check out the information and who reported seeing the children at the address;
 - c. she misled the court that the only available information about the wife was her intention to travel out of Canada with the two children without disclosing that her client had information suggesting the wife had changed her mind;
 - d. she misled the court by claiming that the wife intended to permanently deprive Huber of access to the children when she had information that the wife was willing to allow Huber have custody of the children for a month; and,
 - e. she failed to act with integrity by filing an ex parte application when the circumstances did not warrant it.

As to the first to third allegations, Ms. Deborah admitted the facts but contended that she couldn't have informed the court otherwise when the client had informed her that only the children were found at the address, not the wife. Since she had no reasonable ground to believe that the wife lived or resided at the address, it would have been dishonest for her to tell the court otherwise.

As to the fourth allegation of misleading the court that the wife intended to travel out of Canada and permanently deny Huber of access to the children when in fact she was willing to allow the children stay with their father for a month, Ms. Deborah also admitted the facts but responded that she only relied upon the information supplied by the client. The same client had informed her that his source of information was dishonest and unreliable, and therefore there was no way she could present before the motions judge information from a dishonest and unreliable source.

On the fifth allegation, she confirms filing the ex parte application but denies acting illegally or unlawfully. The information she received about the wife's intention to travel out with the children justified her filing the ex parte application, which is permitted by the rules anyway.

Ms. Deborah asserts that the basis for all her actions in this matter was the recognition of her duty of loyalty to her client's cause. She concluded that she had no opinion on this issue since Commentary [5] to Rule 5.1-1 of the Model Code prohibits her from expressing her personal opinions on the merits of a client's case to a court. Besides, Rule 5.1-1 imposes on her the duty to represent her client loyally and with zeal, and to fearlessly advance the client's cause because she owes loyalty to no one else but the client, and that's all she has done in this matter.

Having heard both parties, prepare a draft of your decision on this matter.

Notes:

This sample question deals with the duties of the lawyer as advocate in an adversarial proceeding. In tackling this type of question, you must take note of the role the examiner wants you to play; here, as the Chair of an investigation committee and for you to render a decision after investigation.

So, to enable you deal appropriately with this type of question, you must follow the 3 stages of the discipline procedure as highlighted in the answer below, viz:

- 1) are the facts established?*
- 2) do the facts of the alleged misconduct constitute professional misconduct?*
- 3) if yes, do sanctions apply?*

Please take note that in some cases, the examiner may ask you to take the facts as established and or not bother about applicable sanctions.