

Question 2

Alex, an attorney, represents Dusty, a well-known movie actor. Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty's home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, filed a criminal complaint against Dusty. Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference on the steps of the courthouse. He told the press: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney."

Meanwhile, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior.

Paul interviewed Dusty's housekeeper, Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. Paul told Henry to avoid contact with Alex.

Paul has not been able to obtain Vic's version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty's preliminary hearing. Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. What ethical violation(s), if any, has Alex committed? Discuss.
2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

Question 2

Professional Responsibility

Alex, an attorney, represents Dusty, a well-known movie actor. (The public is likely to follow this case) Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty’s home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, (Prosecutors have special duties) filed a criminal complaint against Dusty. (At this point, the charges seem to be supported by probable cause) Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference (Trial publicity) on the steps of the courthouse. He told the press: “Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney.” (These comments are improper as they will have a substantial likelihood of materially prejudicing a jury)

Meanwhile, Paul received a copy of the police report describing Dusty’s alleged criminal behavior. Concerned that the description of Dusty’s behavior sounded vague, (The complaint is starting to show that it is not supported by probable cause) Paul asked the reporting police officer to destroy the existing police report (Paul may not unlawfully counsel the officer to destroy any documents having potential evidentiary value) and to draft one that included more details of Dusty’s alleged criminal behavior.

Paul interviewed Dusty’s housekeeper, (Housekeepers are not usually sophisticated in legal proceedings) Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. (The version of the events seem to show Dusty is not guilty) Paul told Henry to avoid contact with Alex. (Paul shall not request Henry to refrain from voluntarily giving relevant information to Dusty’s attorney)

Paul has not been able to obtain Vic’s version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty’s preliminary hearing. (Paul should dismiss the charges) Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing. (Paul shall refrain from prosecuting a charge that he knows is not supported by probable cause)

1. What ethical violation(s), if any, has Alex committed? Discuss.
2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

A Discussion Worthy of Attention

This essay dealt with the special duties of a prosecutor and trial publicity. In terms of difficulty, it was an average essay, albeit a bit unusual. Still, the examiners laid out the specific issues within each paragraph; the press conference, the police report, the conversation with Henry and the preliminary hearing. Thus, it wasn't difficult to organize. As for the headings, it was possible to lay out each rule (Improper Trial Publicity, Fairness to Opposing Counsel) or each individual instance (Press Conference, Police Report, etc...) Nevertheless, as always, it is important to use the facts to support your arguments and write coherent and logical.

Model Answer by One-Timers ©

1. What ethical violations has Alex committed?

Improper Trial Publicity (Press Conference)

California's Rules of Professional Conduct § 5-120 deals with trial publicity and states a member who is participating in litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

However, a member may state the claim or defense involved.

The American Bar Association's (ABA) Model Rule of Professional Conduct § 3.6 dealing with trial publicity is substantially similar to the California rule.

Here, Alex is the attorney who represents a well-known movie actor. Alex held a press conference and said: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney." A reasonable person would know that this statement would have a substantial likelihood of materially prejudicing Dusty's criminal trial.

The statement is a cause for unease because the public has a legitimate interest in Dusty's affairs as he is a high-profile defendant and this is a matter of public concern. Alex's timing of the statement is a factor to consider because it was made right after the prosecutor filed the complaint, making it hard to find an impartial jury. Also, it is important to take into account the grandiose location of the press conference - the steps of the courthouse.

While it is difficult to strike a balance between the right to a fair trial and safeguarding the right of free expression, there must be some curtailment of information that may be disseminated, particularly where a trial by jury is involved. Alex's comment that Dusty is innocent and is the victim of a witch-hunt seems to go beyond the public value of informed commentary. It is likely to prejudice the trial as the commentary is by Alex, the attorney who is involved in the proceeding. Alex has violated his duty regarding trial publicity.

2. What ethical violations has Paul committed?

Fairness to Opposing Party and Counsel (Police Report)

Model Rules of Professional Conduct § 3.4 states a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Here, the police report is essential for Dusty to establish a defense. Dusty has the right to obtain the police report through discovery and that right can be frustrated if the police report is destroyed then altered. If Dusty's criminal behavior sounded vague, then that is probably how the officer viewed the incident at that time. By asking the officer to now destroy the report, and to include details of criminal behavior, Paul is flirting with serious danger. The adversary system realizes that evidence is to be gathered competitively, fair competition is secured by prohibitions against destruction or altering of evidence. For this reason, Paul has committed an ethical violation by asking the officer to destroy the existing police report.

Performing the Duty of Member in Government Service (Institution of Criminal Charges)

California Rule of Professional Conduct § 5-110 states a member in government service shall not institute criminal charges when the member knows or should know that the charges are not supported by probable cause.

Here, Paul, the prosecutor, filed a criminal complaint against Dusty. If Paul knew or should have known that based on the police report and other admissible evidence, Dusty's battery charge is not supported by probable cause, Paul has a duty to dismiss the charge. On these facts, it is not entirely clear whether Dusty's charge is supported by probable cause.

On one hand, Vic, the victim, reported that Dusty knocked him down. However, the police report is vague and Henry, an eyewitness, stated the opposite. But Henry is a biased witness as he is Dusty's housekeeper and would likely side with the defendant so that Henry may keep in good standing at his job. Still, since Vic is on an extended trip and cannot make the preliminary hearing, Paul should have dismissed the charge. Thus, Paul has committed another ethical violation.

Prohibited Contact With Witnesses (Telling Henry to Avoid Contact with Defense Counsel)

California's Rule § 5-310 states a member shall not advise or cause a person to secrete himself or to leave the jurisdiction for the purpose of making that person unavailable as a witness.

Under Model Rule § 3.4 a lawyer shall not unlawfully obstruct another party's access to evidence. Additionally, the lawyer shall not request a person to refrain from voluntarily giving relevant information to another party.

Here, Paul improperly tried to influence Henry to avoid contact with Alex. This was done after Paul interviewed Henry and realized that the state's case was weak. By asking Henry to secrete himself and avoid Alex was improper and unfair to the opposing party. Essentially, Paul is unlawfully obstructing the defense's access to evidence. This type of obstructive tactic is another ethical violation committed by Paul.

Dealing With Unrepresented Person (Conversation with Henry – Dusty's Housekeeper)

Under Model Rule § 4.3 in dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person if the lawyer knows that the interests of that person have a reasonable possibility of being in conflict with the interests of the client.

Here, Henry is a housekeeper and likely a person who is not sophisticated or experienced in dealing with legal matters. Paul should know that Henry may misunderstand Paul's role in this case. Based on that, Paul should have never told Henry to avoid contact with Alex. Paul should have corrected the misunderstanding and explained to Henry that Paul has opposing interests, that Paul represents the state and that Henry's testimony is favorable to the defense. In essence, Paul's interests clearly conflict with Henry's and the defense's case. Paul has committed an ethical violation for his statement to Henry.

Special Responsibilities Of A Prosecutor (Preliminary Hearing – Vic's Absence)

Model Rule § 3.8 states a prosecutor shall refrain from prosecuting a charge that he knows is not supported by probable cause. Additionally, the prosecutor shall make timely disclosure to the defense of all evidence known that tends to negate the guilt of the accused.

Here, Paul has the responsibility of a minister of justice and not simply that of an advocate. His job carries specific obligations to see that Dusty is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paul has not been able to obtain Vic's version of the events and Vic will not be back in time for Dusty's preliminary hearing. Thus, Paul should have refrained from prosecuting the case. Since Duty's charges are not supported by probable cause and Paul decided to proceed with the hearing, Paul has committed a violation.

Meritorious Claims And Contentions (Not Dismissing the Criminal Complaint)

Model Rule § 3.1 states a lawyer shall not bring a proceeding unless there is a basis in law and fact for doing so that is not frivolous.

Here, the original filing of a criminal complaint against Dusty was not frivolous because the facts, at that time, had not been fully substantiated and Paul could have reasonably expected to develop vital evidence only by discovery. However, Henry's testimony, Dusty's likely testimony and Vic's absence shows that no good faith arguments can support the state's case. Since Paul is unable to make a good faith argument on the merits of the action he has committed another ethical violation.

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Answering each call of the question specifically and separating the attorney's ethical issues as well as numbering correctly and making logical coherent arguments supported by the law under the ABA and California's Rules of Professional Conduct **7%**

1. What ethical violations has Alex committed? **22%**

Improper Trial Publicity

Calling a press conference

2. What ethical violations has Paul committed? **71%**

Fairness to Opposing Party and Counsel

Police Report

17%

Performing the Duty of Member in Government Service

Institution of Criminal Charges

9%

Prohibited Contact With Witnesses

Telling Henry to Avoid Contact with Defense Counsel

16%

Dealing With Unrepresented Person

Conversation with Henry – Dusty's Housekeeper

8%

Special Responsibilities Of A Prosecutor

Preliminary Hearing – Vic's Absence

16%

Meritorious Claims And Contentions

Not Dismissing the Criminal Complaint

5%