2016 CLARKE PRIZE IN LEGAL ETHICS

Competition Problem

Inéz Forense was a recent graduate of a Washington State law school, and she practiced as a sole practitioner. Inéz ran a fairly typical general practice: many of Inéz’s cases involved family law matters, but she also prepared wills and trusts, dabbled in minor criminal cases, handled real estate closings and small business matters, and even litigated a couple of low-level tort cases. Inéz’s practice was productive, but as with many sole practitioners, competition was steep and Inéz struggled to build her practice for the future. For example, Inéz did not have any full-time staff. Instead, Inéz retained professional support on an as-needed basis, including investigative and social work services, administrative support, and bookkeeping.

Inéz was retained by Donald Sanders to represent Donald in his divorce. Inéz’s fee agreement with Donald provided that Donald agreed to pay Inéz a $5,000 “retainer” for Inéz to represent Donald in this matter. The retainer included a $3,000 “fixed fee” for Inéz to prepare standard documents for this divorce, including a marriage dissolution petition, a property settlement agreement, and an agreement regarding child custody and support. The retainer also included a $2,000 “advance payment” of hourly fees. The fee agreement provided that in addition to the flat fee, Donald would pay Inéz $200 an hour for negotiations with his spouse and court appearances. Inéz explained to Donald that she expected at least ten hours in negotiation and court appearances, so she needed advance payment of this amount. Inéz placed the entire $5,000 retainer in her office account.

Donald’s case presented Inéz with unfamiliar issues right from the start. Donald’s spouse was not represented by a lawyer in the divorce. Rather, the spouse was assisted by a Limited License Legal Technician (LLLT). Initial paperwork submitted by the LLLT, however, indicated that the LLLT had associated with a lawyer. Inéz contacted the lawyer to start negotiations, but the lawyer said, “I’m on the case solely to review necessary documents prepared by the LLLT. I don’t represent the spouse.” Inéz therefore contacted the LLLT and proposed settlement of various issues in the divorce. The LLLT replied, “You are miles away from where my client is. He will make his position clear at the first court hearing. But he has some bombshells to share with the court.” “Well,” Inéz insisted, “Out with it—what are they?” The LLLT replied, “Talk with my client in court.”

At the first court hearing, the spouse indeed dropped some bombs. The spouse accused Donald of repeated infidelity, and of having serious pornography and prescription medication addictions. Donald had not shared any information of this sort with Inéz. After the hearing, Inéz approached the spouse to ask for more information, including what the spouse wanted from Donald in light of these allegations. The spouse responded, “I can’t have Donald with the kids without serious supervision. I didn’t even tell the judge about his violent side. Donald’s dangerous and a bad influence. I also think he should pay more if I have full custody of the kids.” “What did your LLLT tell you to do?” Inéz asked. “To play hardball,” the spouse answered. Inéz replied, “You really should rethink that position—be fair to the kids, if not Donald.”

Inéz promptly summoned Donald for a meeting at Inéz’s office. “Donald!” Inéz barked, “What the hell is going on? Are any of these allegations true? I cannot represent you if
you keep me in the dark.” Donald growled, “I assumed he’d stoop to this level,” as Donald dropped a box on Inéz’s desk. Donald continued, “I do have some issues, but they are personal. I’m a great parent, and he’s trying to use my personal issues to leverage me and take my money. I want shared custody, and I expect you to fight for me!” Inéz asked reluctantly, “What’s in the box, Donald?” “History,” Donald replied. “I wanted to show you that this stuff is history for me, so you can be confident in fighting for my interests. Do whatever you want with it—throw it away, burn it, store it, whatever. But I definitely don’t want him to find it!” With that direction, Donald turned to storm out of Inez’s office. Inéz exclaimed after Donald, “I can’t just make bad things disappear for you.” Donald turned and hissed angrily at Inéz, “You take care of it the way I’m paying you to, or I’ll take care of it my way. He’s never getting full custody!” Donald left, slamming the door.

Inéz quickly examined the box’s contents. The box contained partially empty bottles of apparent prescription pills—anti-depressants, pain medication, and other medications that Inéz did not recognize. The box also contained a trove of pornography in different media formats. Most of the pornography appeared to be lawful commercial pornography. Some of the pornography, however, involved activities that, while probably lawful, Inéz found disturbing and corroborative of the spouse’s concerns. Moreover, Inéz noted a small number of photographs that appeared to depict individuals who did not look of age, although Inéz was not certain, and she did not want to look any further.

You are a lawyer in Inéz’s community who specializes in professional responsibility representation of other lawyers. Inéz called you from her office with all of this information, seeking your counsel. “What a mess,” Inéz explained, “Please help me to get out of it!” Prepare an advice memorandum to Inéz, addressing Inéz as your client. Inéz is worried about this whole case, so analyze all of the ethics issues presented by Inéz’s representation of Donald. Inéz wants to know whether she already could be subject to discipline, and also how she should proceed to avoid discipline and to do the “right thing.” You should cite to relevant authority to support your analysis. But keep in mind that all ethical issues will be decided under Washington State law.